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The EU's relations with the Southern-Mediterranean in the aftermath of the Arab Spring **CLEER** WORKING PAPERS **2013/3**

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INTRODUCTION: THE EUROPEAN UNION'S RELATIONS WITH THE SOUTHERN-MEDITERRANEAN IN THE AFTERMATH OF THE ARAB SPRING

G. Fernández Arribas, K. Pieters and T. Takács

Cooperation with the Southern-Mediterranean has for long been a high priority in the European Union's external relations. Instruments aimed at supporting economic and social transition of partner countries, trade liberalisation and market access for both parties, and strengthening the internal security of the Union were in focus of multilateral approaches such as the Barcelona Process (1995) and its re-launch within a regional forum, the Union for the Mediterranean (2008), complemented by instruments of the European Neighbourhood Policy extended to countries of the region since 2004. In addition, association agreements signed with individual countries have focused on economic relations so as to foster development, political and social reform, and ultimately, to create sustainable and overall regional integration. Europe is of the highest importance for the economic development of the Mediterranean area. For the EU, the Mediterranean countries have always been economically important since they are large suppliers of natural resources, such as gas and petroleum, to the European market.[1] The Mediterranean countries have also become an essential outlet for European exports. Therefore, the EU aimed at the development of a stable economic situation in the Mediterranean region since this would create attractive export possibilities for the EU. The Mediterranean area has been important for Europe for reasons of security and strategy as well.

A stable and secure Mediterranean region is in the best interest of the EU, but so far the situation in the region has remained politically and economically unstable. Conflicts in the Mediterranean region have direct consequences for political and social stability in the EU. Instability in the Mediterranean region may, for example, lead to mass migration, fundamentalist extremism, terrorism, drugs and organised crime, which is harmful to both the area itself and to the EU.[2] Nowadays, the situation in the Mediterranean area is politically and economically unstable, unpredictable and explosive. Instead of taking effective action which helps the Mediterranean people to ensure the establishment of democratic regimes and human rights in the region, the EU has remained very cautious since the outbreak of the revolts. The EU not only has to support the implementation of democratic regimes in the Mediterranean area, but also needs to tackle, now more than ever, the roots of the uprising, being the eco-

[1] T. Sadeh, 'The Economic Desirability of the Middle Eastern Monetary Cooperation', 20 *The World Economy* (1997) pp. 809-827.

[2] K. Pieters, *The Integration of the Mediterranean Neighbours into the EU Internal Market* 2010 (T.M.C. Asser Press, The Hague), p. 2-3.

nomic and social problems (youth unemployment, rising food prices etc.) in the Mediterranean area by strengthening and deepening the Euro-Med bilateral and multilateral relationship. Two years after the Arab uprising, there are still no real democratic regimes in the Mediterranean countries.

As a response to the events of the Arab Spring, the EU reframed its policy toward the Southern-Mediterranean region, as indeed its entire neighbourhood, and redesigned its tools of cooperation so as to deliver support for transition to democracy and work closely with the partner governments. These instruments include the 'more aid for more democracy' conditionality in the reviewed European Neighbourhood Policy; the Dialogue for migration, mobility and security with the Southern Mediterranean countries and the conversion of free trade agreements into deep and comprehensive free trade agreements. The question therefore arises as to how effective such instruments are and can be and what the future of the EU's relations with the Southern-Mediterranean region is.

To approach these new developments, the conference co-organised by the Universidad Pablo de Olavide and CLEER on 10-11 May 2012 addressed the multi-layered construction of EU and Southern-Mediterranean relations, unpacking the new and renewed normative frameworks and policy instruments available within the European Neighbourhood Policy, bilateral agreements and regional approaches. Tackling specific issues from the EU's Mediterranean strategy, such as the promotion of fundamental rights, rule of law, security and the future of deep and comprehensive trade agreements, policy-makers and academics from the EU and the Southern Mediterranean region evaluated the cooperation, highlighted the major challenges ahead and put forward recommendations for a stable, mutually beneficial approach.

The contributors to this CLEER Working Paper address some of these questions. Assessing the constitutional foundations of the EU's relations with its neighbours, including the Southern Mediterranean, **Christophe Hillion** asserts that by locating it in the Common Provisions of the TEU, the treaty drafters have given a considerable prominence to the neighbourhood policy in the Union's action, confirming its all-encompassing dimension and endowing it with a bold *finalité* by reference to EU values. He adds, however, that the actual commitment of the Union (and its Member States) following the entry into force of the Lisbon Treaty has remained circumspect, despite the strong constitutional mandate given by the TEU and the profound changes in the region, which both call for a new and ambitious engagement. Taking stock of the various instruments, **Jan Wouters and Sanderijn Duquet** find that the use of different policy instruments did not result in the ambitious creation of a comprehensive strategy, partly because the EU has not been successful in prioritising the interests it has pursued. They assess that the EU's quest for stability in the MENA region is still reflected in all its instruments, notwithstanding the re-orientation of programmes towards the engagement of civil society and the support of the democratic aspirations of the people of the region. Concerning the revision of the ENP and EIDHR, they claim that on the basis of preparations that had started before the recent changes in the region, and of the countless tools and

projects concerned, has not been sufficiently thorough. The EU has made clear progress in using its diplomacy tools; but still lacks a long-term vision on the future of the MENA. Looking at the negative conditionality ('less for less') approach, introduced in the reviewed European Neighbourhood Policy, **Steven Blockmans** claims that the revised ENP seems unsuitable as the sole agent for the implementation or support of democratic and socio-economic reforms and carries the risk of counteracting the normative objective which the EU has pursued for the last decade, that of transforming the outer periphery into one area of peace and prosperity built on democratic principles.

Pointing out the meager results of the Union for the Mediterranean (UfM), **José Manuel Cortés** and **Gloria Fernández Arribas** consider that the main problem can be found in the primarily economic approach to the region, leaving apart the political and social dimension. Together with this complex situation, the intricate institutional structure of the UfM makes it also hard to implement the objectives, and the budgetary restrictions will have a negative impact on projects. Despite these difficulties, the UfM is considered an appropriate tool to conduct the Euro-Mediterranean relations, if the necessary changes are taken. Assessing the Union's various efforts to foster region building through instruments and overlapping policy frames of ENP, Euro-Mediterranean Partnership and the Union for the Mediterranean, **Nikos Skoutaris** gauges the EU's success in region-building. He notes that in the aftermath of the Arab Spring, the UfM does not place emphasis on a region-building approach and that the asymmetrical political and economic relationship between the EU and its Southern-Mediterranean partners undermine interregional characteristics of the Euro-Mediterranean Partnership as a policy framework.

Looking at select EU strategies toward the region, **Elisabeth Johansson Nogués**' paper looks at the EU's discourse about civil society actors, as important components to 'deep democracy' and the ambitious rhetoric and measures that were introduced following the Arab Spring. Looking at various recent policy instruments for civil society promotion she observes as positive feature their obvious mission to strengthen relations between the EU and the region's civil society, but laments the EU's timid efforts to speak up against aggression on civil society actors and questions whether the Union will (or can) engage in direct dialogue with civil society actors in the different national assistance plans. For a genuinely new approach toward civil society actors and an effective and fruitful policy, she calls for readjustment of existing policy instruments and assertiveness from the EU and its Member States to defend civil society.

Karolien Pieters looks at the ongoing liberalisation process of goods between the two shores of the Mediterranean Sea through the conclusion of Euro-Med DCFTAs, through the implementation in the Mediterranean countries of the most essential EU *acquis*, but also via the application of the principle of mutual recognition between the Mediterranean countries and the EU. The application of this principle requires confidence between the Mediterranean countries and the EU. Therefore, the establishment of strong independent and institutions in the Mediterranean area are crucial to strengthen confidence. Further she looks at the early stages of the liberalisation process of services

between the Mediterranean countries and the EU. She notes that the best thing is for the EU to involve the interested Mediterranean countries already at an early stage in the liberalisation process of services: common Euro-Med standardisation projects are the best solution to establish an efficient Euro-Med system of movement of services. She also notes that for the liberalisation of services, there will be a need for solid institutions in het Mediterranean area; institutions which develop standards for licensing and certification of professional service providers equal to those in force in the EU should be established with financial support of the EU.

The present CLEER Working Paper thus brings together a number of issues related to the EU's relations with the southern-Mediterranean region in the aftermath of the Arab Spring. The conference organisers and editors are grateful for Professor Lucía Millán Moro at the Universidad Pablo de Olavide, and the T.M.C Asser Institute for continuously stimulating the implementation of the conference and the publication, as well as the European Commission's Representation in Madrid, for their support toward the organisation of the conference. A special word of thanks goes to Professor Ramses A. Wessel, member of the Centre's governing board, who instigated the idea of collaboration between CLEER and the Universidad Pablo de Olavide.

THE EU MANDATE TO DEVELOP A 'SPECIAL RELATIONSHIP' WITH ITS (SOUTHERN) NEIGHBOURS

Christophe Hillion

INTRODUCTION

The terms and modalities of the EU's relations with its South-Mediterranean neighbours are not only coloured by the events unfolding in the region, they are also determined by the evolution of the EU constitutional context. The latter has been significantly altered with the entry into force of the Treaty of Lisbon. This is the subject of this paper. In particular, since Lisbon, the EU has been formally instructed to 'develop a special relationship with neighbouring countries' (Article 8 TEU). While this express mandate partly codifies past EU engagement with its neighbours, particularly in the context of the European Neighbourhood Policy (ENP), it introduces several noticeable novelties in the way in which the EU conceives of, and develops its policy towards its vicinity. Thus, Article 8 establishes an express EU 'neighbourhood competence' which is formulated in mandatory terms (1). Confirming its all-encompassing scope, the new Treaty provision also adjusts the purpose of the Union's neighbourhood policy and the methodology to attain it (2). As it will be argued below, such innovations may contribute to the cohesion of the EU Neighbourhood Policy. At the same time, it will be suggested that, despite its general ambition to enhance the coherence of the EU external action, the Treaty of Lisbon also appears to have some disrupting effects on the institutional framework of the EU external action in general, and on the EU policy towards its neighbours, in particular (3).

1. THE EU OBLIGATION TO DEVELOP A 'SPECIAL RELATIONSHIP WITH NEIGHBOURING COUNTRIES'

1.1. **An EU express competence**

The Treaty of Lisbon introduces an express legal basis for the EU to develop 'a special relationship' with its neighbours. While textually identical to Article I-57 of the Treaty establishing a Constitution for Europe (TCE) where it finds its roots, Article 8 TEU was placed in a very different section of the founding treaties. Article I-57 was included in Part I of the TCE containing all the fundamental provisions of the EU constitutional order, and was the sole article of a specific Title entitled 'The Union and its Neighbours', that preceded the Title on Union Membership (Title IX), to which it was thus related. By contrast, Article 8 TEU is inserted in the Common Provisions of the Treaty on European

Union.[1] Hence, the new neighbourhood legal basis is no longer structurally related to the enlargement provision, still located in the Final Provisions of the TEU (Article 49 TEU). Nor is it formally included in the specific sections of the Treaties relating to the external action of the Union, namely Title V TEU, and Part V TFEU.

Its new home in the Common Provisions colours the meaning of the competence Article 8 TEU encapsulates, the nature of the policy it envisages, as well as its function. In particular, the inclusion of the specific legal basis in the TEU, although outside the chapter on the Common Foreign and Security Policy, entails that the neighbourhood policy should not be affected by the pillar-politics deriving from the recurrent distinction between the CFSP and non-CFSP powers of the Union (cf. Article 40 TEU). It thereby consolidates the *all-encompassing* character of the neighbourhood policy, as conceived and developed pre-Lisbon. In this sense, the 2004 Strategic document of the European Commission emphasised that the ENP is 'a comprehensive policy integrating related components from all three "pillars" of the Union's present structure',[2] which offers 'a means for an enhanced and more focused policy approach of the EU towards its neighbourhood, *bringing together the principal instruments at the disposal of the Union and its Member States*. It was also conceived to further advancing and supporting the EU's foreign policy objectives' (emphasis added).[3] To be sure, the Commission underscored the full accordance of the ENP with the goals of the 2003 European Security Strategy whereby the EU's 'task is to promote a ring of well governed countries to the East of the European Union and on the borders of the Mediterranean with whom we can enjoy close and cooperative relations'. [4]

Moreover, its location outside the specific provisions on the 'EU external action' suggests that the neighbourhood competence is conceived as a policy with both *internal and external* dimensions. Its all-encompassing character might indeed explain why it is not expressly set out in the catalogue of competence included in the TFEU. To be sure, its inclusion in the *Common Provisions* of the TEU means that the objective of the EU special relationship with the neighbours is mainstreamed into other policies of the EU. In practical terms, it entails that EU institutions ought to take account of the neighbourhood policy aims when exercising Union competences, for instance in elaborating the Union's transport, energy, environment policies, in the development of the internal market and, naturally, in the enlargement process. Such a constitutional integration of the neighbourhood aims in the policy-making of the Union, if effective, can significantly contribute to furthering the consistency of the EU's action in general, and towards its neighbours in particular.

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[1] For an elaborate and insightful discussion on this point, see S. Blockmans, 'Friend or Foe? Reviewing EU Relations with its Neighbours Post Lisbon', in P. Koutrakos (ed.), *The European Union's External Relations A Year After Lisbon*, CLEER Working Paper 2011/3, 113-124.

[2] European Commission, *Communication on the European Neighbourhood Policy – Strategy Paper*; COM(2004) 373, at 6.

[3] Ibid., at 8.

[4] European Security Strategy, A Secure Europe in a better world, Brussels, 12 December 2003, at 8.

1.2. **A formal EU obligation to engage**

Not only does Article 8 TEU formally provide an express competence to 'develop a special relationship', its *mandatory* formulation by the use of 'shall' entails the Union is under an obligation to develop such a relationship.

In that, the exercise of the neighbourhood competence differs significantly from that of enlargement. The activation of the accession procedure enshrined in Article 49 TEU is wholly determined by the applicant state's compliance with a set of eligibility conditions, set out in Article 49 TEU and articulated in the so-called 'Copenhagen criteria'. Indeed, the Union is not obliged to trigger the accession procedure, but may choose to do so if the applicant is deemed to fulfil EU conditions. In the case of the competence of Article 8 TEU by contrast, the *decision to engage with* the neighbours is *not* subject to political conditions (safe the somewhat ambiguous requirement that the countries concerned must be neighbouring the EU), but compulsory. Only the *modalities* of that engagement, i.e., of the actions undertaken, are function of the behaviour of the country concerned. In that, the neighbourhood competence could be likened to common policies, such as agriculture, transport or the common commercial policy, which all involve a strong EU mandate to act.

As legal basis establishing an express mandate for an EU engagement with its neighbours, Article 8 TEU formally integrates the EU Neighbourhood Policy in the EU constitutional framework. While this may have positive consequences in terms of substantive coherence as suggested above, it may also entail a degree of formalism in the policy-making that may challenge coordination between various institutional actors. In particular, in constitutionalising the neighbourhood competence, the Treaty adds *constraints* on the development of a policy which, thus far, had been incremental and flexible, thanks notably to the fact that it was carved out outside the Treaty framework, on the basis of soft law instruments.[5] As new express competence, its exercise should fully comply with the structural and procedural principles of the Union legal order, such as conferral, subsidiarity, proportionality, and consistency. In the same vein, the exercise of the EU neighbourhood competence might become subject to competence struggle among institutions, as we shall see below.

The flip side of the coin is that the neighbourhood competence is *more constraining* as a result of its inclusion in the institutional system of the EU, in as much as Union's inaction could lead to possible proceedings before the Court of Justice, the way failures to develop common policies were in the past sanctioned by the Court. Moreover, the exercise of the EU neighbourhood competence requires from both institutions and Member States a higher degree of compliance with the measures thereby adopted, and a mutual duty of cooperation to ensure the fulfilment of the Union objectives thereof.

[5] Further, see B. Van Vooren, 'The European Neighbourhood Policy as a Case-Study for Soft Law in EU External Relations', 34 *European Law Review* 2009, at 696. C. Hillion 'The EU's Neighbourhood Policy towards Eastern Europe' in A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations – Salient Features of a Changing Landscape* (Cambridge: Cambridge University Press 2008), 309-333.

2. A SPECIAL RELATIONSHIP WITH A *FINALITÉ*

Indeed, Article 8 TEU establishes a Union's neighbourhood competence with a broad political objective: the envisaged 'special relationship' is aimed at establishing '*an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation'*. While partly resonating the objectives of the existing ENP, Article 8 TEU appears to refine the ultimate purpose of the Union's neighbourhood policy (2.1) by articulating the foundations of the area it is purported to establish. It also changes the methodology to achieve this aim (2.2).

2.1. **A refined purpose**

By including an explicit reference to 'the values of the Union' as foundation of the future area of good neighbourliness, Article 8 TEU is moving away from the language hitherto employed in most ENP strategic documents. The latter rather referred (as they continuously do) to 'shared values' or 'common values', if not to international standards. In other words, Article 8 TEU encapsulates a normative shift in the EU policy towards the neighbours even if, admittedly, the previous 'shared values' discourse was a fig leaf to the Union's promotion of its own principles. In that, Article 8 is more consistent with the genuine EU interest: it affirms, if not confirms the EU as normative power in the region, acting in coherence with its own political foundations, in line with the general prescription of Article 3(5) TEU.[6]

2.2. **An adjusted methodology**

Alongside the normative shift incarnated by the reference to EU values, Article 8 TEU envisages a partial departure from an approach thus far based primarily on conditionality. While it has been argued that the provision 'impedes the Union from entering into special relationship with neighbouring countries refusing to commit themselves to the values Union',[7] such a reading does not appear to fit entirely with the terminology of the said article. As suggested earlier, Article 8 TEU binds the EU to engage with the neighbours, precisely with a view to asserting its own values.

That the EU engagement is conceived as mandatory indeed coincides with the strategic interest the Union has in a stable and prosperous neighbourhood, as conspicuously acknowledged in the 2003 European Security Strategy. As it

[6] According to Art.3(5) TEU, 'In its relations with the wider world, the Union shall uphold and promote its values and interests…'.

[7] See D. Hanf, 'The ENP in the light of the new "neighbourhood clause" (Article 8 TEU)', College of Europe, *Research Paper in Law – Cahiers juridiques* No 2 (2011); P. Van Elsuwege and R. Petrov, 'Article 8 TEU: Towards a New Generation of Agreements with the Countries of the European Union?', 36 *European Law Review* 2011, at 688.

has been suggested elsewhere,[8] this neighbourhood-security nexus makes conditionality partly inappropriate inasmuch as the EU cannot passively wait that the states in its vicinity comply with political and economic conditions, before eventually engaging if its own security is at stake. Article 8 TEU points towards the development of an active *policy* of transformation of the neighbouring states, in line with its own values and interests (Article 21 TEU). In that, Article 8 TEU is a *neighbouring state-building policy*, involving the whole array of EU instruments.

Having said this, conditionality is not excluded from the neighbourhood policy based on Article 8 TEU. While engagement is conceived as compulsory, the way in which the EU engages with a particular neighbour is significantly coloured by the situation on the ground. Indeed, Article 8 TEU is remarkably unspecific as regards the actual form of the 'special relationship'. The provision is thus formulated so as to encompass the multiplicity of instruments that have so far been carved out, *viz*. unilateral initiatives (e.g., ENP, ENPI), bilateral (e.g., association or partnership agreements), multilateral (UfM, EaP), in view of the plurality of the neighbours concerned. It also accommodates the diversity of views as regards the ultimate purpose of the neighbourhood competence, *viz*. alternative or preparation for membership. Such an undefined character makes it possible to adapt the Union's engagement to the particular circumstances of the country concerned, with a view to influencing its development, ultimately to achieve the ultimate political *finalité* of the policy, namely the establishment of an area of stability, based on the values of the Union.

3. AN EXPECTATION-IMPLEMENTATION GAP?

In the light of the above, it may be suggested that in principle, Article 8 TEU has the potential to contribute to furthering consistency in the EU policy towards its neighbours. In substantive terms at least, the competence conferred to the Union permits it to develop an all-encompassing policy, inasmuch as it is the first and only policy to be included in the Common Provisions of the TEU. In practice however, various elements suggest that the benefits of Article 8 TEU, in terms of providing a legal basis for pursuing a coherent policy towards the neighbours, remain to be reaped. In effect, the Treaty of Lisbon has had disrupting effects on the governance of EU external affairs in general, and of the ENP in particular. While the latter was essentially Commission-driven until the Lisbon Treaty, its development and management has thereafter been divided most notably between the Commission and the European External Action Service (EEAS), without clear allocation of tasks between the two. The European Council and its President are also getting increasingly involved in the shaping of the Union's relations with its neighbours, and so is the European Parliament, while the rotating presidency remains active.

[8] M. Cremona and C. Hillion, '*L'Union fait la force?* Potential and limits of the European Neighbourhood Policy as an integrated EU foreign and security policy', European University Institute Law Working Paper No 39 (2006).

Often presented as a template for cohesive and coherent EU external action, the ENP is thus less well-integrated post-Lisbon, than it was under the previous dispensation. In effect, new needs for inter-institutional coordination have surfaced since the Treaty entered into force. A potent illustration of the ensuing complexity in the governance of the EU Neighbourhood Policy is the 2010 Council Decision on the functioning and organisation of the EEAS,[9] and particularly its Article 9(5), which envisages the involvement of both Commission and EEAS for the programming of ENP funds. Indeed, while the Commission includes a specific Commissioner responsible for the neighbourhood, the incumbent has been deprived of his specific 'neighbourhood' staff since the latter, which formerly belonged to Commission's DG RELEX, has been transferred to the EEAS.

New policy initiatives as regards the neighbourhood therefore require tight coordination, notably but not only, between the Commission services and the EEAS, and so does the management of the policy on the ground, notably at the level of EU delegations. Coordination and cooperation appear all the more pressing, since the multiplicity of actors has led to diverging EU approaches to the neighbourhood. Hence, the European Council stresses the contribution of the ENP to fulfilling the Union's economic interests (see the European Council conclusions of October 2011), whereas the Commission points to further conditionality by reference to international standards while toning down the EU value promotion.[10] At the same time, Member States have been pursuing their own agenda towards EU neighbours, particularly in the context of the Arab spring, including sometimes through military means. This diversity of approaches indicates that the benefits of the unified normative framework established by Article 8 TEU remains to be reaped.

To be sure, the institutional actors of the EU Neighbourhood Policy appear to underestimate, when they do not simply ignore the new neighbourhood competence of the Union, and the objectives thereof. For instance, the 2011 Joint Communication of the Commission and High Representative[11] displays a failure to draw the full potential of the new EU competence. In effect, and quite remarkably, Article 8 TEU, namely the constitutional foundation for the establishment and development of the policy, is hardly mentioned in the 20-page document. It is only evoked once, not to articulate its potentiality, but as a way to include a harmless reference to Article 49 TEU in the document. Indeed, a growing discrepancy is appearing between the policy as conceived in Article 8 TEU, and as envisaged in the context of the ENP, notably in terms of its normative foundations and objectives. To put it simply, the objectives of

[9] *OJ* [2010] L 201/30, 3. 8. 2010.

[10] See e.g. Joint Communication of the Commission and High Representative. A New Response for a Changing Neighbourhood. A review of European Neighbourhood Policy. COM(2011)303, Brussels, 25 May 2011; Joint Communication of the Commission and High Representative. Delivering on a new European Neighbourhood Policy. JOIN(2012)14, Brussels, 15 May 2012.

[11] Joint Communication of the Commission and High Representative. A New Response for a Changing Neighbourhood. A review of European Neighbourhood Policy. COM(2011)303, Brussels, 25 May 2011.

Article 8 TEU are far more ambitious than those of the ENP as set out in, e.g., the Joint communication of May 2011. While the latter foresees increasing differentiation within the vicinity, and restraint in the approach, Article 8, as suggested above, establishes a robust transformative mandate.

4. CONCLUDING REMARKS

In constitutionalising it, the Lisbon Treaty has modified the *nature* of the Union's policy towards its neighbours, particularly in view of the mandatory language it contains. By locating it in the Common Provisions of the TEU, the treaty drafters have given a considerable prominence to the neighbourhood policy in the Union's action, confirming its all-encompassing dimension and endowing it with a bold *finalité* by reference to EU values. However, the reality check is somewhat humbling. The actual commitment of the Union (and its Member States) following the entry into force of the Lisbon Treaty has remained circumspect, despite the strong constitutional mandate given by the TEU and the profound changes in the region, which both call for a new and ambitious engagement. In that, the policy appears to be affected by the disadvantages of its constitutionalisation (viz. less flexibility, and contamination by the post-Lisbon institutional politics) without reaping the latter's benefits in terms of compelling the EU institutions and Member States to act forcefully.

THE ARAB UPRISINGS AND THE EUROPEAN UNION: IN SEARCH OF A COMPREHENSIVE STRATEGY

Jan Wouters and Sanderijn Duquet*

I. INTRODUCTION

The self-immolation of Mohammed Ben Bouazizi, a university-educated street vendor, on 17 December 2010 in a Tunisian provincial city is generally seen as the symbolic trigger for the Arab uprisings. It set in motion a series of civil protests and revolutionary chain reactions against uncompromising and authoritarian regimes in the Middle East and Northern Africa (MENA) during the first half of 2011, and their aftereffects continue until today. Within just a few months, governments were overthrown in Tunisia (President Ben Ali fled to Saudi Arabia on 16 January 2011), in Egypt (President Hosni Mubarak resigned on 11 February 2011), and in Libya (Colonel Muammar Gaddafi was killed on 20 October 2011). The Yemeni President Ali Abdullah Saleh was formally replaced on 27 February 2012 and mass demonstrations took place in Iran, Bahrain, Jordan, Syria and, to a lesser extent, in Algeria, Iraq, Morocco, and Saudi Arabia.

It has been observed that the Arab Spring originated from a combination of an economic deficit, a political deficit, and a dignity deficit.[1] Remarkably, the unrests occurred with such great suddenness that few had seen them coming.[2] Reactions in Europe were initially slow and reluctant, in sharp contrast with the attention they subsequently received. The uprisings triggered a re-thinking of economic, political and security relations of both the European Union (EU) and its Member States with the Arab world. The Arab Spring was, moreover, the first major foreign policy test for the European External Action Service (EEAS), which had only become operative in January 2011. At the peak of the Arab uprisings, the EEAS was confronted with the enormous challenge of coordinating external policies in the region without key officials being appointed or precedents to fall back on.

This contribution critically reviews the instruments at hand for the EU to respond to the Arab uprisings, with a focus on EU policies toward Arab countries in transition (Morocco, Algeria, Tunisia, Libya, Egypt, Jordan, and Syria). It starts with a broad overview of the EU's strategy vis-à-vis the MENA over the

* The authors wish to thank Jed Odermatt for valuable comments and suggestions.

[1] T. Behr and M. Aaltola, 'The Arab Uprisings: Causes, Prospects and Implications', *FIIA Briefing Paper* 76 (2011), available at <http://www.fiia.fi/en/publication/174/the_arab_uprising/>.

[2] See J. Goodwin, 'Why We Were Surprised (Again) by the Arab Spring', 17 *Swiss Political Science Review* 2011, 452; and the May-June 2011 issue of *Foreign Affairs*, entitled 'The New Arab Revolt. What Just Happened. Why No One Saw It Coming. What It Means. What Comes Next'.

last two decades and its strategy reformulation in the wake of the 2011 uprisings (Section II). Subsequently, we examine the instruments which the EU currently has at its disposal to address the challenges posed by the Arab uprisings, in particular those with regard to security, economics, social issues, politics, and legislation (Section III). We then review the EU's structural efforts to engage with MENA countries bilaterally, to cooperate with the United Nations (UN) and regional organisations, and to engage with non-state actors (Section IV). Finally, a number of policy suggestions are made in order to enable the EU to address in a more comprehensive manner the rapid changes in the Arab world (Section V).

II. THE EU'S STRATEGY VIS-À-VIS THE MENA AND THE ARAB UPRISINGS

2.1. **EU strategy prior to the Arab uprisings**

Having close historical, geographical, and cultural links with the region[3], the EU has been moulding its policies vis-à-vis the Arab world for decades. The relationship today comprises an economic (in terms of trade, finance, energy, but also migration) and a political (predominantly security, stability) dimension.[4] Although a strategic approach is indispensable, the establishment of a coherent regional policy has proven to be a process of trial and error. A number of different instruments have been launched, tested and re-launched by the European Commission, the Council, and the EU Member States, resulting in a tangle of different policies and attitudes. *Ad hoc* instruments, mostly bilateral economic agreements, were supplemented only gradually by more structural programmes and working plans. Between 1972 and 1990, trade relations between Europe and the Mediterranean countries were incorporated in the Global Mediterranean Policy.[5] The shaping of a more holistic policy towards Arab States only kicked-off in the mid-1990s following the end of the Cold War and the attempt of the 1993 Oslo Accords to resolve the Palestinian-Israeli conflict.[6] It was this often contradictory policy towards the region that the EU relied upon

[3] See e.g. Joint Declaration of the Paris Summit for the Mediterranean, Paris, 13 July 2008, at 1; Communication from the Commission to the European Parliament and the Council, *Barcelona Process: Union for the Mediterranean*, Brussels, 20 May 2008, COM(2008) 319 (Final), para. 1. For considerations on policy-making in the 1970s and 1980s, see P. J. Cardwell, *EU External Relations and Systems of Governance: The CFSP, Euro-Mediterranean Partnership and Migration* (London/New York: Routledge 2009), at 94-95.

[4] Regional Strategy Paper (2007-2013) and Regional Indicative Programme (2007-2010) for the Euro-Mediterranean Partnership, at 3, available at <http://ec.europa.eu/world//enp/pdf/country/enpi_euromed_rsp_en.pdf>.

[5] See the Declaration of the Paris Summit, 19-20 October 1972, Bull. EC. 10/1972 establishing Global Mediterranean Policy and the Rome European Council Conclusions, 14-15 December 1990, Bull. EC 12/1990 repealing it.

[6] S. Keukeleire and J. MacNaughtan, *The Foreign Policy of the European Union* (New York: Palgrave 2008), at 274.

when it was confronted with the Arab Spring in 2011. The next section briefly outlines and comments on the juridico-political regime that existed at this time.

2.1.1. *Regional instruments*

The Barcelona Conference in 1995 established the central multilateral instrument to govern EuroMed relations: the Euro-Mediterranean Partnership (EMP).[7] The continuous regional forum (hence the term 'Barcelona *Process'*) instituted political, economic and cultural co-operation between the then 15 EU Member States and 12 Mediterranean partners.[8] The 1995 Barcelona Declaration[9] was ambitious. It introduced a common area of peace and stability, aimed at gradually establishing a free trade area by 2010 through Euro-Mediterranean Association Agreements, and promised broader understandings between cultures and exchanges between civil societies in a decentralized manner.[10] This ambition made the Barcelona Process vulnerable to criticism throughout the years and by its tenth anniversary in 2005 it was considered a failure for not meeting these (high) expectations.[11] While some efforts were made at its decennial to constructively rethink and reinforce the EMP, it ended up being renewed, devoid of any critical reassessment.

The search for a new impetus in EuroMed relations resulted in the 2008 creation Union for the Mediterranean (UfM), upon the initiative of French President Nicolas Sarkozy.[12] Although this Union builds on the foundations laid by the EMP, which it does *not* replace, its institutional framework and rationale are quite different. The UfM has its own intergovernmental set-up, separate from the EU, institutionalized in the form of a Joint Permanent Committee in Brussels and a Secretariat in Barcelona.[13] It launched a limited number of realistically

[7] Financial programmes were installed under the headings MEDA I (1995-1999) and MEDA II (2000-2006); Council Regulation (EC) No 1488/96 of 23 July 1996 on financial and technical measures to accompany (MEDA) the reform of economic and social structures in the framework of the Euro-Mediterranean partnership, *OJ* 30 July 1996, L 189.

[8] The EMP nowadays brings together the 27 EU MS and 16 Mediterranean partners: Albania, Algeria, Bosnia and Herzegovina, Croatia, Egypt, Israel, Jordan, Lebanon, Mauritania, Monaco, Montenegro, Morocco, the Palestinian territories, Syria, Tunisia and Turkey.

[9] Final Declaration of the Barcelona Euro-Mediterranean Ministerial Conference, 27-28 November 1995, Bull. EU 11/1995, at 136.

[10] A. P. Vallelersundi, 'The Barcelona Process – A Euro-Mediterranean North-South Partnership', 5 *Georgetown Journal of International Affairs* 2004, 145-151, at 147. The Euro-Mediterranean Committee hosts senior level meetings (representatives of MS, Mediterranean partners and the Commission), dialogues also take place in the EuroMed Parliamentary Assembly.

[11] A. P. Vallelersundi, ibid., at 147; R. A. Del Sarto and T. Schumacher, 'From EMP to ENP: What's at stake with the European Neighbourhood Policy towards the Southern Mediterranean?', 10 *European Foreign Affairs Review* 2005,17-38.

[12] The Commission, aware of EMP criticism, in 2008 expressed scepticism to the intergovernmental approach proposed by France to reform the Barcelona Process. See: M. Emerson, 'Making sense of Sarkozy's Union for the Mediterranean', *CEPS Policy Brief* No 155, March 2008, at 1.

[13] Communication from the Commission, Barcelona Process: Union for the Mediterranean, paras. 11-16. Along with the 27 Member States, members are 16 Mediterranean, African and Middle Eastern countries: Albania, Algeria, Bosnia and Herzegovina, Croatia, Egypt, Israel, Jordan, Lebanon, Mauritania, Monaco, Montenegro, Morocco, the Palestinian Authority, Syria, Tunisia, and Turkey.

implementable projects that were specifically chosen to enhance the visibility of EU actions in the Mediterranean region.[14] Concretized commercial missions were oriented to maintain a status-quo rather than to pursue political objectives, democracy or sustainable prosperity.[15] The UfM has been criticised for adopting a national rather than a European approach and for lacking focus and strategic objectives.[16]

Even before the UfM had seen the light of day EuroMed relations were enhanced through the development of the Southern dimension of the European Neighbourhood Policy (ENP). The general aims of the ENP (stability, security, and societal well-being) do not substantially differ from those of the EMP.[17] While the ENP targets long-term goals in order to reform partner countries, it puts short term goals of enhancing economic relations and European security ahead of addressing local socio-economic problems.[18] The ENP also differs from the EMP in that, rather than a partnership, the former constitutes unilateral – and therefore rather EU-centric – policy-making. The limited multilateral action under the ENP has been subject to criticism, amongst others from the European Parliament.[19] Another complication was that the EU had to develop relations with the countries of the Arab region, at least partly, through a different set of instruments than those used with regard to Eastern neighbours.[20] Moreover, the lack of a direct connection to the plight of the peoples in the MENA complicated the implementation of an effective conditionality policy, an essential part of the ENP.[21]

It is particularly interesting to consider the position of Libya in the programmes of the EU. Libya was not invited to be part of the EMP at the kick-off in 1995

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[14] Nominated projects are the depollution of the Mediterranean, construction of maritime and land highways, civil protection, alternative energies, higher education and research, and the Mediterranean Business Development Initiative.

[15] S. Colombo and N. Tocci, 'The EU response to the Arab uprisings: Old wine in new bottles?', in R. Alcaro and M. Haubrich-Seco (eds.), *Re-thinking Western policies in light of the Arab uprisings* (Roma: IAI Research Papers 2012), at 82.

[16] J.-R. Henry, 'Sarkozy, the Mediterranean and the Arab Spring', 16 *Contemporary French and Francophone Studies* 2012, 405-415, at 411.

[17] European Commission, Strategy Paper on the European Neighbourhood Policy (ENP), Brussels, 12 May 2004, COM(2004) 373 final, at 3. Like the EMP, the ENP aimed to promote the Southern neighbours' commitment to the rule of law, good governance, respect for human rights, all of which were seen as building blocks of good neighbourly relations. See: Communication from the Commission to the Council on the Commission proposals for Action Plans under the European Neighbourhood Policy (ENP), Brussels, 9 December 2004, COM(2004) 795 final, at 3.

[18] Ch. Kaunert and S. Léonard, 'EU Counterterrorism and the European Neighbourhood Policy: An Appraisal of the Southern Dimension', 23 *Terrorism and Political Violence* 2011, 286-309, at 289. R. A. Del Sarto and T. Schumacher, *supra* note 11,at 19.

[19] See: European Parliament Resolution of 19 February 2009 on the review of the European Neighbourhood and Partnership Instrument, 2008/2236, paras 34-35. The Parliament expressed its preference for a multilateral regional approach and for the strengthening of regional, multilateral, and cross-border projects within the framework of the ENP.

[20] The perspective of accession to the EU gave broad latitude to influence political and economic developments in Central and Eastern Europe before 2004.

[21] J. Kelley, 'New wine in old wineskins: Promoting political reforms through the New European Neighbourhood Policy', 44 *Journal of Common Market Studies* 2006 29-55. See generally: M. Maresceau and E. Lannon, *The EU's Enlargement and Mediterranean Strategies. A Comparative Ana*lysis (New York: Palgrave 2001).

and only obtained observer status in 1999.[22] EU relations with the country primarily developed in a bilateral way, the main reason being Libya's subjection to both UN and EU sanctions. The political climate in 2004 following the Libyan Government's steps towards a settlement of claims in connection with the Lockerbie case in 1988 changed the EU's position significantly.[23] The Union lifted its arms embargo against Libya and included it in the ENP. Libya would have been granted full partnership in the EMP framework had it carried out its intention to accept to the Barcelona *acquis*. In 2008 the Commission made a final attempt to close this gap through opening up negotiations for a Framework Agreement.[24] This dialogue was suspended due to the outbreak of the Arab uprisings.

It should be noted that a number of Arab States are also included in other EU regional programmes: Northern African countries are part of the EU-Africa framework.[25] The current framework, for the period 2011-2013, was concluded at the EU-Africa Summit in November 2010 in Tripoli, just weeks before the uprisings started. The development of good relations with two of the Barcelona Process partners, Israel and the Palestinian Authority, is incorporated in the Middle East Peace Process.[26]

2.1.2. *Bilateral instruments*

The multilateral EuroMed framework was complemented with bilateral instruments. Euro-Mediterranean Association Agreements and ENP Action Plans are the two most prominent examples. The Commission has been the driving force behind this process. The first generation of EC Cooperation Agreements had been in place prior to the Barcelona Summit in 1995[27] and have been renegotiated and replaced by Association Agreements, concluded between 1995 and 2005 within the EMP's framework and later also under the ENP.[28] Two notable exceptions exist. EU-Syria relations are still governed by the 1977

[22] P. J. Cardwell, *supra* note 3, 101.

[23] See: Council Common Position 2004/698/CFSP of 14 October 2004 concerning the lifting of restrictive measures against Libya, *OJ* L 317, 16 October 2004. The United Nations Security Council (UNSC) adopted Resolution 1506 (2003) lifting the restrictive measures imposed by UNSCR 748 (1992) and 883 (1993).

[24] Press release, 'Libya: Commission proposes negotiating mandate for a Framework Agreement', Brussels, 27 February 2008, IP/08/308.

[25] The EU-Africa Action Plans define the long-term policy orientations between the two continents, based on a shared vision and common principles. See: Council, General Secretariat, 'The Africa-European Union Strategic Partnership', June 2008, available at <http://www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/EN_AFRICA_inter08.pdf>.

[26] See generally: G. Harpaz, 'Mind the Gap: Narrowing the Legitimacy Gap in EU-Israeli Relations', 13 *European Foreign Affairs Review* 2008, 117-137.

[27] The European Economic Community entered into cooperation agreements with Algeria (*OJ* L 263/2, 27 September 1978) and Tunisia (*OJ* L 265/2, 27 September 1978) in 1976, with Egypt (*OJ* L 266/2, 27 September 1978), Jordan (*OJ* L 268/2, 27 September 1978), Lebanon (*OJ* L 267/2, 27 September 1978), and Syria (*OJ* L 269/2, 27 September 1978) in 1977, and with Morocco (*OJ* L 264/2, 27 September 1978) in 1978.

[28] Euro-Mediterranean Agreements establishing an association between the European Communities and their Member States, of the one part, and, respectively, Tunisia (*OJ* L 79/2, 30 March

Cooperation Agreement since signatures to the Association Agreement, although negotiated in 2004, are still pending for political reasons. The EU is currently not linked with Libya by similar contractual relations, and neither a Cooperation nor an Association Agreement is in force.[29]

Association Agreements have set up all-embracing frameworks to conduct bilateral relations. Provisions on social and cultural cooperation and cooperation in the field of justice and home affairs are included, in particular security-related issues.[30] Association Agreements comprise cooperative efforts on migration, such as the resettlement of the repatriated,[31] and contain provisions on topics such as money laundering, organised crime, and drug trafficking.[32] Yet, the main features of association agreements are trade and development aid relations. As such, the progressive liberalisation of trade is included in the Association Agreements. The intensity may differ to various degrees depending on the profile of the partner country. The EU entered into a customs union with Turkey[33] and opted for the establishment of a Free Trade Area (FTA) with other partners in the Southern Mediterranean.[34] These bilateral instruments are the most concrete, legally binding contributions to the EuroMed free trade area envisioned by the EMP.[35]

Euro-Mediterranean Association Agreements also systematically include human rights and democracy clauses.[36] Although not identical, these provisions

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1998), Morocco (*OJ* L 70/2, 18 March 2000), Jordan (*OJ* L 129/3, 15 May 2002), Egypt (*OJ* L 304/39, 30 September 2004), and Algeria (*OJ* L 265/2, 10 October 2005), were concluded.

[29] Bilateral negotiations on a EU-Libya Framework Agreement were formally launched in November 2008. The EU decided to suspend these in February 2011. See: Declaration by the High Representative Catherine Ashton on behalf of the European Union on Libya, Brussels, 23 February 2011.

[30] W. Rees, 'The External Face of Internal Security' in C. Hill, M. Smith (eds.), *International Relations and the EU* (New York: Oxford University Press 2011), at 226-245.

[31] S. Lavenex, 'EU external governance in 'wider Europe'', 11 *Journal of European Public Policy* 2004, 680-700, at 689-690. Migration policies are discussed in further detail *infra*, Part 3.3.3.

[32] As an example see Art. 60 and 61 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Morocco, *OJ* L 70/2, 18 March 2000; and Articles 61 and 62 of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, *OJ* L 79/2, 21 October 2005.

[33] An Agreement establishing an Association between the European Economic Community and Turkey (*OJ* 217/3687, 29 December 1964) was signed in 1963 and a customs union has been in force since 1996.

[34] For example, art. 6 of the EU-Algeria Association Agreement reads: 'The Community and Algeria shall gradually establish a free-trade area over a transitional period lasting a maximum of 12 years starting from the date of the entry into force of this Agreement in accordance with the following provisions and in conformity with those of the 1994 General Agreement on Tariffs and Trade and the other multilateral agreements on trade in goods annexed to the Agreement establishing the World Trade Organisation (WTO), hereinafter referred to as 'GATT'.'

[35] Multiple association agreements with similar contents, although separate bilateral instruments, can be considered as contributing to a regional, multilateral approach. R. A. Del Sarto and T. Schumacher, *supra* note 11*,* at 21.

[36] Human rights and democracy clauses are thus relatively new: since the early 1990s, these have been systematically included in the EU's bilateral agreements of a general nature. In comparison, the 1963 Association Agreement with Turkey, and even the 1995 Association Council decision establishing a customs union with Turkey failed to contain such references to human rights and democracy.

are shaped in a way that makes the respect for human rights and democratic principles an essential element of the Agreement.[37] Their practical implementation takes two forms. First, the Association Agreements with Morocco, Jordan and Tunisia have established subcommittees with a mandate to discuss the promotion of human rights and democracy. Second, all Association Agreements concluded with Southern Mediterranean partners entail that the application of such provision may give rise to the adoption of appropriate measures following failure to respect human rights and democratic principles.[38] Although constituting a form of political conditionality, bilateral relations have never been suspended because of human rights violations in partner States. [39] This implementation deficit is partly due to security concerns of the EU. Instability in the region is to be avoided at all cost, which has impeded the Union from taking strong action.[40] As Colombo and Tocci put it: 'Stability and democracy were perceived as incompatible goals and the latter was increasingly sacrificed with a view to securing the former'.[41]

Bilateral policies were also strengthened via the EU's adoption of ENP Action Plans.[42] These Action Plans are negotiated with each neighbouring country, while their follow-up instruments, the annual progress reports are drafted unilaterally by the Commission. These translate general political and economic reform objectives of the ENP into concrete measures to be applied at the bilateral level, resulting in *differentiated bilateralism*.[43] The broader EU secu-

[37] Art. 2 of the EU-Morocco Association Agreement reads: 'Respect for the democratic principles and fundamental human rights established by the Universal Declaration of Human Rights shall inspire the domestic and external policies of the Community and of Morocco and shall constitute an essential element of this Agreement'. This language was copied in Agreements with other Southern Mediterranean partners. A somewhat modified version is used in Art. 2 of the EU-Jordan Association Agreement: 'Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect of democratic principles and fundamental human rights as set out in the universal declaration on human rights, which guides their internal and international policy and constitutes an essential element of this Agreement'.

[38] See European Parliament, Directorate-General for External Policies of the Union, Study on the 'Human Rights and Democracy Clauses in the EU's International Agreements', 29 September 2005, vii.

[39] For further reading on human rights conditionality, see L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: Oxford University Press 2005); B. Brandtner and A. Rosas, 'Trade preferences and human rights' in Ph. Alston, M. Bustelo and J. Heenan (eds.), *The EU and Human Rights* (Oxford: Oxford University Press 1999).

[40] As A. Driss formulates it: 'The Union, which certainly does not miss a chance to issue declarations and condemnations every time it notices violations of human rights, is disappointing when it comes to taking firm action against these violations. This double standard attitude strongly handicapped its action towards the Mediterranean Arab countries, whose leaders took advantage of this ambiguity to entrench their authoritarian and anti-democratic regimes'; A. Driss, 'The EU response to the Arab uprising: A show of ambivalence', in R. Alcaro and M. Haubrich-Seco (eds.), *supra* n. 15, 97-110, at 98-99.

[41] S. Colombo and N. Tocci, *supra* note 15, at 71.

[42] ENP Action Plans are being implemented with Jordan, Morocco, and Tunisia since 2005 and with Lebanon and Egypt since end 2006. The Plans can be consulted at <http://ec.europa.eu/world/enp/documents_en.htm>.

[43] R. A. Del Sarto and T. Schumacher, *supra* note 11, at 21. Differentiated bilateralism is increasingly used in MENA politics, see *infra*.

rity discourse is more explicitly incorporated in these Action Plans.[44] They contain extensive provisions on collaboration in internal security areas such as irregular migration, organised crime, human and drug trafficking, money laundering and terrorism.[45] Similar to the Association Agreements, human rights and democratic expectations are integrated in the individual programmatic approaches to the Arab States, yet, they were far from consistently pursued.[46]

The pursuit of the EU's interests in trade, financial, energy, and labour relations was central to the EMP and ENP frameworks. This has been further translated in the bilateral Association Agreements. As was explained, both instruments have been used extensively in anticipation of a further integration of markets, among others via the establishment of FTAs. A result, however, was that the integration of EuroMed markets became conditional upon the progress of the partner States, as stipulated in the bilateral agreements. Furthermore, the ENP's integration of markets' goal of 2003 was replaced by a weaker form of integration, the FTAs, or in some cases and depending on the performances and willingness of partner countries 'deep and comprehensive free trade agreements (DCFTAs)'.[47]

2.2. **EU strategy post the Arab uprisings**

As from December 2010, events in the MENA region have resulted in new challenges for the EU. Initial reactions to the uprisings showed European reluctance and indecisiveness, as the EU and various Member States were unsure about which side to support.[48] In early February 2011, the European Council recognised citizens' democratic aspirations. It committed to providing effective support to those pursuing political and economic reforms including through standing mechanisms, the EMP, UfM and the ENP.[49]

In the course of 2011, three cross-cutting instruments, aimed to set out the broader EU-MENA strategy were presented and/or renewed. The first comprehensive initiative was the Joint Communication of the High Representative and the Commission on 'a Partnership for Democracy and Shared Prosperity with

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[44] S. Biscop, 'The ENP, Security and Democracy in the Context of the European Security Strategy', 3 *Global Europe Papers* No 3 2008, at 2.

[45] D. Lutterbeck, 'Policing Migration in the Mediterranean', 11 *Mediterranean Politics* 2006, 59-82, at 71.

[46] S. Colombo and N. Tocci, *supra* note 15, at 80.

[47] K. Pieters, *The Integration of the Mediterranean Neighbours into the EU Internal Market* (The Hague: T.M.C. Asser Press 2010), at 41-42.

[48] Tellingly, the first joint statement calling for reform, democratic freedoms and free and fair elections in Egypt was made by Merkel, Sarkozy and Cameron on behalf of their countries, not the EU. See: Joint statement by Nicolas Sarkozy, Angela Merkel and David Cameron, 29 January 2011, available at <http://www.diplomatie.gouv.fr/en/spip.php?page=article_imprim&id_article=14940>.

[49] European Council, Conclusions of the European Council of 4 February 2011: Statement by the Heads of State or government of the Euro area and the EU institutions, Brussels, 8 March 2011.

the Southern Mediterranean', of March 2011.[50] As the Communication's title indicates, topics discussed relate to democratic transformations, institution-building, and the enhancement of the role of civil society, as well as to economic development, trade, investment, and finance. The document also demonstrated the EU's constant preoccupation with security issues in the Southern Mediterranean. Topics such as the management of migration flows and border security were included in the democracy partnership. Second, in May 2011 the High Representative and the Commission presented the renewed ENP, which had been prepared since the Summer of 2010.[51] Although it addressed recent changes in the MENA and explicitly referred to them in a neighbourhood context, the basic features of the ENP were not significantly rethought. Third, in September 2011 the Commission launched its SPRING programme (Support for Partnership, Reform and Inclusive Growth) as a strategic and cross-cutting financial instrument to support democratic transformation, institution-building and economic growth.[52] To realise these goals in the years 2011 and 2012, a moderate EUR 350 million was foreseen.

2.3. **Interim conclusion**

The MENA has been a focus of EU external actions and policies, both bilaterally and as a component of EuroMed and neighbourhood policies. It remains difficult, however, to discern a fully-fledged and integrated policy, despite multilevel (bilateral and regional) instruments having been in place for many years. The Barcelona Declaration was overly ambitious, which accounts for the difficulties experienced in the implementation phases that followed. Succeeding EU instruments no longer attempted to be all-inclusive. The 2004 ENP embodies a more traditional, unilateral, foreign policy-making model that abandoned the partnership idea. The 2008 UfM, characterized by intergovernmentalism and an apolitical approach, represents a micro-management model that focuses on project-based, commercially sponsored cooperation. The EU's approach of strategic regionalism was replaced by the differentiated bilateralism in Action Plans and Association Agreements. The sum of these initiatives re-

[50] High Representative and the European Commission, Joint Communication 'A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean', Brussels, 8 March 2011, COM(2011) 200 final [Hereafter: 'A Partnership for Democracy and Shared Prosperity'].

[51] Joint Communication by the High Representative of the Union For Foreign Affairs and Security Policy and the European Commission, 'A New Response to a Changing Neighbourhood, a review of European Neighbourhood Policy', Brussels, 25 May 2011 [hereinafter 'A New Response to a Changing Neighbourhood']. During the strategic review of the ENP prior to the Arab uprisings, a consultation process was set up with Member States, ENP partner countries, experts and academics, senior officials, and civil society organisations from all over the region.

[52] 'EU response to the Arab Spring: new package of support for North Africa and Middle East', Press Release, Brussels, 27 September 2011, available at <http://europa.eu/rapid/press-release_IP-11-1083_en.htm>. See also Commission Implementing Decision of 09 March 2012 amending Decision C(2011) 6828 adopting the Programme of Support to the Association Agreement and the Transition Process for Tunisia under the SPRING programme, to be financed under Art. 19 08 01 01 of the general budget of the European Union, Brussels, 9 March 2012, C(2012)1439 – PE/2012/111.

sulted in the creation of a toolkit for the EU to use in EuroMed relations rather than a comprehensive European strategy.

The EU's relations with the MENA have concentrated on a number of dominant topics, all of which remain very present in post-Arab Spring initiatives. First, the Barcelona Process initiated progress in economic relations, a subject that reappeared in the UfM and (revised) ENP framework. Second, the EU has let security and stability concerns prevail in its relations with the MENA.[53] Policies were driven by Member States' fear of radicalism, migration, and terrorism, which is reflected throughout the regional and bilateral initiatives taken. We can point to measures combatting money laundering and drugs trafficking in Association Agreements and to the recurring topic of the management of migration flows and borders in the ENP Action Plans. This not only hindered the development of a comprehensive EU strategy, but also created double standards in the relationship with authoritarian regimes. Socioeconomic, rights-based, and democratic policy-making remained to a large extent underdeveloped.[54] From the outset, cultural understanding, poverty reduction, the promotion of democracy, rule of law, and human rights have been present in EU discourse on the region, but a yawning gap existed between theory and practice.[55]

III. TARGETED EU RESPONSES TO THE ARAB UPRISINGS

After the general overview above, the present section focuses on specific targeted actions the EU has taken since 2011. This section will present a thematic overview based on three major – often interlinked and even overlapping – challenges related to: (i) security and defence; (ii) economic concerns; and (iii) human rights and democratic aspirations of the people in the Arab world.

3.1. **Security and defence challenges**

As indicated above, the EU's attitude towards the MENA has been strongly shaped by its quest for European security and regional stability.[56] Regional conflict combined with rising radicalism in the Arab world were explicitly men-

[53] K. Roth, 'Time to abandon the autocrats and embrace rights', 22 *Human Rights Watch World Report* 2012, 1-22.

[54] T. Behr, 'L'Union Européenne et le Printemps arabe : Réactions, ruptures et ralliements', 8 *Annuaire français de relations internationales* 2012, at 437.

[55] The Barcelona Declaration stated that partners are 'convinced that the general objective of turning the Mediterranean basin into an area of dialogue, exchange and cooperation guaranteeing peace, stability and prosperity requires a strengthening of democracy and respect for human rights, sustainable and balanced economic and social development, measures to combat poverty and promotion of greater understanding between cultures, which are all essential aspects of partnership'.

[56] See *supra* and the European Security Strategy (European Council, 'A Secure Europe in a better world. European Security Strategy', Brussels, 12 December 2003), stating that the EU's task is to 'make a particular contribution to stability and good governance in our immediate neighbourhood [and] to promote a ring of well governed countries to the East of the European Union

tioned in the 2008 Report on the Implementation of the European Security Strategy as factors leading to instability.[57] Two security aspects can be discerned: an external (unrest in Arab countries) and an internal one (threats to the EU caused by spill-over effects).

3.1.1. *The EU as an external security actor*

The Arab uprisings presented some of the first real foreign policy challenges for the Union's post-Lisbon Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP). More specifically, in countries such as Libya, Syria and Bahrain, the safety of citizens exercising civil and political rights has been threatened by local leaders, resulting in these communities and opposition groups calling for external support. In spite of its institutional and constitutional innovations regarding CFSP and CSDP[58], the Treaty of Lisbon did not do away with the old intergovernmental approach to foreign policy. The effective use of instruments still very much depends on the European and global context and the dynamics in place between the EU actors involved.

Thus far, CSDP instruments have remained underutilised in answering the Arab awakenings, in spite of the EU's repeated commitment to the 'responsibility to protect'.[59] A failed attempt was made in the case of Libya. On 6 March 2011, the High Representative sent a technical fact-finding mission to the country. On 1 April 2011, the Council adopted the decision to launch an EU humanitarian operation, EUFOR Libya.[60] This CSDP operation had the objective of providing humanitarian support to the operationalization of missions mandated by UN Security Council (UNSC) Resolutions 1970 and 1973.[61] However, in practice, the Council Decision merely served as a notification of the EU's readiness to assist the UN Office for the Coordination of Humanitarian Affairs (OCHA) if requested. As such request never came, EUFOR Libya was repealed

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and on the borders of the Mediterranean with whom we can enjoy close and cooperative relations'.

[57] European Council, Report on the Implementation of the European Security Strategy, Brussels, 11 December 2008, at 7.

[58] See *inter alia* J. Wouters, S. Bijlmakers and K. Meuwissen, 'The EU as a Multilateral Security Actor after the Treaty of Lisbon: Constitutional and Institutional Aspects', in S. Lucarelli, L. Van Langenhove and J. Wouters (eds.), *The EU and Multilateral Security Governance* (London: Routledge 2012), 72-103.

[59] For a discussion on the EU's adoption of the 'R2P' concept, see J. Wouters, Ph. De Man and M. Vincent, 'The Responsibility to Protect and Regional Organisations: Where Does the EU Stand?', in J. Hoffmann and A. Nollkaemper (eds.), *Responsibility to Protect: From Principle to Practice* (Amsterdam: Pallas Publications 2012), 247-270.

[60] Council Decision of 1 April 2011 on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya), 2011/210/CFSP, *OJ* L 89/17, 5 April 2011.

[61] UNSC Resolution 1970 of 26 February 2011 on peace and security in Africa, 6491st meeting, S/RES/1970 (2011) and UNSC Resolution 1973 of 17 March 2011 on the situation in Libya, 6498th meeting, S/RES/1973 (2011).

and the closure of the Operational Headquarters was announced in November 2011, without it ever having been operationalized.[62]

A number of Member States contributed individually to the NATO operations in Libya.[63] The lack of a common understanding within the EU on how to handle the crisis, and in what multilateral forum, was illustrated by Denmark's decision to participate in the NATO actions without having done the same in EUFOR Libya[64], and by Germany's abstention on Security Council Resolution 1973 establishing a no-fly zone in Libya and mandating the use of force, going against the position of France and the UK.

The EU has shown more vigour in finding short term alternatives to CSDP instruments. Most notably it applied its 'restrictive measures' policy under Title VI TFEU. Restrictive measures are instruments that have the dual objective of restoring international peace and security in accordance with the principles of the UN Charter and CFSP and maintaining respect for human rights, democracy, the rule of law and good governance.[65] EU sanctions do not need to be preceded by a UN Security Council Resolution, and are tools of a diplomatic or economic nature seeking to bring about a change in activities or policies of external actors.[66] The EU has imposed sanctions on regimes and natural persons in Tunisia[67], Egypt[68], Libya[69] and Syria.[70]

One of the most pressing outstanding challenges in the longer term is initiating a revision of the EU framework for Member States' arms export controls. For a number of years, efforts have been made to establish a common European framework for the export of weapons. These did not achieve the results

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[62] Council Decision 2011/764/CFSP of 28 November 2011 repealing Decision 2011/210/CFSP on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya), *OJ* L 314/35, 29 November 2011.

[63] France and the United Kingdom first preceded, and subsequently participated in, the NATO Unified Protector Operation. Other Member States participating were: Belgium, Bulgaria, Greece, Denmark, Italy, Romania, Spain and Sweden.

[64] In accordance with Art. 5 of the Protocol on the position of Denmark annexed to the TEU and TFEU Recital 11, Council Decision of 1 April 2011 on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya), 2011/210/CFSP, *OJ* L 89/17, 5 April 2011.

[65] Council of the European Union, Basic Principles on the Use of Restrictive Measures (Sanctions), Brussels, 7 June 2004.

[66] Council of the European Union, Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, Brussels, 15 December 2009.

[67] Council Decision 2012/724/CFSP of 26 November 2012 amending Decision 2011/72/CFSP concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia *OJ* L 327/45, 27 November 2012.

[68] Council Decision 2012/723/CFSP of 26 November 2012 amending Decision 2011/172/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Egypt, *OJ* L 327/44, 27 November 2012.

[69] Council Decision 2011/867/CFSP of 20 December 2011 amending Decision 2011/137/CFSP concerning restrictive measures in view of the situation in Libya, *OJ* L 341/56, 22 December 2011.

[70] Council Decision 2012/739/CFSP of 29 November 2012 concerning restrictive measures against Syria and repealing Decision 2011/782/CFSP, *OJ* L 330/21, 30 November 2012. For an accurate list of sanctions in force, consult <http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf>.

hoped for. Member States have been adopting legislation and administrative rules governing control of exports of military technology and equipment in light of the 2008 Council Common Position.[71] This policy, which was adopted before the Arab uprisings, has so far had only mixed success. Moreover, reports by journalists and NGOs of Member State exports of conventional weapon systems to Libya, which were used by Gaddafi for internal repression, have been highly damaging and embarrassing for the EU.[72] It became clear that the common framework had not stopped Member States from delivering 'made in Europe' weapons to the Gaddafi regime until shortly before the uprisings. The EU arms embargo, imposed on 28 February 2011, could only prevent worse damage.[73]

3.1.2. *The EU's internal security*

The management of external security threats has to be reflected in internal policies. The area of freedom, security and justice (AFSJ), integrated in Title V TFEU, provides the framework to materialise this. It compiles EU policies related to external border checks, asylum and immigration, judicial cooperation in civil matters and police and judicial cooperation in criminal matters, including terrorism. Given the often transnational nature of actions falling within this area, the effectiveness of internal policy often depends on external action.[74] As indicated above, the EU had already developed cooperation in AFSJ matters with partners prior to the Arab uprisings, through its EMP and ENP policies.[75] Consequently, Arab countries, and more specifically Northern-African States, in the past have been serving as a barrier against illegal migration, radicalism, and organised crime.[76]

The Arab uprisings have thus far not resulted in a reshaping of AFSJ instruments. However, two of its external aspects have received increased attention since the uprisings. First, migration issues have occupied a central position

[71] Council Common Position defining common rules governing control of exports of military technology and equipment, 2008/944/CFSP, *OJ* L 335/99, 13 December 2008. This Common Position replaced the 1998 Code of Conduct on arms exports. A number of non-EU countries, none of them Arab countries, have officially aligned themselves with the criteria and principles of the Code.

[72] The promotion by individual Member States (Austria, Belgium, Czech Republic, France, Germany, Greece, Italy, Poland, Slovakia, Spain, and the UK have been named) of weapons exports followed the lifting of the EU and UN weapon embargoes in 2003 and 2004. See: M. Bromley, 'The review of the EU common position on arms exports: prospects for strengthened controls', Non-Proliferation Papers No 7, January 2012, at 10, available at <http://www.nonproliferation.eu/documents/nonproliferationpapers/markbromley4f7971fb1fd21.pdf> and D. Spleeters, 'Tracking Belgian Weapons in Libya', *New York Times* 28 December 2011.

[73] Council Decision 2011/137/CFSP of 28 February 2011 concerning restrictive measures in view of the situation in Libya, *OJ* L 58/53, 3 March 2011.

[74] J. Monar, 'The EU as an International Actor in the Domain of Justice and Home Affairs', 9 *European Foreign Affairs Review* 2004, 395-415, at 395.

[75] See e.g. the Barcelona Declaration: 'Fighting terrorism will have to be a priority for all the parties' and 'in the area of illegal immigration they decide to establish closer cooperation'.

[76] See *supra*; A. Driss, *supra* note 40, at 100; C. M. O'Donnell, 'The European Security Policy and the Euro-Meditarranean region 2010-2011', in Alcaro and Haubrich-Seco (eds.), *supra* n. 15, at 164.

from the onset (and are discussed in more detail below). Second, counterterrorism policies have received attention.[77] Former leaders of Arab countries shared with the Union an interest in controlling the risk of terrorism locally. Whereas they perceived various forms of political activism as threatening the stability of their regime, strategically, a status quo in politics was also seen to be in the interests of the EU. Tunisia, for example, effectively collaborated with the EU in fighting terrorism in the aftermath of 9/11, despite NGO criticism on the implementation instruments used.[78] The uprisings brought about a pressing need to redefine EU policies in this respect. The EU Counterterrorism Coordinator (CTC) has pointed out that the new Tunisian government, amongst others, is willing to further coordinate terrorism-related policies.[79] Aware of the flaws associated with former EU counterterrorism cooperation arrangements, the CTC stressed that actions have to be brought in line with the 'deep democracy' principle endorsed by the European Council.[80] The CTC's efforts to convince the EU to respond to the Tunisian request for assistance had little success. Counterterrorism does not seem the highest priority of the EU in the post-Arab uprisings era,[81] possibly because threats are perceived to be greater in the MENA region than in the EU.

3.2. **Economic challenges**

The external dimension of the EU's single market remains pivotal in the aftermath of the Arab Spring. Its prominence has been translated into the so-called '3 Ms' – Money, Markets and Mobility – policy launched by the High Representative and the Commission in their March 2011 Joint Communication 'A Partnership for Democracy and Shared Prosperity'.[82]

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[77] Council of the European Union, The European Union Strategy for Combating Radicalisation and Recruitment to Terrorism, Brussels, 24 November 2005. See S. Wolff, 'The Mediterranean Dimension of EU Counter-Terrorism', 31 *Journal of European Integration* 2009, 137-156.

[78] R. Kéfi, 'Tunisia sparks Arab revolutions', in *Mediterranean Yearbook* (Barcelona: IEMed 2011), at 27. NGOs have called upon the EU to engage Tunisia in a programme of action to bring its terrorism laws and practices into line with the country's obligations under national and international law. See Amnesty International briefing note to the European Union EU-Tunisia Association Council 30 September 2003, available at <http://www.amnesty.eu/static/documents/Tunisia_Anti-Terrorism_briefing_30Sept2003.doc>.

[79] Council of the European Union, EU Counter-Terrorism Strategy – Discussion paper of the EU Counter-Terrorism Coordinator, Brussels, 28 November 2011, at 5. Tunisia also requested the EU's assistance in Security Sector Reform.

[80] Ibid., at 6, the Counter-terrorism Coordinator notes that: 'In order to be effective this kind of reform should not consist of a series of piecemeal projects which do not address the core of the issue, which is transformation of the security sector. There must a broad strategy if reform is to achieve the depth and sustainability needed for long term success. This applies not only in Tunisia but also to opportunities in Morocco, Libya and Egypt'.

[81] On the general 'EU counterterrorism fatigue', see: EU Counter-Terrorism Coordinator, EU Counter-Terrorism Strategy – discussion paper, 26 November 2009, available at <http://register.consilium.europa.eu/pdf/en/09/st09/st09717.en09.pdf>, at 2 and R. Coolsaet, 'EU counterterrorism strategy: value added or chimera?', 86 *International Affairs* 2010, 857-873, at 858.

[82] A Partnership for Democracy and Shared Prosperity*, supra* note 50, at 14.

3.2.1. *Money*

The MENA is a particular area of focus of the European Investment Bank (EIB). The Bank clusters three tasks (the development of financial instruments, the support of the private sector, and the creation of investor friendly environments) in its Facility for Euro-Mediterranean Investment and Partnership (FEMIP). Through the instrument, introduced in 2002 by the European Council and now part of the UfM and ENP, EUR 12 billion were invested on behalf of the Union in the form of loans, private equity investments and technical assistance in the period 2000-2009.[83] The March 2011 Communication called upon the EIB – already the biggest development lender in the region – to take the lead in the promotion of inclusive growth. In follow-up to this, the Council reached agreement with the European Parliament to increase the ceiling for EIB operations for Mediterranean countries undertaking political reform by EUR 1,68 billion.[84] The capital injection was approved by the General Affairs Council without much discussion.[85] Civil society has cast a critical eye on the mere increasing of funding. NGOs have argued that the EIB may not be the right institution to financially support the transition in the region[86], recalling that the high level of funding already provided to the region had too few results and lacked effective accountability to external stakeholders.[87] The Communication's proposal to allow the European Bank for Reconstruction and Development (EBRD) to support 'the current democratic wave in the region' is even more problematic. The Bank has had no running projects or any experience in the MENA region. Its statutes had to be amended for it to be able to be active in the region.[88]

Within the existing EuroMed framework, additional funding was made available to face short-term difficulties resulting from the impact of the revolutions on trade and investment, domestic market failures and a decrease in tourism.[89] This is done so via the European Neighbourhood and Partnership Instrument

[83] See the EIB's website at <http://www.eib.org/projects/regions/med/index.htm> and Studi e Ricerche per il Mezzogiorno, 'EU financial instruments for the Mediterranean Countries', available at <http://www.srm-med.com/images/stories/allegati/nicchia_2%20_eng_a.pdf>.

[84] Decision No 1080/2011/EU of the European Parliament and of the Council of 25 October 2011, *OJ* L 280/1, 27 October 2011.

[85] See Council approves agreement with EP on EIB lending mandate, Press release, Brussels, 18 July 2011.

[86] See CEE – Bank Watch, 'Keep European public banks out of Mediterranean region, say NGOs', 9 March 2011, available at <http://bankwatch.org/news-media/for-journalists/press-releases/keep-european-public-banks-out-mediterranean-region-say-ng>.

[87] For further reading, see: N. Hachez and J. Wouters, 'A responsible lender? The European Investment Bank's environmental, social and human rights accountability', 49 *Common Market Law Review* 2012, 47-95.

[88] Decision No 602/2012/EU of the European Parliament and of the Council of 4 July 2012 on amendments to the Agreement Establishing the European Bank for Reconstruction and Development (EBRD) extending the geographic scope of EBRD operations to the Southern and Eastern Mediterranean, *OJ* L 177, 7 July 2012.

[89] A Partnership for Democracy and Shared Prosperity, *supra* note 50*,* at 12. As such, recovery support programmes were set up and grants were released to, for example recently, Tunisia ('EU releases €107 million to boost Tunisian economy', Press Release, Tunis, 8 December 2012) and Libya ('EU-Libya: supporting transition and reforms in key sectors', Press Release, Brussels, 20 December 2012).

(ENPI) that not only supports the ENP but also replaced the former EuroMed cooperation programme MEDA. Through the ENPI, the EU has set up programmes providing financial assistance to Arab partners.[90] More importantly in the long run, the refocusing of the economic and socio-economic aspects of bilateral programmes of ENP/ENPI is noteworthy. The renewed instrument foresees funding of social and economic development, and links this to positive and negative conditionality.[91]

Southern Mediterranean countries had seen only occasional Macro-Financial Assistance (MFA) operations before 2011.[92] Yet, Arab partners are also eligible to receive this type of assistance if requested.[93] This policy-based financial instrument provides medium and long-term loans or grants on a case-by-case basis for countries experiencing exceptional balance-of-payments difficulties.[94] It is specifically designed for countries close to the EU. Like the instruments discussed above, this financial assistance model has not been spared from criticism. The lengthy decision-making process and the Council being the only legislator for this form of EU assistance has been a thorn in the

[90] In particular bilateral cooperation, co-financed by the European Regional Development Fund (ERDF), between EU Member States and Southern Mediterranean partners was set up as well as regional programmes such as the ENPI CBC Mediterranean Basin and the Neighbourhood Investment Facility (NIF).

[91] Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006, *OJ* L 310/1, 9 November 2006, establishes the financial envelope for the period 2007 to 2013. A Regulation renewing European Neighbourhood Instrument is proposed, see Proposal for a Regulation of the European Parliament and of the Council establishing a European Neighbourhood Instrument, COM/2011/0839 final, 7 December 2011. On the negative conditionality, see also: A New Response to a Changing Neighbourhood, at 3 states: 'They will recognise that meaningful reform comes with significant upfront costs. It will take the reform track record of partners during the 2010-12 period (based on the annual progress reports) into account when deciding on country financial allocations for 2014 and beyond. For countries where reform has not taken place, the EU will reconsider or even reduce funding'.

[92] In a study entitled 'EU macro-financial assistance: a critical assessment', by the European Parliament's Directory-General for external policies of the Union, 23 February 2012 and available at <http://www.europarl.europa.eu/committees/en/inta/studiesdownload.html?languageDocument=EN&file=67351>, it is argued that Arab countries suffered less from the 2009 recession, and were therefore in less direct need of this type of assistance. Yet, it is concluded, the damaging economic consequences of the Arab Spring may generate substantial new demands from this region. Decisions on MFA are taken following a request by a third country. For example, at the November 2012 EU-Egypt Task Force, it was announced that, upon the agreement of an Egypt-IMF arrangement, the EU will provide an additional €50 million in grants and €450 million in concessional loans, in the form of Macro-Financial Assistance. See: Co-chairs conclusions of the First Meeting of the EU-Egypt Task Force, Cairo 13-14 November 2012.

[93] A Partnership for Democracy and Shared Prosperity*, supra* note 50, at 13.

[94] The MFA complements financing provided by the International Monetary Fund (IMF). Eligibility for MFA has been informally based on the 'Genval criteria' originating from the conclusions of the informal ECOFIN Council of 9 October 1993 and reconfirmed in the Conclusions of the Council meeting Economic and Financial Affairs, Luxembourg, 8 October 2002, available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/72608.pdf>, para. 4. The Genval criteria provide for a non-legally binding framework that guides MFA proposals by the Commission and following Council (ECOFIN) deliberations. The five criteria are: (i) exceptional character of the assistance; (ii) complementarity to financing of the international financial institutions; (iii) existence of policy conditionality attached to the assistance; (iv) existence of political pre-conditions; and (v) strong financial discipline that needs to accompany the MFA.

side of the European Parliament since 2003. The Lisbon Treaty stipulated that legislative decisions on MFA are to be taken by the Parliament and the Council under the ordinary legislative procedure (Art. 209 and 212 TFEU). However, this constitutional change also amplified the need to further streamline MFA procedures. The MFA still struggles to function as a crisis response instrument to effectively deal with macroeconomic and financial emergency situations.[95] 2011, a tumultuous year in international politics, witnessed continuous implementation of existing MFA actions, while no new MFA was approved by the Council and Parliament.[96] Admittedly, the Arab uprisings created momentum to address these critiques: initiatives that speed up the allocation process were revitalised soon after the start of the uprisings. In July 2011, the Commission proposed a Framework Regulation that makes it possible to grant MFA via an implementing act of the Commission under the supervision of a committee of Member State representatives.[97] The proposed allocation procedure is similar to those used in other external financial instruments of the EU.

3.2.2. *Markets*

A second area of economic focus is the improvement of market access for MENA producers and the facilitation of export and import of both goods and services. The Arab awakenings opened up new possibilities for the establishment of the Barcelona-envisioned free trade area. By 2010, the EU had largely fulfilled its part of the arrangement. Bilateral FTAs had been included in the Association Agreement instruments, discussed *supra*. Two remarks are in order. First, the coverage of these Agreements is essentially limited to trade in goods. Second, for the multi-State area to be completed, the FTAs need to be concluded among the Southern Mediterranean partners themselves.[98] The only partners that have engaged in such projects so far are Egypt, Jordan, Morocco, and Tunisia. These countries concluded the Agadir Agreement in accordance with the provisions of the General Agreement on Tariffs and Trade of

[95] Report from the Commission to the Council and the European Parliament of 7 July 2011 on the implementation of macro-financial assistance to third countries in 2010, COM/2011/0408 final, at 4.

[96] Report from the Commission to the Council and the European Parliament on the implementation of macro-financial assistance to third countries in 2011, Brussels, 28 June 2012, COM(2012) 339 final, at 3.

[97] Commission, Proposal for a Regulation of the European Parliament and of the Council laying down general provisions for Macro-Financial Assistance to third countries, Brussels, 4 July 2011, COM(2011) 396 final. At the time of writing, the Parliament's first reading is awaited and a decision by the co-legislators is expected for 2013.

[98] The EU faced difficulties to engage Arab partners to cooperate amongst each other. An important example of a similar exercise is the 1997 Greater Arab Free Trade Area (GAFTA), established by the League of Arab States. The agreement has reached full trade liberalisation of goods. Negotiations on services and investment liberalisation were ongoing at the outbreak of the Arab uprisings. The Arab League foresees to upgrade GAFTA into a customs union by 2015. For further reading: B. Hoekman and Kh. Sekkat, 'Arab Economic Integration: Missing Links', 44 *Journal of World Trade* 2010, 1273-1308. The GAFTA has been criticized for not living up to expectations formulated at its launch: W. Abdmoulah, 'Arab Trade Integration: Evidence from Zero-Inflated Negative Binomial Model', 32 *Journal of Economic Cooperation & Development* 2011, 39-66.

1994 (GATT) and the EU rules of origin.[99] The EU has been financially supporting the consolidation of the Agadir Agreement through ENPI[100] and it should now grasp the opportunity to push forward the inclusion of other Arab States. The development of the capacity of the Agadir Technical Unit (ATU) to support potential future signatories to the Agadir Agreement was a specific objective in the second phase of the EU support project, but has to this date not been successful.[101]

Rather than investing in an inclusive multilateral agreement[102], the EU has opted to continue to apply differentiated bilateralism in market access policies.[103] In December 2011, by adopting negotiating directives, the Foreign Affairs Council gave the Commission a mandate for trade negotiations about the conclusion of DCFTAs with Egypt, Jordan, Morocco, and Tunisia.[104] Currently, preparatory work is being carried out for the Commission to start conducting negotiations to establish deep and comprehensive free trade areas (DCFTAs) that may lead to giving these countries a stake in the internal market, by upgrading existing Association Agreements to an advanced status.[105] One new feature compared to the former agreements, which concentrated only on removing tariffs, is the proposed full coverage of all regulatory issues relevant to trade such as trade facilitation, technical barriers to trade, sanitary and phytosanitary measures, investment protection, public procurement, and competition policy. Additionally, the EU established advanced preferential market access arrangements for agricultural and fisheries products with Egypt and Jordan, while EU-Morocco relations now also include an exchange of offers to liberalise

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[99] The Agreement Establishing a Free Trade Area Amongst Arab Euro-Mediterranean Countries (Agadir Agreement), signed in Rabat on 25 February 2004 between Egypt, Jordan, Morocco, and Tunisia, entered into force 6 July 2006. For the full text and most recent status of the Agreement <http://www.agadiragreement.org>.

[100] See ENPI Project: Agadir Agreement-EU support project (phase II). The project provides EUR 4 million in the 2008-2012 period, see <http://www.enpi-info.eu/mainmed.php?id=314&id_type=10>.

[101] Ibid.

[102] Reference should, however, be made to the opening for signature on 15 June 2011 of the regional Convention on Pan-Euro-Mediterranean Rules of Origin. Since then, only the EU, the EFTA States, FYROM, Montenegro, Croatia, Albania and Turkey have done so. At the time of writing, no MENA country has formally endorsed this. For an up-to-date overview, visit <http://ec.europa.eu/taxation_customs/customs/customs_duties/rules_origin/preferential/article_783_en.htm>.

[103] For an assessment of the effects of the EU's market access policies in the different Arab countries from an economics perspective, see: A. Ghoneim N. Péridy, J. Gonzalez and M. Parra, 'Shallow versus Deep Integration between Mediterranean Countries and the EU and within the Mediterranean Region', CASE Network Report No 96 (2011), available at <www.ceps.eu/ceps/dld/6795/pdf>.

[104] Council conclusions on the EU response to the developments in the Southern neighbourhood, 3130th Foreign Affairs Council meeting, Brussels, 1 December 2011, para. 10. The authorization of the Foreign Affairs Council to start the negotiations of DCFTAs happened on 14 December 2011.

[105] R. A. Del Sarto and T. Schumacher, *supra* note 11*,* at 34. Negotiations on a DCFTA can only be launched after the decision of the Trade Policy Committee of the Council on the basis of a report from the Commission. Green light was given in the case of Morocco in November 2012. See: Council, press release, 3203rd Council meeting foreign affairs and trade, Brussels, 29 November 2012.

services.[106] In conclusion, facilitated by impulses from the Commission's DG Trade, medium- and long-term revised market access policies are amongst the most concrete instruments the EU has used effectively to reconnect to the Arab world. Other objectives that remain to be achieved include the conclusion and EU approval of trade liberalisation agreements on agricultural and fisheries products with Tunisia, the launch of negotiations on agreements on conformity assessment and acceptance of industrial products, and the acceleration of on-going bilateral negotiations on the liberalisation of trade in services.[107]

The EU has also sought to take action to stabilise economies within the Arab region through participation in G8 initiatives. On 27 May 2011, in the French city of Deauville, a Partnership was launched between the G8, MENA countries, and a number of external actors[108] to implement home-grown reforms and programmes to restore economic growth and confidence.[109] This informal forum managed to address two of the aforementioned structural bottlenecks which the EU faces in the Arab region: (1) the inclusion of the topics of trade in services and investment and (2) the expansion of trade and intra-MENA investment cooperation.

3.2.3. *Mobility*

The turmoil of Arab awakening caused an alarming numbers of people to move both within and away from the region.[110] EU Member States were the preferred destination of many migrants. The EU responded to this challenge in a rapid manner and with a strong focus on security issues. In February 2011, the joint operation EPN HERMES of Frontex and Europol was launched following Italy's request for assistance in managing the influx of migrants. Additional funds of €25 million were made available by the Commission to be mobilised under the External Borders Fund and European Refugee Fund following concrete requests

[106] Partnership for Democracy and Shared Prosperity, *supra* note 50, 8-9.

[107] Ibid. at 9. Since the launch of the Partnership, an EU-Morocco Agreement on agricultural, processed agricultural and fisheries products entered into force 1 October 2012 (*OJ* L 255/1, 21 September 2012) and a regional Convention on Pan-Euro-Mediterranean Rules of Origin was opened for signature, see *supra* note 102.

[108] Since the inaugural meeting in Jordan on April 11-12, 2012, partnership States are five MENA countries (Egypt, Tunisia, Jordan, Morocco, and Libya), the G8, Saudi Arabia, the United Arab Emirates, Kuwait, Qatar, and Turkey. Participating International Financial Institutions include the African Development Bank, the Arab Fund for Economic and Social Development, the Arab Monetary Fund, the EBRD, the EIB, the Islamic Development Bank, the International Finance Corporation, the International Monetary Fund, the OPEC Fund for International Development, and the World Bank. The Organization for Economic Co-operation and Development is also a Partnership member.

[109] Declaration of the G8 on the Arab Spring, G8 Summit of Deauville, 26-27 May, 2011, available at <http://www.g20-g8.com/g8-g20/g8/english/the-2011-summit/declarations-and-reports/declarations/declaration-of-the-g8-on-the-arab-springs.1316.html>.

[110] Member States had lively discussions on how to control this 'human tsunami' (dixit Berlusconi) within the Schengen zone: D. Perrin, 'Arab Revolts and Migration: Behind the Mediterranean Wall, the Unity of Europe', in *Mediterranean Yearbook* (Barcelona: IEMed 2011), at 283-286.

of Member States.[111] A more comprehensive approach was sought in the opening of a Dialogue on Migration, Mobility, and Security ('the Dialogue').[112] The Dialogue was presented in May 2011 and aims at enhancing and facilitating the regular channels for migration and mobility of the citizens between Arab countries and the EU. Under impulses of the Member States, extra funds were made available, technical assistance to the migration operations was increased, and a resettlement policy was presented.[113]

The EU's management of migration flows reflects pre-Arab Spring practices and a Member State-driven reasoning. To a certain extent, and despite the title of the instrument, the Commission attempted to de-connect migration from its security dimension when it presented its medium and long-term views in the Dialogue. It was argued that mobility would enhance economic prosperity, and thus job creation, and even democracy.[114] Thereto, migration policies were integrated in the economic 3Ms policy framework. The movement of people is, however, not to be reduced to a mere side-effect of market integration. As stated, increased international mobility of people challenges the EU in terms of security and human development as well.

In a follow-up instrument to the Dialogue, the Commission re-introduced a tool it had launched itself, with limited success, in 2006: Mobility Partnerships.[115] In June 2011, the European Council embraced the Commission's proposal to conclude partnerships these with Arab States.[116] The Mobility Partnerships are to be agreed at the political level between the EU, its Member States and the partner country concerned. The reciprocal dimension of the envisioned Partnerships includes increased opportunities for legal (economic) migration, increased capacity building and financial support for border management, in return for cooperation in preventing and fighting irregular migration and trafficking in human beings.[117] Mobility Partnerships will be differentiated according to partner countries' individual merits, agreed with each partner country separately, and will be conditional on efforts and progress made.[118] The conditionality principle ('more for more') was as such included in migration politics, transforming the 'partnerships' into rather unilateral instruments, with a strong role for the Union.

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[111] See: The European Commission's response to the migratory flows from North Africa, MEMO/11/226, Brussels, 8 April 2011.

[112] See: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A dialogue for migration, mobility and security with the Southern Mediterranean countries, Brussels, 24 May 2011, COM(2011) 292 final.

[113] Ibid., at 4-6.

[114] Ibid., at 6-7.

[115] On 16 May 2007 the Commission issued a Communication on Circular Migration and Mobility Partnerships between the EU and third countries Brussels, COM(2007) 248 final, on the basis of which the Council defined the purpose and parameters of Mobility Partnerships. See: Council Conclusions on extending and enhancing the Global Approach to Migration, 2808th General Affairs Council meeting, Luxembourg, 17-18 June 2007, para. 10.

[116] Conclusions of the European Council of 23-24 June 2011, Brussels, paras 27-28. Before the uprisings partnerships had been concluded with Cape Verde and Moldova (2008), Georgia (2009), and Armenia (2011).

[117] A Partnership for Democracy and Shared Prosperity, *supra* note 50, at 7.

[118] Conclusions of the European Council of 23-24 June 2011, para. 28.

Through its 'Erasmus Mundus' programme, the Commission doubled the number of education and teaching grants available for young people and university staff from MENA countries.[119] Though valuable, this is a relatively small project that only encourages short-term stays.

3.3. **Challenges related to human rights and democracy policies**

The upheavals in the Arab region underlined the need for the EU to revisit its role as a promoter of human rights, democracy, rule of law, socio-economic equality, and its contribution to reforming institutions in partner countries.[120] Despite external human rights and democracy policies having been in place for many years, the EU cannot take credit for having enhanced the 2011 democratisation processes.[121] Neither had the European human rights and democracy discourse impeded gross human rights violations from happening or dictators from remaining in power for many years.[122] Coming clean with the past, *nostra culpa* speeches were delivered by Commissioner for ENP Štefan Füle and High Representative Ashton. Both recognised that policies favouring short-termism had to be replaced by a 'sustainable stability' which includes political, social, and economic development, as well as enhanced efforts in defending human rights and local democratic forces.[123] Instruments considered to be fit to put such promising words into practice were those Europe was al-

[119] The Commission announced an allocation of nearly EUR 30 million through Erasmus Mundus in the 2011-2012 academic year, specifically for Southern Neighbourhood countries; European Commission, Erasmus Mundus: funding boost for Arab Spring countries, MEMO/11/918, 16 December 2011.

[120] The EU sees itself as a normative actor in global governance. It prioritises the promotion of human rights, democracy, good governance, and rule of law and seeks to develop relations and build partnerships with third countries and organisations that share these values; see e.g. Art. 21(1) TEU.

[121] K. Roth, *supra* note 53, at 12; A. Driss, *supra* note 40, at 97.

[122] This critique on European pre-Arab Spring policies has been very present. It was also observed that, at the outset, the uprisings were not particularly supported by the EU and its Member States. See, among others: R. Hollis, 'No friend of democratization: Europe's role in the genesis of the Arab Spring', 88 *International Affairs* (2012), 81-94; B. Ward, 'Europe's own human rights crisis', *Human Rights Watch essay* 2012, available at <http://www.hrw.org/sites/default/files/related_material/eucrisis_2012.pdf>.

[123] C. Ashton remarked: 'We know that we need the right blend of democratic and economic reforms to build sustainable stability. Events in the region show that the "old stability" wasn't working. That is why we need to build a new "sustainable stability". This will require us to tackle the political and economic aspects in an integrated manner. What these last few weeks have shown us is that political and economic reforms must go hand-in-hand. Populations are striving for political rights and freedoms, accountability and participation': Remarks at the Senior officials' meeting on Egypt and Tunisia, Brussels, 23 February 2011, A 069/11. Commissioner S. Füle stated: 'We must show humility about the past. Europe was not vocal enough in defending human rights and local democratic forces in the region. Too many of us fell prey to the assumption that authoritarian regimes were a guarantee of stability in the region. This was not even Realpolitik. It was, at best, short-termism – and the kind of short-termism that makes the long term ever more difficult to build': Speech on the recent events in North Africa Committee on Foreign Affairs (AFET), European Parliament, Brussels, 28 February 2011.

ready familiar with: the ENP, the European Instrument for Democracy and Human Rights (EIDHR), and the European Endowment for Democracy (EED).

First of all, the EU made convenient use of the strategic revision of its ENP framework to stress the importance of human rights and democracy in its neighbourhood policies. The new ENP approach is more explicitly based on mutual accountability and enhanced commitment to the universal values of human rights, democracy and rule of law, and as such builds on the normative approach the EU has taken for years.[124] More emphasis is put on comprehensive implementation. It does so by differentiating levels of assistance, depending on progress made in building and consolidating human rights.[125] This is realised, first, via a 'more for more' political conditionality, notwithstanding the implementation deficit that such clauses suffered from in the past.[126] Additionally, a 'less for less' conditionality was introduced enabling the EU to reduce benefits when democratic expectations are not met.[127] A second method used to differentiate policies was the move towards a multi-level and multi-actor approach. This included the boosting of joint initiatives in international fora on issues of common interest[128] and the further engagement of civil society. In this respect, the ENP explicitly aims to address criticism that, although human rights principles have been integrated into ENP action plans and association agreements, they are not matched by sufficient and effective instruments adapted to the local context and needs of the countries and regions concerned.[129]

The second tool in human rights and democratisation policies is the Instrument for Democracy and Human Rights (EIDHR). It functions as the concrete expression of the EU's intention to integrate the promotion of democracy and human rights into all of its external policies.[130] It thereby serves to respond to the often-voiced criticism of a lack of coherence of EU human rights policy.[131] The instrument reaches out to local NGOs and supports those promoting human rights, democracy, and the rule of law via a chain of micro-projects.[132] The EIDHR has also suffered from an implementation deficit. The requirement to approve projects on a case-by-case basis has severely limited the scope of

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[124] A New Response to a Changing Neighbourhood, at 2.

[125] Ibid., at 3.

[126] Ibid., at 6.

[127] Ibid., at 3.

[128] Ibid., at 2.

[129] B. Van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A paradigm for coherence* (London and New York: Routledge 2012), at 255.

[130] Regulation (EC) No 1889/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide, *OJ* L 386/1, 29 December 2006. Through a variety of EIDHR projects the European Commission demonstrates a significant political and financial commitment to supporting human rights and democracy worldwide.

[131] S. Gstöhl, 'Patchwork Power' Europe: The EU's Representation in International Institutions', 14 *European Foreign Affairs Review* 2009, 385-403; G. de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor', 105 *American Journal of International Law* 2011, 649-693.

[132] See for further reading: F. Bicchi, 'Dilemmas of implementation: EU democracy assistance in the Mediterranean', 17 *Democratization* 2010, 976-996.

EU action, and in some years not all of the allocated budget has been used.[133] Remarkably, if anything, the EIDHR has become further marginalised in the EU's Arab uprisings strategies. It was not significantly revised recently nor was it referred to in the Joint Communication on a Partnership for Democracy and Shared Prosperity. This is noteworthy because the EIDHR is a programme financed through the Commission's EuropeAid, and EU delegations are involved in the monitoring of calls to support new local projects, which are now booming in the Arab region. The revised ENP merely refers to EIDHR activities as supplementary to its own. The EIDHR Strategy Paper 2011-2013, adopted in April 2010, states that the EIDHR is intended to complement geographical programmes such as ENP and ENPI.[134] Notwithstanding new demands resulting from the rapidly changing realities in the Arab region, the EIDHR will continue to support projects and civil society in the region in the same manner as prior to 2011.

Generally, democracy support is also provided via EU Electoral Observation Missions and mechanisms to empower civil society.[135] During the uprisings, the promotion of the new, though ill-defined, concept of 'deep democracy' found its way into European policies.[136] A particular instrument to promote this deep democracy is the European Endowment for Democracy (EED), intended to help political parties, non-registered NGOs, trade unions, and other social partners striving for democratic change in their countries. The EED functions as a fund to enhance democracy building around the world. Originally proposed by Poland prior to the Arab uprisings, the EED was endorsed by the High Representative and the Council in the Spring of 2011.[137] It 'will seek to bring

[133] T. Behr, *supra* note 54, at 437; F. Bicchi, *supra* note 133, at 989.

[134] European Commission, 'European Instrument for Democracy and Human Rights (EIDHR) Strategy Paper 2011 – 2013', C(2010)2432, 21 April 2010, para. 30.

[135] The empowerment of civil society is a vital part of the renewed ENP, see *infra*.

[136] A New Response to a Changing Neighbourhood, at 3. In this respect, C. Ashton recalled that "Democracy is of course about votes and elections – but it is also about far more than that. What we in Europe have learned the hard way is that we need "deep democracy": respect for the rule of law, freedom of speech, respect for human rights, an independent judiciary and impartial administration. It requires enforceable property rights and free trade unions. It is not just about changing governments, but about building the right institutions and the right attitudes. In the long run, "surface democracy", democracy that floats on the top – people casting their votes freely on election day and choosing their governments – will not survive if "deep democracy" fails to take root". See: C. Ashton, Speech on main aspects and basic choices of the Common Foreign and Security Policy and the Common Security and Defence policy, European Parliament Strasbourg, 11 May 2011.

[137] See: C. Ashton, 'Empowered, Energised, Engaged', Speech at the 6th Ministerial Conference of the Community of Democracies, Vilnius, 1 July 2011, where she states: 'That is why, I put my support to the proposals put forward by Poland, by Radek Sikorski, for a "European Endowment for Democracy" – flexible, non-bureaucratic tool, free of the imprint of government and free of EU bodies, which can help countries find their democratic voice'. See also Council Conclusions on the ENP, 3101st Foreign Affairs Council meeting, Luxembourg, 20 June 2011, para. 4. In December 2011, EU Member States agreed on a political Declaration on the establishment of a European Endowment for Democracy (COREPER, 15 December 2011). For further reading, see R. Youngs and K. Brudzinska, 'The European Endowment for Democracy: will it fly?', Fride Policy Brief Nº 128, May 2012, available at <http://www.fride.org/publication/1019/the-european-endowment-for-democracy:-will-it-fly>.

greater influence and consistency to the efforts of the EU, its Member States and several of the large European political foundations that are already active in this field'.[138] From a EU policy strategy point of view, the creation of the EED – a purely political and intergovernmental creation – in itself contradicts the November 2009 Council Conclusions. These held that the EU is already reinforced by an extensive array of instruments related to democracy support and that neither new conditionality arrangements nor instruments were necessary. Instead, the focus should be on the consistent and effective implementation of policies.[139] The EED does not replace the other instruments intended to financially support democratisation processes, but is a supplementary instrument with a specific objective that could have been included just as well in the EIDHR. It is therefore desirable for the EU to make further efforts, as was agreed in 2009, to streamline the existing instruments and frameworks aimed at democracy support in third countries.[140]

In conclusion, it is doubtful whether these renewed (ENP), untouched (EIDHR), and somewhat redundant (EED) frameworks will have a significant impact in the Arab region. Despite new rhetoric, in human rights and democratisation policies, the EU has not been distancing itself from old politics and attitudes. Although it seems to have accepted the idea that no actual tool exist to open up societies and enhance democratisation from the outside, more can be achieved than what is the case today. Reducing the mutual incomprehensiveness of the recycled ENP, EIDHR, and EED programmes will be key in this regard as well as the comprehensive use of the different instruments at the EU's disposal.

IV. EU INSTRUMENTS TO ENHANCE MULTI-LEVEL COOPERATION

In its search for innovative approaches for enhanced collaboration in the MENA the EU needed to revise relations with global, regional, and local actors. Moreover, the High Representative and EEAS have made considerable efforts to build personal relationships and to involve different actors, at different levels, in post Arab Spring dialogues. The present section discusses these and indicates where there is room for improvement.

4.1. **Cooperation with international organisations**

The EU engaged with the UN in responding to the Arab uprisings. The EU cooperated with the UN Security Council on the situation in Libya. It has been

[138] A New Response to a Changing Neighbourhood, at 4.

[139] Council conclusions on Democracy Support in the EU's External Relations 2974th External Relations Council meeting, Brussels, 17 November 2009, para. 3.

[140] Similar comments were made by Véronique De Keyser in the Report on EU external policies in favour of democratisation, 2011/2032(INI), Committee on Foreign Affairs of the European Parliament, 16 July 2011, para. 35.

active in urging members of the UNSC to assume their responsibilities as well as in providing assistance in the writing of draft resolutions. Furthermore, in April 2012, the internal crisis platform established by the High Representative brought together different services of the EU specifically to better support the UN in the implementation of the Annan plan.[141] The High Representative also takes part in the Action Group for Syria, a forum to support the implementation of UNSC Resolutions on Syria that is based at the UN Geneva Offices.[142]

The Union's engagement with regional multilateral organisations, including the African Union (AU), the League of Arab States (Arab League), the Organisation of Islamic Cooperation (OIC), and the Gulf Cooperation Council (GCC)[143] has been developing at different speeds. Particularly notable is the EU's rapprochement to the Arab League which, led by Secretary-General Amr Moussa, had reinvented itself as an advocate of the protesters' claims throughout the Arab world.[144] This is remarkable for an organisation that, although it aspires to goals similar to the EU,[145] was primarily occupied with safeguarding the independence and sovereignty of its Member States. Moreover, until recently, it operated in a climate of weak democratic practice, and as such, has little experience engaging in core democratic activities.[146] Even so, the enhanced EU-Arab League cooperation did not entirely come out of thin air. The Arab League had been included in all meetings of the EMP since 2008.[147] In addition, in March 2010, the High Representative visited the headquarters of the Arab League in Cairo, where she indicated her appreciation for the 'grow-

[141] Council conclusions on Syria, 3166th Foreign Affairs Council meeting, Brussels 14 May 2012; Council conclusions on Syria, 3183th Foreign Affairs Council meeting, Brussels 23 July 2012. Prior to this, the Libyan case had also demanded increased internal coordination. An EEAS Crisis Platform was activated to conglomerate crisis response and crisis management structures of the EEAS, the Council, and the Commission. In July 2011, a Conflict Prevention Group and an EU Situation Room were launched to improve the early warning capacity, both of which were integrated in the newly established EEAS Crisis Response Department. The latter also coordinates the work of the EEAS Crisis Platform.

[142] Other invitees are the Secretaries-General of the United Nations and the Arab League, the Foreign Ministers of China, France, Russia, UK, USA, Turkey and representatives of competent committees of the Arab League.

[143] The EU and the Gulf Cooperation Council discussed topics of regional security and stability at a Joint Council held in Abu Dhabi on 20 April 2011, in which they also underlined the need for close cooperation with the Arab League, the African Union, and the UN. See: 21st EU-GCC Joint Council and Ministerial Meeting Abu Dhabi, 20 April 2011, Joint Communique, available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/121610.pdf>.

[144] See, among others, its efforts in (i) convincing the Security Council to create of a flight ban over Libya (February 2011); (ii) suspending the Arab League membership of Syria (November 2011); (iii) sending an observer team to Syria (January 2012); (iv) instructing President Bashar al-Assad to delegate power to the government of national unity (January 2012).

[145] These include the driving of closer relations between and coordination of political and economic activities of Member States. See also the above discussed efforts of the Arab League to further integrate markets.

[146] For further reading, see: E. R. McMahon and S. H. Baker, *Piecing a Democratic Quilt? Regional Organizations and Universal Norms* (Sterling, VA: Kumarian Press 2006).

[147] In 2008 the Euro-Mediterranean Ministers invited the Arab League to participate in all meetings at all levels of the Barcelona Process (prior to this decision, it participated in meetings at the Ministerial level only); Final Statement of the Marseille Meeting of the Euro-Mediterranean Ministers of Foreign Affairs, 3–4 November 2008, at 1.

ing co-operation with the Arab League, with programmes that are aimed at bringing us closer together'.[148] Nonetheless, the EU and the Arab League have amplified their cooperative efforts during the last few months. The Council underlined its support for the Arab League's efforts to end the cycle of violence in Syria, and for the deployment of its monitoring mission. Concrete cooperation modes furthermore include (i) the creation of the League of Arab States Situation Room to improve communications and real time response to natural disasters or political crises; (ii) EU training of Arab League officials to develop analysis and the ability to respond to crisis situations; (iii) the establishment of permanent EEAS-Arab League focal points; and (iv) the implementation of projects by the EU-Arab League Liaison Office in Malta.[149] In addition to more immediate political and operational support, the EU and the Arab League have engaged in exploratory talks regarding their medium and long-term cooperation in the economic, social, educational, cultural and legal fields.[150] A structural redefinition of the EU-Arab League relationship to contribute to regional security, stability, and prosperity has been announced. The increased cooperation, judged positively by both the EU and the Arab League, will furthermore be wielded with regard to other important dossiers: the Middle East Peace Process and Iran.[151]

The crisis situation has resulted in alternative forms of multi-organisational consultation as well. In February 2012, the High Representative joined in rather unique deliberations with the Secretary Generals of the Arab League, UN and OIC on the Syrian matter.[152] The Libya Contact Group, later re-named 'Friends of Libya', was created following impulses from the High Representative. In addition to this, the EU is part of 'Friends of Syria', an informal contact group of 70 States, the opposition group 'Syrian National Council' and seven international organisations[153] and is involved in a similar 'Friends of Yemen' initiative. These contact groups deliberately moved away from the UN Security Council to discuss the highly political issues related to regime changes in the countries in question.[154]

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[148] C. Ashton, 'A Commitment to Peace – the European Union and the Middle East The League of Arab States', SPEECH/10/94, 15 March 2010.

[149] C. Ashton, 'Speech on Syria', European Parliament Strasbourg, SPEECH/12/272, 17 April 2012; Written answer of 26 march 2012 to question of MEP Simon Busuttil (PPE) to the Council of 20 January 2012, E-000167/2012.

[150] Ibid.

[151] Cairo Declaration, adopted at the second European Union-League of Arab States Foreign Affairs Ministerial Meeting, 13 November 2012, available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/133465.pdf>, paras 10 and 12.

[152] The meeting was organised by the Arab League. See: European Union, Statement by High Representative Catherine Ashton following the EU-LAS-UN-OIC meeting on Syria, Brussels, 23 February 2012, A 80/12.

[153] The African Union, the Arab League, the Arab Maghreb Union, the EU, the GCC, the OIC, and the UN.

[154] The High Representative stated in this regard: 'I equally welcome and will play an active part in the Group of Friends of Syria, aiming at building an international consensus on Syria and putting forward urgent proposals to stop the violence, alleviate the suffering of the Syrian population, seek a peaceful outcome to the current crisis and promote a new era of democratic change'; European Union, Statement by High Representative Catherine Ashton on the decisions by the

4.2. **Cooperation with local non-State actors**

The EU's level of success in its interaction with non-State actors before the uprisings was relatively low. Admittedly, the circumstances did not allow for extensive interactions with businesses, civil society, NGOs, and opposition groups. In authoritarian societies, even civil initiatives are closely linked to the governing regimes.[155] The recent changes in the domestic legal orders brought about opportunities in this regard. Hence, goals of real engagement with local non-State actors were taken on board in the revisions of foreign policy instruments. These included cooperation initiatives primarily intended to ensure the embracing of economic challenges (via the funding of local projects and businesses) and socio-economic and State-building challenges (via the funding of human rights NGOs). The first, economic, engagement draws on UfM initiatives.[156] The second form of engagement, the strengthening of the role of civil society in promoting human rights and democratic reform, had already been included in the EIDHR and ENP.[157] The EIDHR Strategy for 2011-2013 states that projects will be implemented in the first place by civil society organisations.[158] The ENP reaches out to non-State actors in different ways.[159] A new feature is the ENP Civil Society Facility to encompass and reinforce in a comprehensive way existing initiatives of support to non-State actors.[160] The EU also prioritises the support for human rights defenders, which are regarded as key interlocutors for EU diplomatic missions in third countries.

The motivation behind these forms of cooperation is twofold. The Union wants to provide a role for civil society in the local democratic and constitutional reform processes. It also wants the people in the Southern Mediterranean to experience a visible change in their daily lives, by acting locally through actors with whom they are familiar.[161] Although not expressly communicated, the fact that supporting NGOs is a convenient way to exercise influence locally without having to interact directly with government bodies, also may have played a role. Cooperation with civil society may therefore be used to rebalance forms of governance in the countries of the Arab region. It should be noted, however, that the use of aid instruments to pursue political objectives remains contested

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League of Arab States on Syria, Brussels, 13 February 2012. See also the continued support by the Council: Council conclusions on Syria, 3179th Foreign Affairs Council meeting, Luxembourg, 25 June 2012, para. 4; Council conclusions on Syria, 3183th Foreign Affairs Council meeting, Brussels 23 July 2012, para. 3.

[155] See for the Syrian example: J. Stacher, 'Reinterpreting Authoritarian Power: Syria's Hereditary Succession', 65 *The Middle East Journal* 2011, 197-212.

[156] See for example, the UfM Mediterranean Business Development Initiative, aimed at assisting existing entities in partner countries operating in support of small and medium-sized enterprises.

[157] Art. 10, EIDHR Regulation No 1889/2006, makes, for example, private actors eligible to receive EU funding for human rights or democracy related projects.

[158] European Commission, 'European Instrument for Democracy and Human Rights (EIDHR) Strategy Paper 2011 – 2013', C(2010)2432, 21 April 2010, para. 18.

[159] It e.g. upgrades the role of civil society organisations, to promote democracy, human rights, and to assist in institution-building: A New Response to a Changing Neighbourhood, at 3.

[160] Ibid.

[161] Ibid., at 5.

and may not be the most effective way to reach out to the needs of the people of the countries in question.

4.3. *Diplomatic instruments to enhance bilateral and regional cooperation*

As indicated above, a differentiated use of policies and instruments in MENA countries is considered crucial for the EU to achieve its foreign policy objectives. One way to improve bilateral relations on a country-by-country basis is to reach out to its partners via the diplomatic instruments the EU has at its disposal.

Throughout the last months, the EU has presented itself as a listening partner, willing to communicate with Arab partners, to better understand local dynamics and build personal relationships. This is considered important in the Arab world, and can contribute to the rebuilding of trust. However, caution is also in order. The 'overspending' of diplomatic capital in personal relationships in this context – a region still in flux – may recall erroneous attitudes towards regimes in the past and complicate the European vision on the MENA's future direction. Recent events in Egypt, in the fall of 2012, outline the complications of such policy choices. The constitutional trials, the referendum, and further tribulations have left the country in a deadlock state, reminiscent of 'defeated' Arab uprisings regimes. The High Representative approached the situation very cautiously, not wanting to jeopardize any relationships. Hence, public statements were limited to 'following with concern the events in Egypt'[162] prior to the referendum and 'I reiterate my previous calls for dialogue among all parties in Egypt […] I urge those concerned, in particular the President, to intensify efforts in this regard' following the vote.[163] It is highly questionable whether the maintaining of personal interactions is preferred over putting pressure on individuals or governments ignoring human rights and democratic principles and, if necessary, strongly condemning these.

The building of diplomatic relationships has taken place in high-level task forces, co-chaired by the High Representative and respective leaders of the partner countries.[164] The Union also has a permanent diplomatic presence on the ground in the form of EU Delegations.[165] These Delegations operate as the

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[162] Statement by EU High Representative Catherine Ashton on the situation in Egypt, Brussels, 5 December 2012.

[163] Statement by EU High Representative Catherine Ashton on the referendum in Egypt, Brussels, 25 December 2012.

[164] The EU-Tunisia Task Force in September 2011, which gathered expertise from the Commission, EEAS, EU Member States, the private sector, the EIB, the EBRD, and other international financial institutions has been set up to ensure better coordination of the country's political and economic transition. This concept has been applied in Jordan (February 2012) and in Egypt (November 2012).

[165] The EU has an active and passive *jus legationis* and relies on a worldwide bilateral and multilateral diplomatic network to conduct international relations. For further reading, see J. Wouters and S. Duquet, 'The EU and International Diplomatic Law: New Horizons?', 7 *The Hague Journal of Diplomacy* 2012, 31-49. On 12 November 2011, the High Representative officially inaugurated the EU Delegation in Libya's capital Tripoli. An EU Office had been operational in

diplomatic missions of the EU as a whole and serve as bilateral contact points with governments and civil society. The EU Delegations have proven to be an excellent instrument in the Arab region by allowing the EU to already have a foot on the ground. Tasks include the briefing of the Union, and more specifically the Brussels-based EEAS headquarters, on the situation on the ground.[166] As was foreseen in the 2010 EEAS Decision, the Head of Delegation also has to implement operational credits in relation to the Union's projects in the country of stationing.[167] Many EU initiatives were launched, but have yet to be established and kept running, and the Delegations are given the central task to comprehensively follow-up on these.[168] It is yet unclear whether these tasks are being performed in the most effective way. First, EU Delegations have to maintain their role in promoting friendly relations with different sides in the conflict.[169] To illustrate the complexity it can be recalled that in the midst of the Arab uprisings, Heads of EU Delegations found themselves accredited to 'old' regimes (e.g. Morocco), transitional governments (Libya, Egypt), and newly elected governments (Tunisia). The situation in Syria is even more complicated: the EU Delegation in Damascus remains operational and continues to host diplomats of Member States that decided to suspend the activity of their own embassies.[170] Second, the diplomatic function of the Delegations must at all times be preserved. The Delegations form a network of embassies and fulfil a similar function: the representation of the EU with local governments.[171] As such, a reciprocal EU commitment to respect the 1961 Vienna Convention on Diplomatic Relations (VCDR)[172] terms and conditions in the application of privileges and immunities is vital to its diplomatic relations. EU Delegations have to respect Art. 41(1) VCDR regarding the non-interference in the internal affairs of the receiving State. Local laws and regulations have to be obeyed and thus a careful balancing act is needed between the tasks assigned under EU instruments and the diplomatic functions of the EU Delegations under international law.

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the country's second city Benghazi since 22 May 2011 to enable EU actors to interact with the Transitional National Council, civil society groups and international partners.

[166] See also Art. 5 (9) which states that the Union delegations shall work in close cooperation and share information with the diplomatic services of the Member States.

[167] Art. 5 (4) EEAS Council Decision.

[168] As a side remark, given that delegations are staffed with diplomats, additional financial support is desired for the training and recruitment of staff to take up these tasks.

[169] When regime change is taking place in a country, in general, diplomatic delegations cautiously adhere to the principles of neutrality and impartiality. Today's opposition group may become tomorrow's official representatives of a country.

[170] C. Ashton, EU High Representative for Foreign Affairs and Security Policy and Vice President of the European Commission, Speech on Syria European Parliament Strasbourg, 17 April 2012. By December 2012, following MS have closed their Damascus embassies: Austria, Belgium, Finland, France, Germany, Greece, Italy, Netherlands, Poland, Slovakia, Spain, Sweden and the UK.

[171] Art. 221(1) TFEU.

[172] Vienna Convention on Diplomatic Relations, signed at Vienna on 18 April 1961, entry into force 24 April 1964, *UNTS*, vol. 500, at 95, no. 310. The EU is not a party to this convention but the latter's provisions are widely considered as being part of customary international law.

The EU's policies and interests are also promoted by its network of Special Representatives. The Special Representatives are tasked to play an active role in efforts to consolidate peace, stability, and the rule of law. As a result of the Arab awakenings, the Council appointed the Spanish diplomat, Bernardino Leó n, as the EU Special Representative for the Southern Mediterranean.[173] His mandate includes, first, the vaguely formulated mission to support an orderly transition of the region to sustainable democracy, as well as human rights, and rule of law.[174] Second, and on a more concrete level, he serves as the personification of the EU's enhanced diplomatic cooperation with the region as a whole, with external partners, and bilaterally.[175] Following the inclusion of local, non-State actors in all EU's instruments and policies, the Special Representative is furthermore responsible for coordinating relations with these partners.[176]

V. WHAT TO DO FOR THE EU?

It has become clear that the EU, after a slow start, now assumes an active role in addressing the needs of the people of the MENA. Yet, it has been stuck in old habits of thought. The EU has chosen to answer the variety of challenges by adapting its existing instruments. Hasty policy-making, especially in the period from March to October 2011, resulted in vague programmatic language. This is unsatisfactory, since, up until now, a majority of the medium- and long-term measures are awaiting further implementation. Additionally, the lack of critical creative thinking about an EU strategy in the MENA hinders the more profound and much needed regeneration of EU attitudes. High stakes are nevertheless involved: if the EU fails in the region, this will have an impact on economic, human development, political, and even geo-strategically conditions. A comprehensive strategy for the EU requires an original way of re-thinking a number of issues, a selection of which are discussed here.

(i) Find a good mix between multilateralism and bilateralism

A recurring challenge for the EU is the development of comprehensive, multilateral policies while at the same time effectively differentiating its bilateral relations. As demonstrated above, one has witnessed a shift from the more multilateral EMP towards a policy of differentiation and bilateralism in the (revised) ENP and UfM. When promoting domestic reforms, differentiated bilateralism can be supported, but only to the extent that the multilateral basis it builds upon is well-defined. Differentiation in policies may not contribute to differences in the enjoyment of human rights and democracy, nor may it lead

[173] Council Decision of 18 July 2011 appointing a European Union Special Representative for the Southern Mediterranean region, 2011/424/CFSP, *OJ* L 188/24, 19 July 2011.

[174] Ibid., Art. 2 (b) and 3 (e).

[175] Ibid, Art. 3 (d); The SR enhances the EU's effectiveness, presence and visibility in the region and in relevant international fora. Art. 2 (c) names international organisations such as 'African Union, the Cooperation Council for the Arab States of the Gulf, the Organisation of the Islamic Conference, the League of Arab States and the United Nations'.

[176] Ibid., Art. 2 (c) and Art. 3 (a); (b).

to the use of conditionality mechanisms. Concretely, the policy of 'less for less' conditionality warrants caution, especially since further isolation of countries may contribute to regional instability.

It is interesting to compare the MENA strategy with the EU's relations with other regions at this point. In the East, the EU is also confronted with a diversity in country profiles. Some States are doing relatively better (Moldova, Ukraine) while others disapproved or even rejected a European rapprochement (Armenia, Azerbaijan and Belarus).[177] In this context, the EU has initiated a return to multilateralism via its Eastern Partnership (EaP). Yet, it does so without abandoning existing bilateral structures. While the EaP is formally incorporated in the Eastern dimension of the ENP, an EU Neighbourhood East Parliamentary Assembly, Euronest, has also been launched. Not only does this reinforce multilateral structures, it also builds on the idea of a partnership rather than unilateralist approaches.[178] The Barcelona process also includes a parliamentary dimension. The Euro-Mediterranean Parliamentary Assembly (EMPA) can be further consolidated into a forum in which democratically elected members of parliaments can discuss the changes that have been taking place in the countries. Accordingly, it provides for unique opportunities to exchange views in a multilateral arena on topics such as political reform and state-building. A return to multilateral solutions may not only be interesting to consider for this reason, but also because institutional support is needed to install an Euro-Arab free trade zone and to increase intra-Arab cooperation. If needed, a multilateral model could also take a more informal shape. The club-like network established under the G8 Deauville Partnership offers an example of engagement by some of the most important neighbours, international organisations and development banks with the Arab region.

(ii) Make (the monitoring of) funding more coherent

The EU lacks a mechanism to oversee the distribution of funds of the different ENP, EIDHR, UfM and EMP programmes. Financial support for the MENA region has been channelled through a wide variety of sources, including the ENPI, the EIB and the Refugee Fund. Although announced as a flagship initiative, the Commission's SPRING Programme is not the integrated instrument one may have hoped for. Funds continue to be incoherently distributed through a variety of instruments, of which SPRING is just one example. Among the most promising changes of the renewed ENP and EED is the treatment of civil society as full partners and receivers of European funding.

Since 2011, the principle of conditionality has been (re)introduced in the SPRING, ENP, Mobility Partnerships and Association Agreements. Including conditionality in different instruments demands an integrated implementation

[177] For further reading see G. Christou, 'Multilateralism, Conflict Prevention, and the Eastern Partnership', 16 *European Foreign Affairs Review* 2011, 207-225 and S. Stewart, 'EU Democracy Promotion in the Eastern Neighbourhood: One Template, Multiple Approaches', 16 *European Foreign Affairs Review* 2011, 607-621.

[178] See: Euronest Parliamentary Assembly, Constituent Act of the Euronest Parliamentary Assembly, April 2011.

mechanism. Additionally, the incentives in conditionality policies have to be defined precisely. Previous experience in the MENA has proven that using financial assistance as a 'carrot' does not automatically generate sustainable human rights and democracy. Other offers that may be included to make the acceptance of European proposals more attractive are the long-promised realisation of the 'stake in the market' for Arab countries and the conclusion of mobility agreements striving for broader labour-related mobility. In this regard, the EU should be aware that the public opinion prefers the pooling of efforts in these fields over the external support for State system reforms.

(iii) Enhancing EU-Arab cooperation

Progress has been made in the EU's structural cooperation with States – multilaterally and bilaterally, e.g. with governments of Arab countries – as well as non-State actors. A clear shift in the EU's policy towards its partners can be observed. First, the Euro-Med relationship has progressed from merely being a Commission-directed unilateral one to being more dialogue-based. Second, civil society is increasingly treated as a full-grown actor in all revisited EU programmes, although admittedly this trend had started before December 2010. Third, the EU deepened its relations with the Arab League and envisions further cooperation. It has been announced that in addition to joint crisis-management, collaboration will also be set up on economic and political themes in the longer term. Fourth, the systematic deployment of EU Delegations is relatively new to the EU. The EU Delegations, working closely with partner governments and civil society, are given a formal role in the implementation of EU policies. Under the SPRING programme, for example, EU Delegations are tasked to locally identify initiatives for the EU to sponsor. Yet, it is far from certain that the EU will be able to reach out to Arab society through the funding of civil society. Civil society often has close ties with governments and other funding organisations (international organisations, e.g. the Gulf Cooperation Council and States, e.g. Saudi-Arabia). Cooperation should be further enhanced with regard to the non-organised part of society in the Arab region, a group still generally neglected in EU tools. The engagement of 'society behind civil society' should be more prominently put forward as a priority. Additionally, insufficient attention has gone to the establishment of relations with the military and religious groups, influential as political parties and as providers of social (health, education, and social security) services.

(iv) Why does the EU need a strategy?

The EU's actions in the MENA have been tools-based rather than strategy-led.[179] None of the renewed or launched instruments display an original and well-thought-out EU vision on the MENA. More concretely, it is unclear where the EU wants the MENA to be in twenty or thirty years and what it expects from local policy-makers and cooperation partners in this regard. Even when setting

[179] See *supra* and D. Greenfield and R. Balfour, 'Arab Awakening: Are the US and EU Missing the Challenge?', *Atlantic Council Publication,* (June 2012), available at <http://www.acus.org/files/publication_pdfs/403/95825_ACUS_arab_awakening_us_eu.pdf.pdf>, at 19.

up cooperation structures, the lack of vision is striking. The EU has presented itself as a listening partner to the MENA. The Arab world has seen the High Representative coming clean with the past, listening to complaints and bringing outreach visits to the region. Self-effacement was in order for the EU, but is this sufficient? This approach was probably defendable in the first months of the awakenings, considering the failures of past policies. But it rapidly loses its strength if it is not backed up by a forward-looking strategy that comprises a vision on the future development of the region. In fact, feedback has been, if not indifferent, very mixed.[180] Claims for European money, access to markets and increased mobility are more present than requests for European assistance in democracy- or institution-building.

VI. CONCLUDING REMARKS

The Arab uprisings provide unique opportunities to revise the EU's relations with countries in transition in Northern Africa and the Middle East. Caught by surprise at first, the EU has now embraced security, economic, socioeconomic, political, social, and diplomatic challenges. The exact impact of the instruments created or modified is hard to measure, especially since the region is still in the middle of one of the greatest changes it has seen in 50 years. As outlined, in countries such as Egypt, the political impasse is to be followed up very closely until present day. The use of different policy instruments did not result in the ambitious creation of a comprehensive strategy, partly because the EU has not been successful in prioritising the interests it has pursued. Ultimately, the EU's quest for stability in the MENA region is still reflected in all its instruments, notwithstanding the re-orientation of programmes towards the engagement of civil society and the support of the democratic aspirations of the people of the region.

The revision of the ENP and EIDHR, on the basis of preparations that had started before the recent changes in the region, and of the countless tools and projects concerned, have not been sufficiently thorough. The EU has made clear progress in using its diplomacy tools. The mobilisation of EU Delegations, the coordination by the EU Special Representative for the Southern Mediterranean, the organisation of task forces, the intensification of partnerships, whether formal and informal, with local actors, regional and global international organisations are all steps in the right direction. Yet, all these actions have to be guided by a long-term, coherent strategy. Now that the optimism of the early days of the Arab awakenings has ebbed, it has become all the more clear that the EU still lacks a long-term vision on the future of the MENA.

[180] See R. Youngs, 'The EU and the Arab spring: from munificence to geo-strategy', *Fride Policy Brief No 100*, (October 2011), available at <http://www.fride.org/publication/950/the-eu-and-the-arab-spring:-from-munificence-to-geo-strategy>.

THE ENP AND 'MORE FOR MORE' CONDITIONALITY: PLUS QUE ÇA CHANGE …

Steven Blockmans

1. … PLUS QUE ÇA RESTE LA MÊME CHOSE?

The revolutionary upheaval in the southern Mediterranean and the disparate reforms in Eastern Partnership (EaP) countries have pushed the EU to revise its approach to the European Neighbourhood Policy (ENP). While EU institutions and Member States were caught by complete surprise by the so-called 'Arab Spring', a comprehensive discussion on the future of the ENP by the Council had – coincidentally – already been planned for the first half of 2011.[1] In March 2011, the European Commission and the High Representative presented some ideas on a new 'partnership for democracy and shared prosperity' with the southern Mediterranean.[2] In May 2011, they presented a full review of the ENP.[3] Whereas these documents were presented as a strategic response to the sea change brought about by the revolts in the southern neighbourhood, the priority areas of the revised ENP are essentially the same as those of the 'old' ENP, which was launched in 2003, revised at different intervals since, and widely regarded as unsuccessful by analysts.[4]

With an emphasis on the promotion of democracy and the support for democratisation processes, reinforcing the rule of law, improving the respect of

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[1] See Foreign Affairs Council conclusions, 27 July 2010, para 1.

[2] Joint Communication to the European Council, the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean*, COM(2011) 200 final of 8 March 2011, Brussels.

[3] European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A New Response to a Changing Neighbourhood*, COM(2011) 303 final of 25 May 2011, Brussels.

[4] See J. Kelly, 'New Wine in Old Wineskins: Policy Adaptation in the European Neighbourhood Policy', 44 *JCMS* (2006), 29-55; S. Blockmans and A. Łazowski, 'Conclusions: Squaring the Ring of Friends', in S. Blockmans and A. Łazowski (eds.), *The European Union and Its Neighbours: A Legal Appraisal of the EU's Policies of Stabilisation, Partnership and Integration* (The Hague, T.M.C. Asser Press 2006), 613-639; M. Cremona and C. Hillion, 'L'Union fait la force? Potential and Limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security Policy', *EUI Working Papers LAW* 2006/39; M. Cremona and G. Meloni, 'The European Neighbourhood Policy: A Framework for Modernisation?', *EUI Working Papers LAW* 2007/21 (2007); G. Noutcheva, N. Popescu and M. Emerson, 'European Neighbourhood Policy Two Years on: Time indeed for an 'ENP Plus'', *CEPS Policy Brief* No. 126, March 2007; G. Edwards, 'The Construction of Ambiguity and the Limits of Attraction: Europe and its Neighbourhood Policy', 30 *Journal of European Integration* (2008), 45-62; B. Van Vooren, 'The European Union as an International Actor and Progressive Experimentation in its Neighbourhood', in P. Koutrakos (ed.), *European Foreign Policy: Legal and Political Perspectives* (Cheltenham, Edward Elgar Publishing 2011), 147-171.

human rights, judicial reform, administrative capacity-building, fighting corruption, and economic modernisation, the revised ENP is *again* based on the principle of positive conditionality: the more governments in neighbouring countries implement reforms in the sectors outlined in the EU strategy paper, the more assistance the EU will offer. Rebranding the incentive-based principle of conditionality as 'more for more' cannot disguise the fact that the EU is essentially promising more of the same, thus reincarnating a weak pledge that has still not been reciprocated by commitments of the region's leaders to democracy, the rule of law and political reforms.

In real terms, the EU has allocated €700 million in new grants for the Southern neighbourhood, in particular through the SPRING programme (Support for Partnership, Reform and Inclusive Growth) which provides additional funding to southern partners showing commitment to, and progress in, democratic reform: e.g., €90 million for Egypt to support the government's socio-economic reform programme; €70 million to Jordan (to support the electoral process, to assist in reforming the justice system, to support efforts targeting public finance management, education and social security, and to help develop the private sector and foster job creation), in tranches of 30 and 40 million, with the second tranche linked to progress achieved in terms of democratic reform.[5] Arguably, the sums mustered on top of the existing envelopes under the European Neighbourhood and Partnership Instrument are too small an incentive to bolster the change needed to secure a successful transition from authoritarianism to democratic rule in the southern Mediterranean.[6]

The revised ENP does offer one major innovation by indicating more clearly than ever before that the EU will restructure or even reduce financial aid and sectoral support for those governments of neighbouring countries which delay, impede or abandon reform plans. With the categorical reference to the principle of 'less for less', the EU has implicitly declared an end to the days that it would simply acquiesce to a retreat on reforms by ENP partners. However, while the introduction of negative conditionality cannot be dismissed out of hand, the problem with the less for less principle rests with its implementation of 'other political measures' 'and targeted sanctions'. Two years on, the EU has unfortunately not a whole lot to show for in terms of implementing the 'less for less' principle, neither with regard to the eastern neighbourhood (e.g. Belarus, Azerbaijan),[7] nor for the southern Mediterranean (with the exception of cutting

[5] For these and other details, see European Union, 'EU's response to the "Arab Spring": The State-of-Play after Two Years', Press release A 70/13, Brussels, 8 February 2013. Towards the eastern neighbourhood "more for more" has been applied in the visa liberalisation process, allowing the EaP's poster child Moldova to progress faster than the Ukraine of Victor Yanukovych.

[6] This observation takes account of the sums generated through the EU-induced Task Forces for Tunisia, Jordan and Egypt, preferential loans granted by the EIB, and other collateral funding mechanisms. See J. Teorell, *Determinants of Democratization: Explaining Regime Change in the World, 1972-2006* (Cambridge, Cambridge University Press 2010).

[7] See P. Pawlak and X. Kurowska, 'EU foreign policy: more for more, or more of the same?', *EU observer*, 5 October 2011: The results of the Eastern Partnership Summit in Warsaw on 29 and 30 September 2011 "clearly show that while the EU is taking a strong stance in its mid-Arab-Spring southern neighbourhood, it is repeating its old mistake in the post-Soviet east. Rather than paying respect to 'more for more' the EU has again turned a blind eye to lack of reform in the

EU support to war-torn Syria, the 'less for less' principle has not been used to signal the EU's dissatisfaction with, e.g., the ongoing abuse of human rights resulting from continued *de facto* rule by the military in Egypt and the lack of reform of a mistrusted police force and justice system in Tunisia).[8] In its application, the revised ENP must therefore be seen as a continuation of the EU's inability and lack of political will to exert effective influence on (quasi-)authoritarian regimes to establish and maintain democratic reforms.

Politics aside, design is partly to blame for this. Both the joint communication of 8 March 2011 and the May 2011 strategy paper read more like blueprints for an assistance programme than strategic documents which offer a coherent approach to a clearly defined reform agenda designed to foster 'deep democracy' (yet another new label to distinguish the 'new' approach from the EU's hapless efforts at promoting democracy before the Arab revolts erupted). Going by its path dependency in the formulation of external relations,[9] it is hardly surprising that in the revised ENP the Union again proceeds from the assumption that governments in the southern Mediterranean are ready to embark on a path of reform accompanied by EU assistance.[10] The 'new' ENP fails to acknowledge the complexity of the transition processes in the Arab Mediterranean, the impact of the simmering conflicts between secular and religious movements, as well as the wide variety of other drivers for change in each of the countries concerned. This lesson took a while to sink in. Whereas the 2011 strategy paper still contained an unjustified assumption that the Tunisian development model could be projected to the other countries in the region, the 2012 ENP strategy paper's references to the changed internal power structures in Tunisia, Morocco, Egypt and Libya show that the Commission and EEAS have learned to distinguish the countries' different transition pathways.

Another structural shortcoming of the revised neighbourhood framework relates to what has already been noted in passing, i.e. that the EU's key documents still pack the diplomatic *langue de bois* which characterised the 'old' ENP. Ill-defined terms (e.g. 'deep democracy',[11] 'rule of law', 'governance re-

region by promising more financial support and deeper political co-operation. The EU's $9 billion offer to Belarusian President, Alexander Lukashenko, in exchange for freeing political prisoners and holding free and fair elections (which do not require him to step down) is surprising, to say the least, and is an unfortunate reminder of the mistakes the EU has made in the southern Mediterranean. This suggests that the EU has not learnt from the Arab Spring and will continue to repeat the same mistakes it has made in the past." Another case worthy of the application of "less for less" concerns Azerbaijan. See J. Kobzova and L. Alieva, 'The EU and Azerbaijan: Beyond Oil', *ECFR Policy Memo* No. 57, May 2012.

[8] There is a total absence of references to "less for less" in European Union, 'EU's response to the "Arab Spring": The State-of-Play after Two Years', Press release A 70/13, Brussels, 8 February 2013.

[9] See, e.g., T. Risse, S. Ropp and K. Sikkink (eds.), *The Power of Human Rights. International Norms and Domestic Change* (Cambridge, Cambridge University Press 1999).

[10] See E. Adler and B. Crawford, 'Normative Power: The European Practice of Region Building and the Case of the Euro-Mediterranean Partnership', in E. Adler, F. Bicchi, B. Crawford and R. Del Sarto (eds.), *The Convergence of Civilizations; Constructing the Mediterranean Region* (Toronto, University of Toronto Press 2006).

[11] According to the May 2011 Joint Communication, the notion includes "free and fair elections; freedom of association, expression and assembly and a free press and media; the rule of

form') are sometimes used interchangeably (e.g. 'democratisation', 'democratic transformation', 'transition'). Moreover, the EU's mechanisms to assess whether the situation in neighbouring countries matches the revised terminology, or is apt for the application thereof represent a return to the *status quo ante* of donor-driven aid policies based on programmatic priorities and levels of absorption capacity.[12] Thus, the 'new' ENP stands in the tradition of 'old' bilateral action plans, representing nothing more than a vague and incomplete catalogue of reforms.

2. VISION IMPOSSIBLE?

Whether the 'more for more' and 'less for less' conditionality can produce a leveraging effect and inspire wholesale reform as desired by the EU is, to a considerable extent, dependent on the prospects offered by the Union to neighbouring states. Whereas the eastern neighbours have reason to be hopeful that they may be offered a membership perspective (perhaps as early as November 2013, at the EaP Summit in Vilnius),[13] the southern neighbours have no such prospect as they are not considered 'European' in the sense of the EU membership clause in Article 49 TEU. Thus, the EU has to develop its strategic commitment to the South if it wants the ENP to steer the revolutionary momentum in the direction of what is spelled out in Article 8 TEU, i.e. the creation of 'an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation'.

Whereas extending economic integration has been the EU's method to beef up the ENP, slogans like 'close relations', 'everything but the institutions' and 'a stake in the internal market' have in the past ten years proven to be too vague and bureaucratic to rally support from the people on the streets of Cairo, Tunis and Amman, or to inspire governing elites to engage in difficult and politically costly legal, administrative and economic reform.[14] One way of resolving this

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law administered by an independent judiciary and right to a fair trial; fighting against corruption; security and law enforcement sector reform (including the police) and the establishment of democratic control over armed and security forces". In February 2012, High Representative Ashton and European Commissioner Füle sent an unpublished letter to EU Foreign Ministers on the operation of conditionality that added "the respect of other human rights" to this shopping list.

[12] N. Gros-Verheyde, 'Quand le «more and more» devient un «peu plus» c'est tout!', *Bruxelles2*, 8 July 2012 : "Sous couvert de préciser quelques termes et déplacer quelques mots, on place en fait la barre «démocratique» beaucoup plus bas. L'incitation différenciée liée aux critères d'avancée dans les réformes, en particulier à l'approfondissement de la construction démocratique, fait ainsi place aux seuls critères, classiques, d'absorption et aux priorités «définies d'un commun accord». L'incitation démocratique est renvoyée à un soutien «additionnel». Un petit plus, simplement… En quelque sorte, on revient à la situation *quo ante*. L'aide européenne – pourtant fixée au titre de l'Instrument pour la démocratie – ne sera pas évaluée et conditionnée aux avancées démocratiques mais à des seuls critères techniques (l'absorption) ou programmatiques (les priorités)."

[13] See R. Sadowski, 'Commissioner Fule wants prospective EU membership to be offered to Eastern European countries', *Eastweek*, 7 November 2012.

[14] For a legal analysis, see K. Pieters, *The Mediterranean Neighbours and the EU Internal Market: A Legal Perspective* (The Hague, T.M.C. Asser Press 2010).

lack of incentive is by offering neighbouring countries a real prospect of regional integration. Inspired by projects such as the Energy Community Treaty, the European Common Aviation Area and the draft Transport Community Treaty, the EU could explicitly inject 'legally binding sectoral multilateralism' into the ENP as a means to provide a tangible perspective of real long-term benefits from EU cooperation to Mediterranean partners and to reinvigorate the ENP for the next decade.[15] The strong symbolism of such a well-defined project would enhance the political profile of EU relations with the southern neighbourhood where the Union for the Mediterranean (UfM) has faltered. While there is no silver bullet for EU engagement with the post-Arab Spring Mediterranean, the accession of Ukraine and Moldova to the Energy Community Treaty has already illustrated the potential of this approach in the Eastern Partnership.[16]

Another way to achieve those goals would be to increase the level of differentiation between individual ENP partners. The 'more for more' and 'less for less' conditionality approaches lay the basis for a stronger differentiation between neighbouring countries, one not based on geographic criteria but on merit in individual performances. Ironically, the success of the revised approach would steer the EU further away from its constitutional obligation to create 'an' (i.e. a single) area of peace and prosperity that Article 8 TEU calls for.[17] However, the revised strategy does not set out which precise cooperation and association prospects might provide to the agents of reform in return for legal adaptation, administrative shake-ups and tightening belts. As said before, the EU continues to rely on the same instrument regardless of whether they are attractive to the recipient country. This applies to the bilateral ENP action plans, which may call for partly differentiated reform efforts at the micro level but which, due to their vagueness and the EU's path dependency, fail to offer a framework for the implementation of fundamentally different policies. The same applies to the offer of Deep and Comprehensive Free Trade Agreements (DCFTAs), the central component of the 'more for more' approach, whose structural distinctions between EaP countries (compare the templates for, e.g., Ukraine and Moldova) and among southern Mediterranean countries (Morocco, Jordan, Egypt and Tunisia) remain to be explained by the European Commission. The fact that the EU claims to differentiate between neighbouring countries through a merits-based approach, but is instead pushing model characteristics in the DCFTAs, irrespective of different conditions in partner countries, serves to confirm accusations of duplicity levelled against the ENP over the years.[18]

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[15] See S. Blockmans and B. Van Vooren, 'Revitalizing the European 'Neighbourhood Economic Community': The Case for Legally Binding Sectoral Multilateralism', 17 *European Foreign Affairs Review* (2012), 577–604.

[16] See S. Blockmans and B. Van Vooren, 'Strengthening the Strategic Choice Offered to the EU's Southern Mediterranean Neighbours', *CEPS Commentary*, 7 February 2013.

[17] For a legal commentary on the EU's mandate under Article 8 TEU, see the contribution of Christophe Hillion to his working paper.

[18] See T. Schumacher, 'New Neighbors, Old Formulas? The ENP One Year After the Start of the Arab Spring', in A. Garcia Schmidt and J. Fritz-Vannahme (eds.), *The Arab Spring: One Year After Transformation Dynamics, Prospects for Democratization and the Future of Arab-European Cooperation* (Gütersloh, Bertelsmann Stiftung 2012), 87-104, at 92-3.

Despite declarations to the contrary, the EU has continued its 'one size fits all' policy since the outbreak of revolutionary upheaval in the southern Mediterranean. Arguably, prevailing conflicts of interest between Member States, among themselves and with the Commission, EEAS and EP, only lead to the continuation of the lowest common denominator and affect the effectiveness and credibility of the revised ENP. Thus, much like earlier editions of the ENP strategy paper, the implementation of the revised neighbourhood policy is hampered by a variety of inherent structural weaknesses and contradictions. These are especially evident in the area of political transformation and also apply upstream, when considering the binding language of Article 8 TEU.

3. MITIGATING THE POTENTIALLY COUNTERPRODUCTIVE IMPACT OF "LESS FOR LESS"

The success of political reforms and democratic transformation in neighbouring countries is inextricably linked to improving the micro- and macro-economic situation, i.e. people's living conditions. In the light of the prevailing socio-economic problems in almost all Arab Mediterranean states, a concern about the implementation of the revised ENP therefore pertains to the potential application of a "less for less" approach. Given that the reduction or cancellation of external support negatively impacts societal welfare, it is worth considering the option of partially detaching the application of negative ENP conditionality from those economic and social sectors that are most affected by structural (e.g. urban vs. rural; touristic coastal regions vs. agrarian interior) discrepancies: transport, energy, communication, distribution of water, health care, and others.[19] Arguably, negative conditionality does not have to apply to all policy fields. The logic of "more for more" and "less for less" could be more deftly evoked in those non-negotiable sectors in which reforms primarily affect the (abuse of the) power monopoly of the ruling authoritarian regime: political accountability, independence of the judiciary and freedom of expression. Excluding certain socio-economic and humanitarian areas from the application of "less for less" may prevent potential veto players from exploiting socio-economic hardship to block those transformation processes already underway.[20] Although the ENP is – in all but in constitutional vocation – based on the principle of differentiation, the application of negative conditionality is expendable in the above-mentioned areas, not only because it would generate more socio-economic problems and contradictions without necessarily generating greater political and societal influence over local transition processes, but also because the basic socio-economic deficiencies are comparable in all Arab Mediterranean neighbouring states.

In sum, the revised ENP seems unsuitable as the sole agent for the implementation or support of democratic and socio-economic reforms and carries

[19] Ibid.

[20] See N. Witney and A. Dworkin, 'A Power Audit of EU-North Africa Relations', *ECFR*, September 2012, at 58.

the risk of counteracting the normative objective which the EU has pursued for the last decade, that of transforming the outer periphery into one area of peace and prosperity built on democratic principles. A bolder revision is needed if the EU is to make good on its own promises, as indeed the expectations from both neighbouring countries and strategic partners.

THE UNION FOR THE MEDITERRANEAN: CHALLENGES AND PROSPECTS

José Manuel Cortés Martín and Gloria Fernández Arribas

1. A NEW ENTITY IN ORDER TO REINFORCE THE BARCELONA PROCESS

The Union for the Mediterranean (UfM) is a new entity founded in July 2008 aimed at improving the Euro-Mediterranean Partnership. This entity confirms the continuation of the Barcelona Process, launched in November 1995 with the objective of reinforcing its most successful elements.[1] This multilateral partnership encompasses 43 countries from Europe and the Mediterranean basin: the 27 Member States of the European Union (EU) on the one hand, and 16 Mediterranean partner countries from North Africa, the Middle East and the Western Balkans on the other. Among this group of 43 countries all EU Member States are included, even though most of them do not have a Mediterranean character. Precisely, this diverse membership has been considered to be one of the main constraints the UfM has faced so far, due to the difficulties of reaching consensus between countries with so many different interests.[2] Promoting peace, stability and prosperity throughout the Mediterranean region are the objectives of this new entity, which are postulated on three main pillars[3]:

(a) Equality among members within a context of strong co-ownership and effective joint action;
(b) A mostly intergovernmental approach, based on traditional diplomacy and political realism;
(c) A focus on selected economic and social projects, which present a transversal and strategic perspective, and whose success is expected to reinforce political dialogue and promote political cooperation.

Despite the interest raised by this organisation at its onset, its developments and results have been fairly modest up to date, and it has not come up with the desired outcomes yet. The reasons could surely be found in the European

[1] F. Granell Trias, 'La Unión por el Mediterráneo como organisación internacional y como catalizadora de cooperación europea', 44 *Revista de Derecho Comunitario Europeo* (2013) Forthcoming. European Commission, Communication from the Commission to the European Parliament and the Council. Barcelona Process: Union for the Mediterranean, doc. COM (2008) 319 final, 20.5.2008, at 4; L. Huici Sancho, 'La participación de la Unión Europea en la Unión por el Mediterraneo', 28 *Revista General de Derecho Europeo* (2012), at 6.

[2] F. Bicchi, 'The Union for the Mediterranean, or Changing Context of Euro-Mediterranean Relations', 16 *Mediterranean Politics* (2011), at 9.

[3] R. Aliboni and F.M. Ammor, 'Under the Shadow of 'Barcelona': From the EMP to the Union for the Mediterranean' 77 *Euromesco Paper* (2009), at 24.

financial crisis or the revolutions emanating from the Arab Spring. Be that as it may, the idea behind the establishment of the UfM was a positive one – that of a high level partnership between the two shores of the Mediterranean. However it must be recognised that its endowment did not deliver the expected results, thus failing to fulfill its initial expectations.[4] Given these moderate achievements, this paper will be focused on exploring the reasons of such an outcome, raising several questions as well as evaluating its future prospects.

First and foremost, it will be necessary to analyse the objectives of the UfM and the instruments at its disposal to accomplish these goals. Secondly, this reflection will address both the changes in the region as well as in the institutional architecture of the EU and the UfM. To conclude, some hints about the capacity of action of this entity will be presented.

2. IS THE UNION FOR THE MEDITERRANEAN A REAL UNION?

Some authors have categorised the UfM as an International Organisation.[5] Nevertheless, it is noteworthy to observe that the UfM does not self-denominate like an International Organisation, but as a multilateral partnership.[6] On the one hand, some misgivings remain about its real autonomy, even though, it is possible to affirm that the UfM is gradually becoming an international organisation. On the other hand, it is doubtful whether it could be categorised as such at the moment, at least, if the International Law Commission definition in the framework of the responsibility of International Organisations[7] is taken into consideration. First of all, due to the fact that the UfM is the continuity of the Barcelona Process, it does not have a Founding Treaty. However it is worth stressing that in its Final Statement, while Ministers and delegates established the institutional architecture of the UfM and granted legal personality to the Secretariat,[8] they did not bestow international legal personality to the whole entity as such. Moreover, the Final Statement established the UfM objectives, but no reference was made to the creation of an International Organisation whatsoever, which makes it difficult to consider that such an idea was the intention of the States. Secondly, the only entity the Statutes of the UfM is provide it with is the Secretariat, which incorporates the structure of an International

[4] Joint Communication to the European Council, the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean. COM (2011) 200 final, 8.3.2011, at 11.

[5] F. Granell Trias, *supra* n. 1.

[6] "The Union for the Mediterranean is a multilateral partnership with a view to increasing the potential for regional integration and cohesion among Euro-Mediterranean partners". http://www.ufmsecretariat.org/en/who-we-are/

[7] "International organisation" means an organisation established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organisations may include as members, in addition to States, other entities. Draft articles on the responsibility of international organisations, 2011.

[8] "Have a separate legal personality with an autonomous status". Final Statement. Marseille, 3-4 November 2008, at 5.

Treaty. In this Treaty, the legal personality bestowed to the Secretariat in the Final Statement and in its Statutes,[9] and the recognition of privileges and immunities[10] mentioned in these legal texts, are elements that could allow the UfM to be considered as an International Organisation, but only in relation with its Secretariat.

Thirdly, in this respect, the Secretariat has signed a headquarters agreement with Spain, in which the latter recognised the legal personality of the former.[11] But this is internal personality, exclusively. Therefore it is difficult to affirm that the UfM has international legal personality or, that it is a mere permanent intergovernmental conference or a conference of governments.

However, taking into account the implied powers doctrine, the UfM could acquire this nature as it goes in the exercise of its competences. In this direction, in the advisory opinion of the International Court of Justice in the case '*Reparation for Injuries Suffered in the Service of the United Nations*' from 1949, the Court appeared to support the view that the legal personality of an organisation exists when: it has been given competences in order to achieve certain objectives; it exercises them; and, in particular, when such an exercise shows a separate will of the organisation.[12]

> "The Organisation was intended to exercise and enjoy, and in fact is exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality."[13]

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[9] Statutes of the Secretariat of the Union for the Mediterranean. Article 1.

[10] "A Headquarters Agreement between Spain and the Secretariat will grant the Secretariat the privileges and immunities for carrying out its activities" Statutes of the Secretariat of the Union for the Mediterranean. Article 1. See also Final Statement. Marseille, 3-4 November 2008, at 7.

[11] España reconoce la plena capacidad jurídica del Secretariado de la Unión por el Mediterráneo para contratar, adquirir o enajenar bienes muebles e inmuebles, recibir y desembolsar fondos públicos y privados, y entablar acciones judiciales y/o realizar cualquier acto necesario para desempeñar sus obligaciones y cumplir sus objetivos. BOE Nº 145, 15/6/2010. The rest of the participant States are reluctant to recognise that legal personality. L. Huici Sancho, *supra* n. 1, at 12.

[12] J.M. Cortés Martín, *Las Organisaciones Internacionales: Codificación y Desarrollo Progresivo de su Responsabilidad Internacional* (Sevilla, Instituto Andaluz de Administración Pública, 2008), at 91.

[13] ICJ, Reparations for injuries suffered in the service of the United Nations, Advisory Opinion 11 April 1949, ICJ Rec. 1949, at 179. See C.F. Amerasinghe, *Principles of the Institutional Law of International Organisations* (Cambridge, Cambridge University Press 1996); P.H.F. Bekker, *The Legal Position of International Organisations. A Functional Necessity. Analysis of Their Legal Status and Immunities*, (Dordrecht/Boston/London, Martinus Nijhoff Publishers 1994); M. Bettati, 'Création et Personnalité Juridique des Organisations Internationales', in R-J Dupuy, *Manuel sur les Organisations Internationales*, (Dordrecht/Boston/London, Martinus Nijhoff Publishers 1998); J.M. Cortés Martín, *supra* n. 12.; G. Fernández Arribas, *Las capacidades de la Unión Europea como sujeto de Derecho Internacional*, (Granada, Educatori 2010)*;* J Klabbers, 'Presumptive Personality: The European Union in International Law', in M Koskinniemi (ed.)., *International Law Aspects of the European Union* (The Hague, Kluwer International Law 1998); M Rama-Montaldo, 'International Legal Person and Implied Powers of International Organisations', 44 *The British Yearbook of International Organisations* (1970), at 11; F Seyersted, 'International Personality on Intergovernmental Organisations. Do their capacities really depend upon their constitutions?', 4 *The Indian Journal of International Law* (1964), at 1; F Seyersted, 'Is the International Personality of Intergovernmental Organisations valid vis-à-vis Non-Members?', 4 *The Indian Journal of Inter-*

Consequently, it should be necessary to prove whether the UfM is effectively exercising such a kind of functions and rights.[14] Should this be the case, it could be appropriate to speak about the UfM as an International Organisation, something that at present times seems to be difficult to assert. Furthermore, concerning the nature of the UfM, it is worth mentioning that this entity has been conceptually referred to as a Union of projects,[15] although some of its institutional developments point more to a Union of agencies. In this sense, the activities carried out by the UfM are in the framework of projects concerning technical cooperation, although the objectives enshrined in its Statute are of political nature. Ultimately, the UfM has also been defined as an institutionalised intergovernmental cooperation structure.[16]

Regardless this complex set of definitions, it has been claimed that this entity is a first stage in the path towards a *genuine* political cooperation[17]. Besides, should the case be that the UfM finally develops projects that truly affect in a positive way the life of the population, it could be possible for the UfM entity to secure an effective political leverage. In general terms however, it seems that the beginning of defining a policy, in which the sequence and effectiveness of the instruments at stake, as well as the question of how they will be assigned to achieve its intermediate goals, remains unspecified.

The current state of affairs seems to demonstrate that the UfM could be perceived as an entity which does not take into account the reality of Mediterranean region. This argument is based on the substantial differences to be found regarding the few shared interests and opposite aspirations between the countries on the two shores of the Mediterranean. For instance, Albania's and Montenegro's future are said to be within the EU family, while the same cannot be assumed for the North African countries. In addition, Monaco and Turkey (which initially did not even wish to be part of the UfM) or finally Mauritania and Slovenia may have quite rather divergent national interests so to say. The high number of participants has been criticised because of the difficulties of reaching consensus. It has been noted, that, 'by increasing the range of diverse interest that must be accommodated, it amplifies the need to focus on sub-regional projects and the related impossibility to achieve any substantial result by a group of over 40 members'.[18] In any case, it has been pointed out that the contrary option — including only European countries whose interests lie in the Mediterranean area — would have broken the focus of attention of the EU into two diverging directions: one directed towards the southern neighbourhood,

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national Law, (1964) at 233; N. D. White, *The Law of International Organisations* (Huntingdon, N.Y. Juris Publishing; Manchester, Manchester University Press 2005).

[14] It can be inferred that these rights come to manifest the capacity to operate upon international plane. G. Fernández Arribas, *supra* n. 13*,* at 63.

[15] F. Granell Trias, *supra* n. 1.

[16] L. Huici Sancho, *supra* n. 1, at 11.

[17] Ibid. at 5.

[18] F. Bicchi, *supra* n. 2, at 9.

and other pointing to the East, thus undermining the role of the EU as a civil power in these geographic areas, respectively.[19]

Pertaining to the number of participants issue, the French proposal should be analysed. The proposal did not foresee the participation of all EU countries at the launching of a joint project or action. However, it included a model which tried to mitigate the consequences of the high number of eventual participants: the variable geometry method.[20] This method allowed different degree of implications by the participants depending on their interests in the projects or actions at stake. Nevertheless, the final decision for the approval of a project was subject to an agreement among all participants, which would have made the success of the UfM inevitably difficult .[21]

One of the immediate consequences of this architecture is that the UfM only keeps the appearance of a Union on one side of the Mediterranean, namely the EU: a proper union of States, that, most of times, speaking with one voice. On the other side, an agglomeration of States with complex or limited relations among themselves is to be observed; including certain countries of the southern shore involved in internal conflicts, together with the different countries of the Adriatic Sea. As a result, it seems that this conglomerate of member countries does not correspond properly with the term Union. There are two radically different blocs, instead. As it has been stated: on the one hand, a real unity, the EU. On the other, a large number of countries with no real link between themselves and, consequently, no common voice to negotiate as a bloc.

This situation however could have found a turning point with the arrival of the new Secretary General in early 2012, who has expressed fresh, clear and tangible ideas. One of these new proposals includes the possibility of making a distinction between Western and Eastern Mediterranean countries, which are facing different realities and pursuing different goals. Mr. Fathallah Sijilmassi, UfM's Secretary General since February 2012, launched the idea of focusing the UfM's work at the sub-regional level and making a broad distinction between the Eastern and Western Mediterranean countries from the south shore. The aim would be to take into account their specific constraints and particular problems, including political obstacles. Nonetheless, this division between East and West is not the only contrast among Southern-Mediterranean countries. In this regard some remarkable differences inside the sub-regions are to be observed. One example is the disparity of GDP/per capita among countries of the western area: Morocco (31 million population and €3,800 per capita), and Tunisia (10 million population and €6,800 per capita).[22] Furthermore, some more divergences can be identified: in relation with their exports, integration of women in the labour market, education, etc. However, the main differences between them are the political transformations that have already taken place or, those which are meant to occur across the region. No distinction

[19] G. Escribano and L. Rodríguez, 'After Partnership, Neighbourhoods and Advanced Status… Who fears the Union for the Mediterranean?' 21 *Papeles de Europa* (2010), at 32.

[20] L. Huici Sancho, *supra* n. 1, at 5

[21] Ibid., at 29.

[22] F. Granell Trias, *supra* n. 1.

between West and East can be made here, since these political upheavals are taking place in both parts of the region. As a valid example, the cases of Tunisia or Syria can be mentioned. In addition, there are some conflictive areas that could be complicating the activity of the UfM. Indeed, the Middle East conflict has come to affect the UfM's agenda.[23]

The proposal of the Secretary General could be probably the first step for an effective application of the variable geometry method: the number of countries participating in projects will vary in line with their real interest in those specific ventures. The problem remains however, as it would be still necessary to count with the green light of all members in order to implement these actions.

3. ARE THE AIMS OF THIS UNION CLEAR?

As has been stated the main objectives of the UfM are the establishment of peace, stability and prosperity in the Mediterranean countries. However, these objectives are rooted in the particular interests of the EU in some areas as security, migration or energy.[24] These interests, however, might be distant to the specific interests of the South-Mediterranean countries. For example, the Arab countries are developing relations amongst themselves which, in many cases, bear no relation to their Mediterranean shoreline. In this context, the position of the countries of the other side of the Mediterranean differs greatly from the aspirations held on the EU side.

For the achievement of the UfM's political objectives, technical projects in six priority areas have been established: (1) de-pollution of the Mediterranean; (2) maritime and land highways; (3) civil protection; (4) alternative energies, like the Mediterranean Solar Plan; (5) higher education and research, like the Euro-Mediterranean University (EMUNI) project; and (6) the Mediterranean Business Development Initiative.[25] It has been accepted that the development of the region can foster democracy and good governance and, consequently, it would lead the region to peace and stability. Nevertheless, advances on projects of technical nature exclusively, without a political strategy accompanying them do not guarantee the success of the UfM. The EU has been acting in this area throughout several decades, providing tailor-made plans for each country, and also by the means of the Euro-Mediterranean Partnership and the European Neighbourhood Policy. Assessing its results, the EU has been somehow involved in the region without getting important political changes in those countries. Therefore, the economic problems of the Southern Mediterranean

[23] F. Bicchi, *supra* n. 2, at 11-12.

[24] F. Granell Trias, *supra* n. 1; Bicchi, *supra* n. 2, at 4.

[25] Final Statement. Marseille, 3-4 November 2008. Together with the projects that the UfM has approved, there are some areas where the UfM should focus its activities. Rural development is considered for experts and scholars one of the priority areas due to half of the population depends on farming so it is necessary "to modernize the agriculture and prepare for it competition"; and also strengthening the small and medium size company should be one of the main initiatives of the UfM with the objective of improving business productivity. See G. Escribano and L. Rodríguez, *supra* n. 19, at 35-37.

countries still persist, also due to the existence of deep structural problems. As a consequence, the impact of the EU's cooperation policies has been lowered, thus making political dialogue necessary.

However, political dialogue is not the only method to move forward, since the mentioned projects are also crucial to the development of the growth potential of the Mediterranean countries. Nevertheless, several questions can be raised in relation to these projects:

Firstly, it seems doubtful if there are synergies between the projects designed by the Union for the Mediterranean and those featuring in the objectives of the EU's policy for the Mediterranean. The UfM is neither part of the EU's development and cooperation policy nor of the European Neighbourhood Policy.[26] However, the UfM is acting in the same area where these EU's policies are performing their activities. Therefore, from this perspective, it seems necessary to increase the interaction between the actors, aimed at establishing a closer relationship with the European institutions. In this direction, the UfM could be more in line with the institutional policies that affect the Mediterranean, thus creating synergies. As a matter of fact, the EU as a whole fulfills the co-presidency of the UfM since 2012.[27] Thus, it will be necessary to coordinate its activities in order to avoid the overlapping of projects and areas of performance.

Secondly, as stated above, political and economic development must go hand in hand. Democracy and involvement of civil society into the political life will not materialise without improvement in the population's socio-economic situation. The recent transformations in the Mediterranean countries, namely riots, upheavals and changes of government, have demonstrated again that economic aid itself does not have an impact on the population. It does not contribute to the real development of the country either, nor to peace, security or stability. For that reason, the UfM must contribute through its cooperative instruments to the consolidation of democracy and lasting stability in all the Southern Mediterranean countries. To accomplish this, it is imperative to strengthen the cooperation with Mediterranean partners and their civil societies, who have chosen the road to democracy and who expect significant support, particularly in financial terms, from the European Union.

The clarification of aims and competences of the UfM, considering the implications of the new political changes across the Mediterranean, and the necessity of a renewed approach to the region, which ought to take into account civil society and its preferences,[28] will allow the UfM to play the role of a catalyst to help and support the ongoing process of reconstruction and transforma-

[26] But half of the budget of the UfM come from the European Commission's budget of Neighbourhood Policy. See F. Granell Trias, *supra* n. 1.

[27] Concerning the EU institutions and organs which assumes this task see Conclusions of the Council and of the Representatives of the Governments of the Member States on the Northern Co-Presidency of the UfM, doc. 6981/12, 27 February 2012; and *infra* n. 45, at. 10.

[28] "The dynamics of not dealing with relevant issues in order not to bother MPCs governments (democracy, human rights, institutional and economic reforms, civil society…) nor EU's sensitive sectors (agriculture, labour movements, funding increases…) to focus on EU's Member States immediate interests (energy, environment, university education) is not sustainable in the long run", G. Escribano and L. Rodríguez, *supra* n. 19, at 39.

tion in the region. Last but not least, it is important to ensure that the UfM will not be kept to be used by the Mediterranean elites as an instrument to retain power.[29]

4. HAVE *ALL FACTORS* BEEN TAKEN INTO CONSIDERATION?

The EU's vision has been somewhat illusory and possibly even a bit self-centered as regards the possible future transitions of these countries.[30] The EU has promised to support countries which make a serious commitment to democracy. However in practice, not so long ago the EU was demanding these countries to adopt 'European society values', with the principles and beliefs that this entails. In this regard Article 8 TEU can be highlighted, that calls for the respect of European values as a condition for participating in the European Neighbourhood Policy. These requirements have been linked with the policy of conditionality that could provide the EU with a very important instrument to promote democratic changes in the partner countries. But this policy has had a limited application.[31] This is particularly true in the Euromed relations, where this policy has been characterised for being ineffective, arguing that its agenda focused basically on security and trade.[32]

The UfM does not intend to change this practice. However, the Paris Declaration does not contain references to conditionality. Even though its objective is to build together a future of peace, democracy, prosperity and human, social and cultural understanding, it is stated that this should be 'accomplished on the basis of equality and mutual respect for each other's sovereignty.'[33] Taking into account that the conditionality policy has been viewed as an asymmetric relationship[34] this reference to 'equality' brings the idea of the elimination of conditions. This lack of conditions can be observed on the projects of the UfM, where no conditionality has been imposed in order to develop them.

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[29] Ibid. at 34. The recent European Commission Communication concerning 'A partnership for democracy and shared prosperity with the Southern Mediterranean' could be an important proposal and way of action for the new approaching to the Mediterranean region. In this sense the Communication, among economic or trade objectives, introduces the democracy and institution building objective, based on: expanding support to civil society; establishing a Civil Society Neighbourhood Facility, and support Social Dialogue Forum. These objectives must be assumed and implement by the UfM in order to accomplish its mission, see COM(2011) 200 final, 8.3.2011.

[30] Concerning the relationship between the EU and the Mediterranean countries see. A. Blanc Altemir, La *Unión Europea y el mediterráneo. De los primeros acuerdos a la primavera árabe* (Madrid, Tecnos, 2012)

[31] In this sense, the European Parliament has expressed its concern because of violation of human rights in some of these countries and the narrow response of the EU, and as an example, in 2002 the European Parliament demanded to suspend the EU-Israel Euro-Mediterranean Association Agreement because of the activities of Israel in the Palestinian territories getting a negative answer from the Council. European Parliament Resolution on the Middle East, P5_TA(2002)0173. 10/04/2002.

[32] A. El Maslouhi, 'Une conditionnalité dépourvue d'effectivité: clause démocratique et gestion des risques dans les relations Euromed', 1 *EuroMeSCo Paper* (2011) at 10.

[33] Joint Declaration of the Paris Summit for the Mediterranean, Paris 13 July 2008, at 9.

[34] A. El Maslouhi, *supra* n. 32, at 10 -15.

Despite the characteristically limited success of this conditionality policy, its elimination from the UfM framework will create obstacles to demand the fulfillment of requirements in terms of democracy and respect for human rights. This proves again that the UfM seems to be focused on economic matters without paying special attention to the social demands of the population.

Proceeding with the analysis of factors affecting the Euro-Mediterranean relations, it is also necessary to remark the weight of traditions, mainly religious ones. In this respect, the EU has been somewhat disappointed to realise that the population of these countries has largely voted on the basis of their own religious beliefs and traditions. This has driven Islamic political parties to power, generating a sense of mistrust among European countries. These transformations, however, seem to present a new opportunity for the European Union to back a real democratic change in these countries, although it is important to mention that the outcomes could be unpredictable at the moment, owing to the absence of political culture and of new political leaders in the region.[35]

5. IN-DEPTH GEOPOLITICAL AND ECONOMIC CHANGES

Concerning this question, it is necessary to focus on the role of the UfM in the present context. The global environment has changed substantially since the Paris Summit of 2008, as both areas of the Mediterranean basin, North and South, have been the subject of a radical transformation. In the North, the EU's room of maneuver is restricted by the limitations arising from the economic crisis, in particular since 2008. It has neither the resources or the determination to make any further commitments to countries on the Southern shore of the Mediterranean. In this difficult budgetary context, it seems essential to achieve more with less, and to determine priorities clearly, especially those actions that could contribute to the economic recovery and tackling high unemployment. One should also take into account that the UfM's attempt to address the problems of the Mediterranean region with less financial resources than those of the cooperation policy of the EU is a utopia.[36]

In any case and despite the difficulties, it seems that in order to achieve this objective, the European Commission's overall approach concerning the economic and financial dimensions of the European Neighbourhood Policy goes in the right direction in particular with the launching of the Neighbourhood Investment Facility.[37] Moreover, the idea of creating a Euro-Mediterranean Investment Bank[38] has been mentioned, but the current financial crisis makes the implementation of this project quite a difficult one. On the one hand, according

[35] F. Granell Trias, *supra* n. 1.

[36] Ibid.

[37] It is financial mechanism aimed at mobilising additional funding to cover the investment needs of the EU Neighbouring region for infrastructures in sectors such as transport, energy, the environment and social issues (e.g. construction of schools or hospitals). The NIF also supports the private sector particularly through risk capital operations targeting Small and Medium-sized Enterprises.

[38] G. Escribano and L. Rodríguez, *supra* n. 19, at 38.

to the mentioned projects of the European Commission, it could be observed that the EU is increasing the level of funds allocated to the Mediterranean partner countries. This could be interpreted as a way of incorporating in its portfolio the needs arising from the Arab Spring and the consequences of the economic crisis. As a matter of fact, half of the funding of the UfM in 2011 came from the European Commission.[39] On the other hand, it looks like the Euro-Mediterranean region suffers from a lack of investors' confidence. Even though one of the objectives included in the French proposal was to gather private funding to develop projects,[40] the success of this initiative has been limited. It is necessary to bear in mind that there are only some projects that could benefit from private funding, as energy or public services; while others as civil service reform need the allocation of public funding.[41] In this framework, it seems that confidence can only be achieved by improving the economic and legal environment through major structural reforms, in order to make the region more attractive. To this end the use of public funding needs to be materialised.

In relation with the southern basin, the so-called Arab Spring has created a new political reality that has brought winds of democracy to the front line of politics. At the same time, it requires urgently the dutiful management of the transition processes and quick responses to the needs of the population. Therefore, the relations between the EU and the countries of the Southern shore of the Mediterranean cannot leave aside and ignore the new reality. Particularly, it is necessary to take into account some concrete factors that may determine the political character of the region despite the latest events:

(a) The links between the countries of this Southern shore and the rest of the Arab world;
(b) The growth of Turkey's presence and importance in the region as a geopolitical actor has also affected the UfM's activity. Worth mentioning is the opposition of Greece and Cyprus to a Turkish candidate for the post of Deputy Secretary General in the UfM's Secretariat.[42]
(c) Finally, the Arab–Israeli conflict has politicised and disrupted the agenda of the UfM, as national interests have come to the forefront and democracy and human rights have come to a second place.[43]

Mediterranean countries also need to send a positive message to Europe. They are not external partners similar to the rest of countries which have a relationship with de EU; they are natural partners, instead. Due to the geographical proximity, they are linked commercially, economically and in human terms. In fact, the majority of migrants coming from these countries do indeed live in Europe. As a matter of fact, migration movements, the colonial past or the

[39] Together with the European funding the UfM has also received public funding from the World Bank and the Gulf countries. See F. Granell Trias, *supra* n. 1.
[40] L. Huici Sancho, *supra* n. 1, at 6.
[41] G. Escribano and L. Rodríguez, *supra* n. 19, at 38.
[42] F. Bicchi, *supra* n. 2, at 14.
[43] Ibid. at 11-13.

geographical proximities have been some of the reasons for the implication of the EU with these southern Mediterranean countries.[44]

6. IMPACT OF RECENT EUROPEAN UNION INSTITUTIONAL INNOVATIONS ON THE UNION FOR THE MEDITERRANEAN

The evolution of the EU's institutional architecture has also had a remarkable influence on the Euro-Mediterranean relations. Indeed, the UfM is now directly connected to the European institutions, as a result of the entry into force of the Lisbon Treaty in 2009.

Concerning this aspect, the northern co-Presidency of the UfM has been transferred to the EU as a whole, in line with the Lisbon Treaty objectives. In other words, instead of EU Member States exercising the northern UfM co-Presidency individually, this task has been entrusted to the EU in its entirety. At the moment the co-Presidency is held by the EU and Jordan. According to the Conclusions adopted by the EU Foreign Affairs Council, the High Representative of the Union for Foreign Affairs and Security Policy, Catherine Ashton, will take over the co-presidency for meetings of Foreign Ministers. The European Commission will take over for Ministerial Meetings that solely concern matters falling within areas of exclusive EU competence. For other Ministerial Meetings, the Commission will also do so, in cooperation with the Member State holding the rotating Presidency of the EU Council, except when such meetings deal exclusively with matters falling within the scope of actions and responsibilities of the Member states. Should this be the case, then the chair will be held by the rotating presidency only. The EU's External Action Service will take over the UfM's northern co-Presidency for Senior Official Meetings.[45] This internal set-up gives a clear illustration of the European Union's central role in the UfM. Enhancing the role of the EU and elevating its profile in the governance of the UfM means that the former, by means of its European Neighbourhood Policy, will provide greater support to specific UfM projects.

Despite these institutional innovations in the EU, it remains doubtful whether this new supranational approach will be enough to overcome the standstill of the UfM. The paralysis of the co-Presidency and the election of programmes motivated by States' preferences, instead of by populations needs have been criticised; as well as the UfM's complex and oversized structure, regarding its functions and objectives.[46] Other critics point to the Secretary General, which is considered to be a politicised organ. In this respect, tensions between States have also arisen, culminating in the election of six deputy Secretaries. The great difficulties presented by the election of the Secretary General also demonstrated the States' reservations and misgivings.[47]

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[44] F. Granell Trias, *supra* n. 1; F. Bicchi, *supra* n. 2, at 4.

[45] Conclusions of the Council and of the Representatives of the Governments of the Member States on the Northern Co-Presidency of the Union for the Mediterranean (UfM), 27 de febrero de 2012, doc. 6981/12 MED 9 PESC 245.

[46] G. Escribano and L. Rodríguez, *supra* n. 19, at 39.

[47] Ibid. at 31.

7. FINAL REMARKS

This paper has asserted that the UfM still faces problems that do not enable it to accomplish its objectives. However, one must recognise the success of the projects and joint actions approved and implemented so far, i. e.: the de-pollution of the Mediterranean, the Mediterranean Solar Plan, the Trans-Maghreb Motorway axis, or the EMUNIU University in Slovenia.[48]

Nevertheless, in spite of these activities, it is not possible to properly talk about an international organisation regarding the UfM, although its Secretariat may seem to incorporate some characteristics of an international organisation. Be that as it may, the most harmful constraint affecting the action of the UfM is the lack of internal unity, due to the presence of different countries with diverging interests. The difficulties of the UfM do not lie in its objectives *per se*, but in the implementation and the approach that ought to be taken to reach them. As this reflection has laid out, the objectives of the UfM are peace, stability and prosperity, attaching to all of them a political as well as a social character. The activities of the UfM, however, are focused on economic matters leaving apart the political and social dimensions. Once again, this is not the right approach. Otherwise, it must have been wrongly assumed that the economic success will exclusively bring the desired political and social changes. In any case, it is worth pointing out that the elimination of the policy of conditionality in the UfM's framework will complicate the process of obtaining the necessary changes to really improve the lives of the population.

Implementing these objectives is not the only problem that the UfM needs to tackle. The UfM has to take into consideration other factors that come to complicate the difficult relationship between its members, like their religious traditions. In the broader context and importantly, the economic crisis and the Arab Spring have also imposed several hurdles to the work of the UfM. The budgetary limitations, despite the efforts taken by the European Commission to allocate more funds to these projects, will affect the success of the UfM. Furthermore, private investors' lack of confidence, as a result of the region's political instability after the riots and upheavals, will surely not contribute to the improvement of the work of the UfM. The action of the UfM is orchestrated by an institutional structure that has been defined as complex and oversized, which come again to hinder the activities of the UfM. It is therefore necessary to stress that the complicated representation of the EU in the UfM will hardly improve this situation. Despite the complexity of this scenario, on both sides of the Mediterranean basin, the necessity of creating a beneficial relationship has been assumed, because of its potential for economic growth, its economic complementarities, its energy market and human exchanges. As a result, the Union for the Mediterranean has the potential to become more useful, relevant and necessary than ever. It may be an appropriate tool to improve the new Euro-Mediterranean partnership.

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[48] 22 million euros to de-pollution of the Mediterranean; 5 millions euros to the solar plant; 7,5 millions euros to the Trans-Maghreb Motorway Axis; and 1 million euros to the Euro-Mediterranean University. A. El Maslouhi, *supra* n. 32, at 23.

Priorities and methods need to be amended and adapted, however, in order to search for the possible synergies between the UfM's projects and the EU policy for the Mediterranean. Therefore, important decisions and steps have to be taken in the right direction. After having agreed upon procedures, institutions and headquarter's location, the UfM has to abandon the Eurocentric diplomatic bargaining exercise and incorporate a renewed approach urgently. This approach should concentrate on: (i) implementing the selected projects effectively; (ii) extending its scope of action to more significant domains for the Mediterranean countries and its population; and (iii) posing a credible and recognisable final goal that allows economic agents to effectively fulfill their expectations.

Finally, it is necessary to remark once again that even though the intergovernmental method has largely prevailed in the Euro-Mediterranean relations, the European Union is exercising the northern co-Presidency. This puts an end to the intergovernmental approach followed so far, giving a new perspective of action to the UfM.

EUROMED, ENP AND UFM: 'FOSTERING REGION-BUILDING AND PROMOTING INTERREGIONALISM'?

Nikos Skoutaris

1. INTRODUCTION

The term 'region' is a polysemous concept. 'Historically, the concept of the region has evolved primarily as a space between the national and the local level within a particular State. These types of regions are referred to as sub-national regions or micro-regions.'[1] However, the very same concept 'can also refer to macro-regions, which are larger territorial units or subsystems, between the State level and the global system level such as the EU'.[2] The present paper focuses on the latter understanding of the term, by mainly asking whether the EU policies towards the Southern Mediterranean do aim at building such a macro-region.

It is important to reply to this question not least because some of the most prominent scholars of regionalism have consistently argued that one of 'EU's main foreign policy objectives is to […] promote a world order where regions gain increasing legitimacy as actors in international affairs'.[3] In other words, fostering region-building and promoting inter-regionalism are really crucial ingredients of the EU's foreign policy. Evidence of such view can be found in statements of EU officials and documents of Union institutions where the will and intention to use the European Neighbourhood Policy (ENP) as a medium for region-building has been declared. In fact, the establishment of an economic community emerging between the EU and its ENP partners is the long-term goal of the Neighbourhood Policy.[4] Such a vision was very much present from the beginning of this endeavour as Solana and Patten were foreseeing 'a gradually evolving framework for an economic and political space surrounding the Union, which would nevertheless stop short of full membership or creating shared institutions'.[5] Similarly, the then president of the Commission Romano Prodi clarified, in a speech on December 2002, that the ENP concept 'sharing everything but the institutions' does not exclude the possibility of developing

[1] P. De Lombaerde, F. Söderbaum, L. Van Langehove and F. Baert, 'The Problem of Comparison in Comparative Regionalism', 36 *Review of International Studies* 2010, 731-753, at 736.

[2] Ibid.

[3] F. Söderbaum, P. Stålgren and L. Van Langenhove, 'The EU as a Global Actor and the Dynamics of Interregionalism: a Comparative Analysis' 27 *Journal of European Integration* 2005, 365-380, at 373.

[4] European Union, *Strengthening the European Neighbourhood Policy,* Brussels, COM (2006) 726, 4 December 2006; European Union, *A New Response to a Changing Neighbourhood*, Brussels, COM (2011) 303, 25 May 2011.

[5] Solana-Patten letter on Wider Europe, 7 August 2002, available at <ec.europa.eu/world/enp/pdf/_0130163334_001_en.pdf>.

new structures with our neighbours at a later stage, if necessary.[6] Hence, it seems that there is an understanding among EU political elites that has also been reflected in academia: 'if the ENP is to develop into something substantial and long-term, thought needs to be given to the nature of its own institutional framework, and in particular whether to maintain the bilateral approach [...] or to seek to establish either a two-pillar approach (like the EEA) or a multilateral/regional framework (like the Barcelona Process)'.[7]

The aim of the proposed paper is exactly to problematise the view according to which the EU 'promotes a world order where regions gain increasing legitimacy as actors in international affairs,'[8] by focusing on whether the Union does foster in reality region-building through the overlapping policy frames of ENP, Euro-Mediterranean Partnership (EuroMed) and the Union for the Mediterranean (UfM). The thesis of the paper is that, firstly, the chiefly bilateral character of the ENP questions the region-building dimension of this policy. Secondly, the ENP multilateral dimension with regard to the Mediterranean area, consisting mainly out of overlapping policy frames of EuroMed and the UfM, could be better understood in sub-regionalist (marked by dependence of countries on the fringe of Europe on the EU) rather than inter-regional (an interaction between supposedly diplomatic equals) terms.[9]

To achieve its aim, the paper discusses the term 'region' and questions whether the Mediterranean basin could be understood as such. Having established tensions between the definition and the political and historical reality, it then analyses the different overlapping policy frameworks that exist with regard to the Mediterranean. In particular, the paper focuses on the ENP instruments and methodologies for region-building including the aforementioned multilateral initiatives of EuroMed and UfM and the new Neighbourhood Initiative. In the last part, the paper shows that the ENP multilateral dimension could be better understood in sub-regionalist rather than inter-regional terms. Such a critique is coupled by an analysis that sheds light on the tension between region-building and inter-regionalism.

2. THE MEDITERRANEAN AS A MACRO-REGION?

In order to examine whether the overlapping policy frameworks of ENP, EuroMed and the UfM indeed foster region-building in the Mediterranean, we should first define the term 'region' and examine whether the Mediterranean area falls under the definition. Contested as the term 'region' may be, it seems that in order to be characterised as such, a certain group of States must present a

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[6] R. Prodi, 'A Wider Europe: A Proximity Policy as the Key to Stability', Brussels, SPEECH/02/619.

[7] M. Cremona and C. Hillion, '*L'Union fait la force?* Potential and limits of the European Neighbourhood Policy as an integrated EU foreign and security policy', *European University Institute Law Working Paper* No 39 (2006), at 18.

[8] F. Söderbaum *et al. supra* note 3, at 373.

[9] M. Comelli, 'Sub-regional Cooperation around the Mediterranean and the role of the EU' 15 *European Foreign Affairs Review* 2010, 385-401, at 394.

certain geographical proximity. However, it seems that geographical relationship and territorial contiguity are necessary but not sufficient conditions in order to call a group of States a 'macro-region'. A degree of mutual interdependence should also be exhibited.[10] Such degree of interdependence could vary between different fields. In fact, Nye distinguished between political integration (the formation of a transnational political system), economic integration (the formation of a transnational economy) and social integration (the formation of a transnational society).[11] By the same token, a number of scholars have emphasised the function of regions either as integrated market places[12] or as political ideas and administrative units.[13] Finally, some have also stressed the characteristics of cultural homogeneity,[14] sense of community[15] or 'regionness'.[16] Overall, 'regions' consist of a number of geographically proximate countries that are perceived as having a certain internal coherence in social, economic, political, linguistic and or institutional terms.[17]

So, the question is whether the Mediterranean basin could fall under such definition. Starting from the geographical component, it is clear that the States around the Mediterranean Sea are geographically proximate countries. Still, it seems that under the different EU policy frameworks, the geographical limits of the region are far from clear. In 1995, the Barcelona conference brought together the then 15 EU Member States with 12 invited 'Mediterranean partners': Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, the Palestinian Territories, Syria, Tunisia and Turkey. Almost 10 years later, the newly launched ENP obviously did not include Cyprus and Malta that meanwhile became EU Member States but also excluded Turkey, because Turkey is a candidate for EU accession. Libya, which was not invited to participate at the moment of the Barcelona Declaration because it was under a UN sanctions regime, was also added to the catalogue of the ENP countries.[18] Finally, when during the French presidency of 2008, Sarkozy relaunched EuroMed as the

[10] J. S. Nye, *Peace in Parts. Integration and Conflict in Regional Organisation* (Boston: Little, Brown and Company 1971), at vii.

[11] Ibid., at 26-27.

[12] J. Bhagwati, 'Regionalism and Multilateralism: An Overview' in J. de Melo and A. Panagariya (eds.), *New Dimensions in Regional Integration* (New York: Cambridge University Press 1993), at 22; E. D. Mansfield and H. V. Milner, 'The New Wave of Regionalism' 53 *International Organization* 1999, 589-627.

[13] T. A. Börzel, L. Goltermann, M. Lohaus and K. Striebinger (eds.), *Roads to Regionalism: Concepts, Issues and Cases* (Farnham, Surrey: Ashgate 2012).

[14] B. Russett, *International Regions and the International System. A Study in Political Ecology* (Chicago: Rand-MacNally 1967).

[15] K. W. Deutsch, S. A. Burrell and R. A. Kann, *Political Community and the North Atlantic Area: International Organization in the Light of Historical Experience* (Princeton: Princeton University Press 1957).

[16] B. Hettne and F. Söderbaum, 'Theorising the Rise of Regionness' 5 *New Political Economy* 2000, 457-474.

[17] E. Johansson, 'Subregionalization in Europe's Periphery: The Baltic and Mediterranean Dimensions of EU's Foreign Policy', Institut Universitari d' Estudis Europeus, *Quaderns de Treball* 2000/36, 9-10.

[18] P. J. Cardwell, 'EuroMed, European Neighbourhood Policy and the Union for the Mediterranean: Overlapping Policy Frames in the EU's Governance of the Mediterranean', 49 *Journal of Common Market Studies* 2011219-241, at 225.

'Barcelona Process: Union for the Mediterranean', Albania, Bosnia-Herzegovina, Croatia, Mauritania, Monaco and Montenegro were also invited to sign the joint Paris Declaration apart from the 27 EU Member-States and the original Barcelona Declaration partner States'.[19]

But it is not only the territorial scope of the different policy frameworks that questions whether the Mediterranean is a region as a whole. The extent of the political, economic and cultural differences between the different groups of Mediterranean States have made some commentators argue that the basin is 'more of a frontier' than a region.[20] 'Arab countries are Arab before they are Mediterranean; similarly, Southern European countries are European first and then Mediterranean.'[21] Despite its exaggerating tone, such aphorism sheds light on the fact that characteristics such as the cultural homogeneity, the sense of community and the 'regionness' might not be present in the region in question. Having noted that, the next issue that we have to discuss is whether the overlapping policy frameworks of the EU intend to and could create a region characterised by mutual interdependence in political and economic terms. The thesis of the paper is that on the one hand the ENP has very few elements of region-building while the EuroMed and the UfM are better understood as sub-regionalist frameworks in the sense that they are marked by the dependence of the non-EU Mediterranean countries on the EU.

3. THE EU POLICY FRAMES TOWARDS THE MEDITERRANEAN AREA

3.1. **The Barcelona Process**

The Euro-Mediterranean Partnership was officially launched in 1995. The then 15 EU Member States and the 12 invited 'Mediterranean partners' signed the Barcelona Declaration that signified their agreement 'to establish a comprehensive partnership […] through strengthened political dialogue on a regular basis, the development of economic and financial cooperation and greater emphasis on the social, cultural and human dimension'.[22] In order to achieve this aim, the EuroMed was structured around three main dimensions ('baskets' of co-operation) which remain today as the broad working areas of the partnership under the UfM umbrella: political and security dialogue, economic and financial partnership and social, cultural and human partnership. Under the framework of each 'basket', general and sectorial ministerial meetings were taking place at least on an annual basis. The work programme of those ministerial conferences was prepared by the EuroMed committee, which is comprised

[19] Ibid., at 229.

[20] M. Comelli, *supra* note 9, at 389 quoting S. Calleya, 'European Union Policy towards the Mediterranean: The Euro-Med Partnership and Region Building', paper presented at the conference 'The Convergence of Civilisations? Constructing a Mediterranean Region' (Lisbon, 6-9 June 2002).

[21] Ibid.

[22] Barcelona Declaration available at <http://tinyurl.com/8dj2ydt>.

of senior officials from both sides. Finally, the multilateral dimension of this initiative was also underlined by the existence of the EuroMed Parliamentary Assembly, the EuroMed Civil Forum and the Anna Lindh Foundation for the Dialogue of Cultures.

Next to the progressive institutionalisation of the multilateral cooperation, it is also important to note for the purposes of the present paper that the Barcelona Process envisaged the creation of a vast Euro-Mediterranean free trade area for the exchange of goods, services and capital between the EU and the non-EU Southern Mediterranean countries. Such a free trade area was proclaimed to be achieved by 2010. According to the Barcelona Declaration, it would have been established through the new EuroMediterranean Association Agreements and free trade agreements between Mediterranean countries themselves. However, the establishment of such a free trade area has been challenged as 'unrealistic and even counter-productive',[23] while at the same time it has been questioned whether it would actually result in improved economic performance for the region.[24]

Despite those criticisms, it is noted that the EuroMed appears to 'demonstrate the EU's preference for multilateral, region-based frameworks'.[25] The asymmetrical relationship between the EU and its Southern Mediterranean partners in both political and economic terms, however, undermines the interregional characteristics of this policy framework. To put it differently, it is recalled that interregionalism is marked by the interaction among supposedly diplomatic equals. However, in the case of the multilateral dimension of EuroMed, the Commission and the Council act as 'central points' channeling the interests of the EU Member States. But no such channeling exists on the other side, since the non-EU Mediterranean partners have not formed a *fora* that would allow for something similar. It is even questionable that they should consist of a coherent regional grouping of States, as we pointed out in the previous section. It seems rather that the strong bilateral dimension of the EuroMed combined with a multilateral dimension dominated by the strong presence of the EU suggests the creation of a relationship that is characterised by the dependence of the Southern Mediterranean countries from the Union.

3.2. **ENP**

Before the tenth anniversary of EuroMed, the EU officially launched the European Neighbourhood Policy in 2003 as a new framework of its relations with a number of neighbouring countries, including most Southern Mediterranean

[23] R. Balfour and A. Missiroli, 'Reassessing the European Neighbourhood Policy', European Policy Centre (EPC), *Issue Paper No 54* (2007), at 7, available at <http://www.epc.eu/documents/uploads/963724382_EPC%20Issue%20Paper%2054%20-%20Reassessing%20the%20ENP.pdf>.

[24] D. Müller-Jentsch, 'Economic Prospects for the Euro-Mediterranean Partnership: deeper Integration and Trade in Services', World Bank and European Commission Programme on Private Participation in Mediterranean Infrastructure, *PPMI Paper* (2003), at 3. See the contribution of K. Pieters on liberalisation through free trade agreements later in this volume.

[25] P. J. Cardwell, *supra* note 18, at 231.

ones. In fact the only EuroMed partner State that is not covered by the ENP is Turkey, which is candidate for EU accession. The ENP's genesis, however, could be traced back to the later stages of the 'Big-bang' Enlargement process. References to a more substantive 'proximity policy' were contained in Strategy Papers attached to the pre-accession country reports in 2001 and 2002, in a joint position paper in the form of a letter from Javier Solana and Chris Patten[26] and in a speech made in December 2002 by the then President of the Commission, Romano Prodi. In this speech Prodi referred to a proximity policy based on 'mutual benefits and obligations, which is a substantial contribution by the EU to global governance'.[27] He also underlined the link between Enlargement and ENP by mentioning that the new policy was to be based on the idea that 'accession was not the only game in town'. 'We have to be prepared to offer more than partnership and less than the membership'. The overall long-term goal of this new policy is to create a 'ring of friends' in the periphery of the enlarged Union by incorporating the neighbours into an EU-led economic region.[28]

Despite the existence of a long-term goal that points to region-building, the ENP is chiefly a bilateral process that involves the EU on the one side and the relevant partner country on the other. This is apparent if one looks at the mechanism that the Union has used in order to realise the vision of an increasingly closer relationship with the neighbouring countries and a zone of stability, security and prosperity for all. At the outset of the process, the Commission had to prepare Country Reports analysing the political and economic situation in every partner State as well as institutional and sectoral aspects. It did so in order to assess when and how it is possible to deepen relations with the relevant country. The next stage was the development of ENP Action Plans with each country. Those are non-binding instruments that are agreed between the EU and the ENP States. They are tailor-made for each country based on the country's needs and capacities as well as their and EU's interests. In those Action Plans, the EU and the partner States jointly define an agenda of political and economic reforms by means of short and medium-term priorities pointing to the 'joint ownership' character of the ENP. The incentives on offer in return for progress on relevant reforms are greater integration into European programmes and networks, increased assistance and enhanced market access. The implementation of the mutual commitments and objectives contained in the Action Plans is regularly monitored through sub-committees with each country, dealing with those sectors or issues.[29]

The nature and structure of the Action Plans underline the fact that the ENP is mainly a framework of soft law. However, the relationship with its Southern

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[26] Solana-Patten letter on Wider Europe, 7 August 2002.

[27] R. Prodi, 'A Wider Europe: A Proximity Policy as the Key to Stability', Brussels, SPEECH/02/619.

[28] M. Pace, *The Politics of Regional Identity: Meddling with the Mediterranean* (Abingdon: Routledge 2006), at 106.

[29] For a detailed analysis of the Action Plans and the methodologies of the ENP, see M. Cremona, 'The European Neighbourhood Policy. More than a Partnership?' in M. Cremona (ed.), *Developments in EU External Relations Law* (Oxford: Oxford University Press 2008), 245.

Mediterranean partners is still based on legal agreements, being the Euro-Mediterranean Association Agreements. Those are a type of association agreements which contain legally binding provisions in each of the three aforementioned areas covered by the Barcelona Declaration. So, in a way the ENP with its policy documents and the Action Plans that provide for a 'framework of modernisation'[30] is complementary to the bilateral contractual relationships that have been created within the framework of Barcelona Process. According to Commissioner Wallström,

> "It is not a matter of recasting Barcelona but rather rereading it, rediscovering it and realizing, as certain analysts have said, its potential. […] Whilst the action plans already agreed with the first signatory Mediterranean countries contain differences, they are also the bedrock of shared values and objectives which the Commission deems indispensable if we are to avoid divergent paths."[31]

The bilateral character of the ENP is also very much visible in the 'new approach' of ENP towards the Southern Mediterranean that was launched in the aftermath of the Arab Spring. In the Joint Communication with the title 'A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean'[32] the High Representative of the Union for Foreign Affairs and Security Policy (HR) speaks about an 'incentive-based approach based on more differentiation ('more for more'): those that go further and faster with reforms will be able to count on greater support from the EU.'[33] It is true that differentiation is a principle underlying the ENP from its very beginning together with conditionality. However, such tailor-made approach based on a 'more for more' policy strengthens even more bilateralism as the main characteristic of ENP and thus undermines its region-building characteristics.

Given the bilateral nature of both the Action Plans that consist of the main ENP instruments and the pre-existing Euro-Mediterranean Agreements that are supplemented by the Neighbourhood Policy, it is rather clear that the ENP does not have a strong region-building element. Still, a few elements of regional cooperation are present in the ENP and especially in its current financial instrument. The European Neighbourhood and Partnership Instrument (ENPI hereafter)[34] replaced existing financial instruments (TACIS and MEDA) for the ENP countries and Russia for the period 2007-13. According to Article 2 of the

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[30] See, M. Cremona and G. Meloni (eds.), 'The European Neighbourhood Policy: A framework for Modernisation?' *EUI Working Paper Law* No. 2007/21, available at <http://cadmus.eui.eu/bitstream/handle/1814/6976/LAW-2007-21.pdf;jsessionid=7A7946AA7E11EB7AE0CBEB67876E49FE?sequence=1>.

[31] M. Wallström, 'The European Neighbourhood Policy and the Euro-Mediterranean Partnership', Cairo, SPEECH/05/171.

[32] Joint Communication to the European Council, the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean', Brussels, 8. 3. 2011 COM (2011) 200 final.

[33] Ibid., at 5. On instruments of conditionality, see the contribution of S. Blockmans in this volume.

[34] Regulation 1638/2006/EC laying down general provisions establishing a European Neighbourhood and Partnership Instrument [2006] *OJ* L310/1.

Regulation, the overall scope of this programme is to 'promote enhanced co-operation and progressive integration between the European Union and the partner countries'. Approximately 1 billion EUR out of the overall 12 billion EUR budget has been specifically provided for cross-border cooperation.[35] Cross-border cooperation allows for the implementation of joint programmes covering regions from the Member States and the partner countries sharing a common border.[36] There are two main categories of programmes: the ones covering a common land or short sea crossing; and the ones covering a sea basin such as the Mediterranean.[37] However, only two of the 15 ENPI cross-border cooperation programmes relate to the Southern Mediterranean and concern a sea crossing (Italy-Tunisia) and basic-crossing programmes (The Mediterranean Sea programme).[38] Analogous provisions concerning cross-border cooperation are also included in the proposed European Neighbourhood Instrument (ENI) that will replace ENPI.[39]

Despite the existence of those cross-border cooperation elements, it is clear that the multilateral dimension of the ENP is rather weak. This becomes even more apparent if one takes into account that there is no institutionalised forum where all the heads of governments of the EU Member States and the ENP partner States would meet as it happens within the EuroMed framework. So, overall, we could argue that while in the case of the EuroMed the rather asymmetrical relationship between the EU and the partners questions the interregional dimension of the framework suggesting a rather sub-regional character, in the case of the ENP its chiefly bilateral dimension sheds light to the almost absolute absence of region-building characteristics.

3.3. **UfM**

Ironically enough, the project that entailed most region-building characteristics has been a rather failed endeavour. During his election night press conference on 6 May 2007, Nicolas Sarkozy announced his intention to found *Union de la Méditerranée*. His initial aim was to 'develop a Mediterranean region through intra-sub-regional cooperation between the Northern and Southern shores'[40] loosely resembling that of the early European Economic Community (EEC) and based around an economic free trade area. The new organisation 'would have developed outside an EU context and would have therefore excluded all

[35] Arts. 6(2) and 9 of the ENPI.

[36] Note the difference with Regulation 1082/2006 on a European grouping of territorial co-operation (EGTC) that regulates cross-border cooperation between EU Member States and their sub-state entities, [2006] *OJ* L210/19. According to this relatively new legislative instrument, sub-state entities from different Member States may also establish an EGTC, which enjoys legal personality under EU law. Such an option is not available under the ENPI.

[37] Art. 9 of the ENPI.

[38] <http://www.enpi-programming.eu/wcm/en/regional-updates/cross-border-cooperation.html>.

[39] Proposal for a Regulation establishing a European Neighbourhood Instrument, Brussels, 7. 12. 2011, COM(2011) 839 final.

[40] M. Comelli, *supra* note 9, at 399.

non-Mediterranean EU Member States'.[41] Pursuant to Article 207 TFEU (ex 133 TEC), however, the EU enjoys exclusive competence in the area of external trade. Thus, it would have been legally impossible to create such a free trade area only with the Mediterranean EU Member States. So the Sarkozy project had to be reformulated.

The project in its final format is a compromise and its title points to the fact that it consists of a repackaging of the EuroMed: 'Barcelona Process: Union for the Mediterranean'. As such, it has brought together 43 Mediterranean countries including the 27 EU Member States, Balkan countries bordering on the Mediterranean Sea such as Albania, Bosnia-Herzegovina, Croatia and Montenegro, small States like Monaco plus a few non-littoral States like Jordan and Mauritania. Thus, this new initiative includes States covered by existing policy frameworks and bilateral agreements. To facilitate its role, it has a Secretariat that focuses on the coordination of concrete projects such as the depollution of the Mediterranean, the establishment of maritime and land highways, civil protection, alternative energies etc.

As it is the case with the EuroMed, its predecessor, the UfM consists of a forum that it is not characterised by the interaction of diplomatic equals. On the one side there is the EU speaking with one voice while on the other there are the Mediterranean partners each with its own contractual relationship with the Union and its very different political aspirations. Again, it seems that this framework nourishes relations that are marked by the dependence of the partner States on the EU. At the same time, the political difficulties of the endeavour should not be ignored. To this end, it is noted that in the aftermath of the Israeli attacks in Gaza, the Arab countries blocked the political activities of UfM.[42] This led the EU to acknowledge that the urgent progress on the Middle East process is vital for the success of the UfM.[43] Despite such recognition, it seems that in the aftermath of the Arab Spring, the emphasis is not placed on a region-building approach through UfM. The EU has decided to strengthen the ENP through an incentive-based approach based on more differentiation as we have noted in the previous section of the paper. This undermines even further the region-building characteristics of the EU overlapping policy frameworks for Southern Mediterranean.

4. (IN PLACE OF A) CONCLUSION

It has become clear from the analysis that despite the statements of EU officials and institutions declaring ENP as a medium for the region-building, the reality is somewhat different. The mainly bilateral character of the Neighbourhood Policy as underlined by its soft-law mechanism and its 'new approach' towards the Southern Mediterranean entailing even more differentiation questions the

[41] Ibid.
[42] Ibid.
[43] High Representative, 'A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean', *supra* note 32, at 11.

engagement of the EU in region-building in the area. At the same time, the asymmetrical relations between the EU and the partner States with the differentiated contractual relations with the Union and the very different political ambitions suggest that the multilateral dimension of the overlapping policy frameworks could be better understood in sub-regionalist (marked by dependence of countries on the fringe of Europe on the EU) rather than inter-regional (an interaction between supposedly diplomatic equals) terms.

Having mentioned that, one should also keep in mind the possible tensions between region-building and inter-regionalism. By this, I mean that if a certain entity engages in efforts to build the mutual interdependence of a certain group of States, there is a considerable possibility that the relationship between the two entities –the one that engages in region-building and the other that it is to be built– will acquire hierarchical characteristics. The process of region-building by definition entails that the two entities will not be diplomatically equal at least in the beginning of the relationship. So, it should not raise any eyebrows that the multilateral dimension of the EU overlapping policy frameworks towards Southern Mediterranean mainly has sub-regional characteristics. It is to be expected that until the moment that the Southern shore of the Mediterranean basin acquires a level of interdependence that would be at least comparable to the one of the EU, inter-regionalism is out of the question and the relationship will be one of dependence from the Union.

In the meantime, we note that the current policy frameworks correspond to a certain extent to the constitutional requirements of Article 8 TEU. The EU indeed through the ENP and its multilateral dimension tries to 'develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union.'[44] For those purposes it has concluded 'specific bilateral agreements with the countries concerned'[45] within the frameworks of EuroMed, ENP and UfM. It remains to be seen whether all those different contractual relationships will also evolve towards the creation of a region at a later stage.

[44] Art 8(1) TEU.
[45] Art 8(2) TEU.

EU'S POST-ARAB SPRING RELATIONS WITH SOUTHERN MEDITERRANEAN CIVIL SOCIETY ACTORS: CONTINUITY OR CHANGE?

Elisabeth Johansson-Nogués

The popular uprisings in several southern Mediterranean countries during the 2011 Arab Spring caught the European Union (EU) – along with most other observers – off-guard. After decades of stagnant authoritarianism, the scale, spontaneity and dynamism of the demonstrations and the accompanying intense political activity in social networks in countries like Tunisia, Egypt, Morocco, Jordan and elsewhere was indeed unexpected. Regional autocrats had for years helped fuel the (never verified, but still lingering) Western perception that Arab culture was to some extent incompatible with democratic practices[1]. The 'Arab street' was therefore to a majority of outsiders not associated with political initiative and the resulting protests appeared to spring from nowhere.

The conclusion which the EU apparently immediately drew was that the popular uprisings indicated the birth of an independent Arab civil society. The EU therefore offered a *mea culpa* for having in the past predominantly concentrated on supporting government- and regime stability in the southern Mediterranean countries and not focused enough on helping non-state actors. To remedy such shortcomings in light of the changing circumstances, the Union has discursively shifted civil society actors from a rather marginal status prior to 2011 to becoming portrayed as an important component of what the EU refers to as 'deep democracy'.[2] On the whole thus, in the post-Arab Spring era the Union appears to seek to intensify its engagement with civil society in the Euro-Mediterranean area.

The purpose of the present paper is, however, to ask whether the strengthened EU rhetoric and new associated measures truly constitute a before and after in terms of the Union's engagement with southern Mediterranean civil society actors. The first section will provide definitions and a historical backdrop for the European Union's attempts to engage with such actors in the southern Mediterranean area. The second section will describe some of the Union's new initiatives related to civil society actors which the Arab Spring has triggered. The final section will ponder whether the emerging EU initiatives will constitute a truly new chapter in EU-southern Mediterranean civil society relations or not.

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[1] R. Alenius Boserup and F. Tassinari, 'The Return of Arab Politics and Europe's Chance to Engage Anew', 17 *Mediterranean Politics* 2012, at 99.

[2] See European Union, High Representative Ashton visits Tunisia and wider Middle East, Brussels, A 052/11, 14 February 2011; European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, Joint Communication. 'A New Response to a Changing Neighbourhood: A Review of European Neighbourhood Policy', Brussels, COM (2011) 303, 25 May 2011.

1. CIVIL SOCIETY IN EURO-MEDITERRANEAN RELATIONS

'Civil society' is a widely used concept whose exact meaning nonetheless continues to be contested in academic literature. We will here define civil society as referring to actors independent from the state, independent from private business and independent from 'primordial structures', i.e., family, clan or tribe.[3] More concretely we find civil society actors to be characterised by voluntary, non-lucrative, associative activity in the spirit of the three 'independencies' noted above.[4] This would entail referring to a group of actors which a recent EU document describes as including, for example, non-governmental organisations (NGOs), independent political foundations, community-based organisations, and private-sector non-profit agencies.[5]

The European Union's engagement with civil society is nothing new. The EU has shown notable off-and-on interest for promoting civil society actors beyond its borders in the past decades. The end of the Cold War and the Velvet Revolutions in the Central and Eastern European countries revealed the important role of (often clandestine) associative networks for organising political resistance and eventually for bringing down the sitting Communist regimes. The events which came to pass in the late 1980s and early 1990s therefore encouraged the EU and its member states to engage with civil society actors for their perceived role as catalysts of democracy and/or direct contributors to democratic transitions processes. The Union therefore took up civil society promotion as a foreign policy objective in its relations with most geographical regions of the world as the bipolar era came to an end and the 'end of history' appeared to roll out democracy as the only viable political system across the globe.

In terms of the Mediterranean, the EU's efforts to further civil society action would first be channeled into the Renewed Mediterranean Policy of the early 1990s and then, more concertedly, into the 1995 Barcelona Declaration. The Barcelona Declaration put its faith to 'the essential contribution civil society can make in the process of development of the Euro-Mediterranean Partnership'

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[3] A. Jünemann, 'From the Bottom to the Top: Civil Society and Transnational NGOs in the Euro-Mediterranean Partnership', in R. Gillespie and R. Youngs (eds.), *The European Union and Democracy Promotion: The Case of North Africa* (London: Cass 2002), 87-105.

[4] We recognize, however, at the outset that this threefold set of 'independencies' do not provide us with an entirely satisfactory conceptual clarity. A typical example would be that such a definition does not allow us to properly distinguish between a regular NGO and a so-called 'governmental non-governmental organisations' (GONGOs), especially when such GONGOs fail to be forthcoming about their state patronage and/or the implications of such patronage. We also note that in certain countries (e.g., Egypt under Mubarak) NGOs at times registered as for-profit organisations in that the national legislation given that scrutiny of such entities was less strict than of non-profit voluntary associations, see F. Bicchi, 'Democracy Assistance in the Mediterranean: An Overview', 14 *Mediterranean Politics* 2009, at 61.

[5] European Commission, 'European Instrument for Democracy and Human Rights (EIDHR) Strategy Paper 2011 – 2013', Brussels, C(2010)2432, 21 April 2010.

and even made civil society dialogue the centerpiece of the Partnership's third basket devoted to the social, cultural and human affairs partnership.[6]

However, the EU was soon to discover that, although a worthy objective, fomenting civil society was not going to be an easy task. While some northern EU governments championed a fairly free and self-sustained interaction between civil society actors across the Mediterranean basin, most North African and Middle Eastern countries insisted upon that control was needed. Having drawn their own conclusions from the democratic revolutions in Central and Eastern Europe they were not eager to allow an independent civil society which might later transform into effective political opposition and undermine their regimes. The EU, on its hand, was struggling with consolidating itself as a political actor and with its post-Maastricht institutional reconfiguration was in a relative weak position to impose the views of the more ambitious pro-civil society advocates among the EU's member states.[7] The combined effect was that the third basket of the Euro-Mediterranean Partnership would never become fully operative.[8]

Then, 11/9 would once more put the issue of democratisation and hence civil society into the limelight. As a consequence. at the 2002 Valencia Euro-Mediterranean minister meeting, the EU members fairly unanimously pushed for good governance, democracy and human rights and the Arab Mediterranean governments saw no alternative this time but to acquiesce.[9] New bold plans were made for the Euro-Mediterranean Partnership's third basket and distinct accent was placed on the added value of civil society action. The main ideas underpinning the Valencia Action Plan were also later mainstreamed into different EU policies. A first example would be the launch of the European Neighbourhood Policy (ENP) in 2004, in which civil society cooperation is given a more prominent role. In particular, the ENP aspired to make civil society cooperation a central aspect of a reinforced political dialogue with partner governments (top-down). Another example would be the Commission's Communication titled *Reinvigorating EU actions on Human Rights and democratisation with Mediterranean partners – Strategic guidelines*.[10] The Communication set out ten concrete recommendations for how the EU should pursue these issues, many of these recommendations relating to boosting civil society action.

The EU's civil society promotion appeared therefore to pick up speed in the period between 2002 and 2005. However, at the tenth anniversary meeting held in Barcelona in November 2005, all progress appeared to come undone.

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[6] Euro-Mediterranean minister meeting, 'Barcelona Declaration', Barcelona, 27-28 November, 1995.

[7] E. Johansson-Nogués, 'Civil Society in Euro-Mediterranean relations: What success of EU's normative promotion?', 40 *RSCAS Working Paper* (2006), available at <http://cadmus.eui.eu/bitstream/handle/1814/6386/RSCAS-2006-40.pdf?sequence=1>.

[8] Although a few areas did register activity, like, e.g. Euromed Heritage, Euromed Audiovisual, Euromed Youth, see A. Jünemann, *supra* note 3.

[9] R. Gillespie, 'The Valencia Conference: Reinvigorating the Barcelona Process?' 7 *Mediterranean Politics* 2002, at 105.

[10] European Commission, 'Reinvigorating EU actions on Human Rights and democratisation with Mediterranean partners – Strategic guidelines', Brussels, COM(2003) 294 final, 21 May 2003.

The British and (above all) the Spanish co-hosts of the anniversary meeting had worked hard towards finding a consensus in regards to the final declaration and the Work Program amongst all Euro-Mediterranean partners in the months before the summit. However, in the end they had to concede defeat on several fronts.[11] In terms of civil society cooperation, the declaration and the five year Work Program would appear to a large extent as a restatement of the (very limited) objectives in the third basket of the 1995 Barcelona Declaration. The Work Program was to be lamentably vague on how the objectives set for civil society dialogues for the period 2005-2010 were to be achieved.[12] These set-backs can be said to be as a result of that the global impetus which existed after 11/9 in terms of democratisation (and hence focus on civil society) was lost in the latter half of the 2000s. The insurgency and difficulties in winning the peace in Afghanistan, Iraq and the dithering US foreign policy sapped the strength out of Western democracy promotion. European civil society actors and the European Parliament have attempted with various initiatives to keep the EU torch on civil society high, however, EU governments appeared unwilling to follow suit. A good example of EU governments' lack of stomach for civil society promotion in this period was the launch of the Union for the Mediterranean in 2008 whose sector-specific focus abandoned any pretensions to specific democratisation promotion or to foment civil society.[13]

2. THE ARAB SPRING

The onset of the Arab Spring would, however, once again force civil society onto the center stage of EU policies. The changing conditions in the southern Mediterranean countries warranted new dynamics in the relations. Only days after Mubarak was ousted, the EU Foreign Affairs Council therefore stated that:

> "[t]he Council expresses its support to the peoples of the South Mediterranean and their legitimate hopes and aspirations for democratic change, social justice and economic development. The EU stands ready for a new partnership in its relations with the countries of the region to support the process towards democracy, rule of law, socio-economic development and strengthened regional stability, on the basis of shared principles, cooperation and local ownership".[14]

Catherine Ashton, the European Union High Representative for Foreign Affairs and Security Policy and Vice-President of the European Commission, further elaborated that such a new partnership should be based on the southern Mediterranean countries' aspirations to achieve 'deep democracy', i.e., regularly

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[11] R. Gillespie, 'Onward but not Upward: The Barcelona Conference of 2005.' 11 *Mediterranean Politics* 2006, at 271.

[12] Council of the European Union, '10th Anniversary Euro-Mediterranean Summit: Five Year Work Programme', Brussels, 15074/05, 28 November 2005.

[13] E. Johansson-Nogués, 'The UfM's Institutional Structure: Making Inroads towards "Co-Ownership"?' 16 *Mediterranean Politics* 2011, at 21.

[14] Council of the European Union, Draft Council Conclusions on Developments in the Southern Neighbourhood (Egypt/Tunisia), Brussels, 6774/11, 21 February 2011.

held pluri-party elections, freedom of association and expression, the rule of law, the fight against corruption and democratic control over security forces. Ashton has also emphasised that '[d]eep democracy can only take root and flourish through and with the participation of all civil society stakeholders'.[15]

The European Commission in a set of Communications therefore pronounced that the Union would henceforth seek to establish good working relations with civil society to 'support this greater political role for non-state actors', helping such actors in particular 'to develop their advocacy capacity, their ability to monitor reform and their role in implementing and evaluating EU programmes'.[16] The Union's frequently noted rationale for engaging with such actors is that '[a] thriving civil society empowers citizens to express their concerns, contribute to policy-making and hold governments to account'.[17]

EU funding for civil society agency is to be channeled principally through a new Neighbourhood Civil Society Facility. The Facility is a specific financial envelope inside the more general 'SPRING' (Support for Partnership, Reform and Inclusive Growth) program which the Union created in May 2011 and which is open to all the Union's neighbouring partners in Eastern Europe and in the southern Mediterranean. Out of the total €350 million for the 2011-2012 biennium, €22 million of the SPRING program are specifically earmarked for the Civil Society Facility. The Civil Society Facility will in coming years set aside €11 million for three large areas of action in relation to the southern Mediterranean civil society: (1) capacity-building; (2) support for regional and country projects; and (3) 'increasing' the civil society 'involvement' in the dialogues between EU and partner country government on EU programs and priorities.[18] Additional sums for civil society actors will be made available from other instruments, such as the Civil Society Regional Programme,the Non-state Actors and Local Authorities in Development program, the European Instrument for Democracy and Human Rights, the Good Governance program and others.

Another novel feature in the EU's outreach to southern Mediterranean civil society actors is the European Endowment for Democracy (EED) 'to help political parties, non-registered NGOs and trade unions and other social partners'.[19] The political declaration supporting the EED's set-up was issued by EU Member States in December 2011. However, at the time of writing very little is known about the specific institutional set-up and purpose of the Endowment.[20]

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[15] European Union, *supra* note 2.

[16] European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, *supra* note 2.

[17] *Ibid.*

[18] European Union, 'EU response to the Arab Spring: the Civil Society Facility', Press Release, Brussels, MEMO/11/638, 27 September 2011.

[19] European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, *supra* note 2.

[20] For an insightful reflection on the potential and added value of the European Endowment for Democracy cf. R. Youngs and K. Brudzinska, 'The European Endowment for Democracy: will it fly?', *FRIDE, Policy Brief* No 128 (2012), available at <http://www.fride.org/publication/1019/the-european-endowment-for-democracy:-will-it-fly>.

3. EU CIVIL SOCIETY PROMOTION IN THE SOUTHERN MEDITERRANEAN: CONTINUITY OR CHANGE?

As we have seen, the Arab Spring appears to have triggered a re-think in Brussels on the importance of civil society. The events of the popular uprisings in the southern Mediterranean have also put into motion a set of EU civil society initiatives which must be seen as the Union's most ambitious ones to date. However, are we witnessing a genuine change in the EU's approaches to civil society?

The EU's engagement with southern Mediterranean civil society is a long-standing one, as noted above. The accent, then as now, was always placed on that civil society should perform the function of watchdog of their governments, of holding their governments accountable. This is the great value of civil society in mature democracies. However, prior to the Arab Spring, this function of civil society was effectively undermined by authoritarian governments. Civil society organisations were closely monitored by their governments and independent associations were often outlawed. Harassment and violence were the order of the day for those southern Mediterranean activists who dared to speak up and demand change and/or to hold governments accountable. The EU, on its part, would only on numbered occasions speak up against repression and in favor of civil society actors or seek to protect them prior to Arab Spring.[21]

In the post-Arab Spring setting it is difficult to see that the EU has truly changed its ways in order to help strengthen the alleged civil society 'pillar' of 'deep democracy'. In early 2012 there was a crackdown on civil society in Egypt, including the raids on foreign[22] and Egyptian NGOs, excessive use of force on demonstrators and criminal proceedings opened on some human rights activists.[23] On top of this, a new Egyptian NGO draft law has been introduced in parliament which local associations describe as even more restrictive than that under the Mubarak regime. Against the backdrop of such events, the EU 'reiterates its deep concern with regard to restrictions on civil society organisations in Egypt',[24] but still launched negotiations for a Deep and Comprehensive Free Trade Area (in December 2011) without any pre-condition – and even before a democratically elected Egyptian government had taken position. Similarly, an April 2012 governmental repression of demonstrators in Tunisia did not warrant any EU response.[25] Elsewhere in southern Mediterranean area, for example in Algeria, parliamentary bills to further restrict civil society activity have also been introduced in the midst of ongoing EU consultations with the country for an ENP Action Plan. The lessons drawn from this by southern

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[21] See H. Malmvig, 'Security through Intercultural Dialogue? Implications of the Securitization of Euro-Mediterranean Dialogue between Cultures', 10 *Mediterranean Politics* 2005, at 349.

[22] Including US Freedom House and German Konrad Adenauer Stiftung.

[23] 'Civil society groups are the new spies, says Egypt official, as UN warns NGO curbs undermine transition', *Democracy Digest*, 26 April 2012, available at <http://www.demdigest.net/blog/2012/04/civil-society-groups-are-the-new-spies-says-egypt-official-as-un-warns-ngo-curbs-undermine-transition/>

[24] Council of the European Union, *supra* note 14.

[25] Democracy Digest, *supra* note 23.

Mediterranean activists is that in spite of EU post-Arab Spring rhetoric, EU-civil society relations are essentially back to square one again.

Second, as noted above, the EU's new Civil Society Facility, inside the SPRING program, offers new additional funds to southern Mediterranean civil society actors for capacity-building. In absolute terms, the sums are also fairly generous for the period 2011-2012. However, the pre-requisite is the same as it was under the Barcelona Process and the ENP, i.e., that recipient civil society organisations be 'registered' (legal and fiscal personas) before the national law in their respective host countries. The registration process was employed by the southern Mediterranean government as an additional means of control of civil society actors operating on their territory. For example, in Ben Ali's Tunisia, associations were required to present a detailed description of their activity plans and budget to the authorities before being given the green light to operate legally and must, in addition, have all their elections, leaders and members cleared by the security apparatus. For this reason, the 2004 ENP Country Report for Tunisia estimated that out of the approximately 8000 NGOs operating in Tunisia only a small fraction can be considered genuinely independent.[26] What is more, foreign funding, like that from the EU, destined to southern Mediterranean NGOs had, as a rule, to be channeled through the state or through intermediary bodies approved by the host government. Southern Mediterranean governments were therefore in an unparalleled position to grant or deny funding to local and foreign registered associations even if the latter were fully entitled to the money. The European Union's insistence on that projects be co-funded by the host government was an additional obstacle for NGOs to receive money for their activity, especially those associations dedicating themselves to issues which might be sensitive for the southern Mediterranean government. Finally, it is worth noting that although in theory the EU had at its disposal one financial instrument, the European Instrument for Democracy and Human Rights (EIDHR), which was created to be able to get around such restrictions and channel funds directly to NGOs, the Union was reluctant to use it. In practice the European Union has always shown itself sensitive to its partner governments' preferences and on the whole consulted with the target country's government over which projects to fund.[27] As a result, only those civil society organisations approved by the Mediterranean partner governments have been eligible for Barcelona Process/ENP/EIDHR money. This susceptibility of the EU *vis-à-vis* the wishes of the partner governments has regularly been criticised. However, indignation in the NGO community would run especially high when the Commission in 2003 withdrew the funding of already approved projects to civil society actors in Egypt. The withdrawal was due to the insistence of that country's authorities that some of them were linked to Islamic terrorism.

[26] European Commission. 'European Neighborhood Policy Country Report – Tunisia', Brussels, SEC(2004) 570, 12 May 2004.

[27] Netherlands Institute for Multiparty Democracy, 'No Lasting Peace and Prosperity without Democracy and Human Rights: Harnessing Debates on the EU's Future Financial Instruments', Report Commissioned by the European Parliament, July 2005.

The situation for civil society actors in most southern Mediterranean countries is not that different today compared to prior to the Arab Spring. The Egyptian authorities – the Egyptian armed forces transition government supported by the Muslim Brotherhood and even the Salafist Nour Party – have imposed limits to what post-Arab Spring NGOs would be allowed to register. Civil society actors linked to Coptian or Nubian communities or to other minority rights organisations have had their application to register denied.[28] The claim is that '[a]ll the organisations that have been rejected [are those which] steer up fanaticism and sentiments hostile to the national spirit'.[29] In other southern Mediterranean countries like Morocco or Jordan continue undeterred their use of restrictive registration/notification procedures on NGOs.

Finally, the EU has made it an objective for the Civil Society Facility to increase the civil society involvement in the dialogues between EU and partner country governments on EU programmes and priorities.[30] The trilateral dialogue (EU-partner government and NGOs) has in the past been undermined by authoritarian governments unwilling to engage in direct discussions with civil society actors out of fear that, such contacts would circumscribe governmental power and/or its freedom of action. At the moment, as we have seen above, it is difficult to gauge how much this governmental reluctance has changed, even in the aftermath of the Arab Spring. We nonetheless leave the door open to that governments might at a later stage of the political transition process be more positively inclined towards such dialogues. A much more feasible prospect in the short to medium term would be for the EU to foment a bilateral EU-civil society dialogue instead. Indeed, both the Barcelona Process and the ENP envisioned exchanges of ideas between the EU and southern Mediterranean civil society actors and this is the spirit to which the Civil Society Facility appears to return. This would also cater to a longstanding demand from southern Mediterranean NGOs to be consulted by the EU when Brussels designs national framework programs or aid strategies of different kinds. In terms of the SPRING Program, actors such as the Arab NGOs Network for development and ten affiliated associations therefore welcome EU's intention of giving civil society a central role and propose that 'civil society groups should be at the core of consultations around SPRING allocations, identification and use of benchmarks' 'including at all stages of policy design, project and program identification, implementation, and evaluation'.[31] Other civil society activists broaden such consultations to encompass future Association Agreements, DCFTAs, etc., between the EU and relevant governments. Still, the NGO community in these countries drily notes that in terms of the SPRING program 'consultations with civil society have not yet taken place, and [as far as they

[28] Democracy Digest, *supra* note 23.

[29] Ibid.

[30] European Union, *supra* note 18.

[31] Arab NGO Network for Development *et al*., 'A Letter from Civil Society Groups in the Arab Region to EU Officials: "What Does 'More' Stand for and How to Ensure Economic Policy Conditionality is not Exercised?"', unpublished open letter, 18 October 2011, available at <http://www.annd.org/userfiles/file/latestnews/General-%20CS%20reaction%20to%20CSF_SPRING%20initiatives-%20October%202011-%20FINAL.pdf> (accessed 9 August 2012).

are aware of] none are publically planned'.[32] They therefore await their invitation to participate further in the dialogues between EU and partner country governments on EU programs and priorities.[33]

4. CONCLUSIONS

The European Union has expressed an interest for civil society organisations since the early 1990s for their role in the democratic overturn which swept across the Central and Eastern Europe. The Union has created several mechanisms and allocated significant sums to civil society promotion. The Arab Spring stimulated the EU to put forth an ambitious set of initiatives. The EU has also upped its rhetorical ante on the civil society with its various Communications emerging in connection to the Arab Spring.

However, it remains to be seen whether the EU's new rhetoric and financial instruments amount to a true change in EU-southern Mediterranean civil society relations. We have noted that the Union continues to be lamentably timid in view of speaking up against aggressions on civil society actors. It has yet to learn the pertinent lessons of the insistence on working with registered NGOs, many of which have fallen into disarray or disrepute as a consequence of the fall of their former authoritarian governmental patrons. Finally, there is also uncertainty surrounding whether the Union will (or can) engage in direct dialogue with civil society actors over objectives in the different national assistance plans. Southern Mediterranean civil society actors are awaiting the EU's cue to become policy makers in areas related to their operation and not simply policy takers.

Thus, there is much which points to that the EU's 'new' approach toward southern Mediterranean civil society represents more re-packaging than novelty. While the new Arab Spring EU measures have amounted to an important political message for civil society actors, the way the Union follows up on its propositions in the years ahead will now become key. A genuine change in EU policy would require some assertiveness from Brussels and other EU capitals in terms of defending civil society activists and some readjustments of the policy currently proposed the Union. Let us hope that with time, 2011 will prove to having been a pivotal year for the European Union's engagement with southern Mediterranean civil society.

[32] Ibid.
[33] European Union, *supra* note 18.

DEEP AND COMPREHENSIVE FREE TRADE AGREEMENTS: LIBERALISATION OF GOODS AND SERVICES BETWEEN THE MEDITERRANEAN NEIGHBOURS AND THE EU

K. Pieters

1. INTRODUCTION

The current Euro-Med Association Agreements (AAs) between the European Union (EU), the Member States on the one hand and the Mediterranean partners on the other hand are, amongst others, designed to lead to the establishment of a Euro-Med free trade area of goods, services and capital.[1] Besides the establishment of a free trade area, the AAs also contain provisions on competition, intellectual property rights, financial and economic cooperation, agriculture, investments, transportation, telecommunications, energy, science and technology, environment, tourism, statistics and the fight against illegal drugs. The Euro-Med free trade area is not yet complete, since free trade agreements between the Mediterranean countries themselves are lacking. Nevertheless, the EU has the intention to take the Euro-Med liberalisation process of goods, services and capital to a higher level through the conclusion of Deep and Comprehensive Free Trade Agreements (DCFTAs) between the EU and the Mediterranean countries which will form part of the existing Euro-Med AAs. The DCFTAs will cover three of the four freedoms of the EU internal market: free movement of substantially all goods, many services and capital.[2] DCFTAs will have an enormous impact on the Mediterranean countries involved and the entire region since their markets will be open to the European markets, including European multinationals, which will increase competition between

[1] The Mediterranean neighbours in this paper are the countries of the Maghreb (Morocco, Algeria, Libya and Tunisia), the Mashreq (Egypt, Lebanon, Jordan, Syria and the Palestinian Authority (PA)) and Israel. At present there are seven Euro-Med AAs and one Euro-Med Interim Agreement. Before the Summit in Barcelona in November 1995, the EU and its Member States had already signed a Euro-Med AA with Tunisia on 17 July 1995, which came into force on 1 March 1998 after being ratified by all 15 EU Member States. In the framework of the Barcelona process, the EU and its Member States signed an AA with Morocco on 26 February 1996, which entered into force on 1 March 2000, with Israel, which entered into force on 1 June 2000, with Jordan on 24 November 1997, which entered into force on 1 May 2002, with Egypt on 25 June 2001, which entered into force on 1 June 2004, with Algeria on 22 April 2002, which entered into force on 1 September 2005, and with Lebanon on 17 June 2002, which entered into force on 1 April 2006. An Interim Association Agreement on trade and trade-related matters between the EU and the PA has been in force since 1 July 1997. At the end of 2004, the AA with Syria had been submitted to the political authorities on both sides for final approval and signature. The EU Council has never signed the proposed EU-Syria AA.

[2] P. M. Wijkman, 'Fostering Deep and Comprehensive Free Trade Agreements for the Eastern Partners', *Eastern Partnership Review*, no. 8, December 2011, p. 5.

the Mediterranean countries with the EU and other parts of the world.[3] This paper offers legal recommendations for an intensified Euro-Med liberalisation of goods, services and capital.

2. DEEP AND COMPREHENSIVE FREE TRADE AGREEMENTS FOR THE MEDITERRANEAN NEIGHBOURS

2.1. **Origins and purpose of the DCFTAs**

The concept of 'DCFTA for the Mediterranean area' is found in several documents of the Commission on the European Neighbourhood Policy (ENP) since 2006.[4] It has been envisaged that the DCFTAs will form a part of the existing Euro-Med AAs, and will thus be based on Article 217 TFEU.[5] Many agreements concluded on the basis of Article 217 TFEU refer to the prospect of accession to the EU and are called Accession Agreements, but the Euro-Med AAs never embodied the idea of future accession to the EU, nor will the new DCFTAs with the Mediterranean countries do so. Accession Agreements aim at accession and thus at full acceptance of the EU acquis. Since the DCFTAs with the Mediterranean countries do not aim at EU accession, but only at association, the Mediterranean countries are not obliged to align all their legislation with the EU's *acquis*.

With the conclusion of the DCFTAs, the EU aimed at a better competitive position of the EU and the Mediterranean countries in the world through the 'highest possible degree' of Euro-Med liberalisation of goods, services and capital.[6] However, the EU's purpose of the DCFTA changed ever since the EU

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[3] M. Cermak, A. Canonne and R. Knottnerus, EU Deep and Comprehensive Trade Agreements: A Threat to the Aspirations of the "Arab Revolutions", A Seattle to Brussels Paper, available at www.s2bnetwork.org.

[4] Communication of the Commission to the Council and the European Parliament of 4 December 2006 on strengthening the ENP, COM (2006) 726. On 15 November 2007, the European Parliament adopted a report on the 2006 Communication (P6_TA (2007)0538). The Commission stated in its Strategy Paper of December 2006 that trade with its neighbouring countries should also include 'behind the border' issues, meaning progressively achieving comprehensive convergence in areas, such as technical norms and standards, sanitary and phytosanitary rules, competition policy, enterprise competitiveness, innovation and industrial policy, research cooperation, intellectual property rights, trade facilitation customs measures and administrative capacity in the area of rules of origin, good governance in the tax area, company law, public procurement and financial services. In its Communication of 5 December 2007, the Commission again proposed measures towards further economic integration, such as tailor-made FTAs, which should include strong legally-binding provisions on the implementation of trade and economic regulatory issues, COM (2007) 774 final.

[5] E. Zapater, *El Fundamento juridico de la actuacion exterior de las Comunidades Europeas en el ambito de la cooperacion energetica internacional* (Catalunya, Universidad Autonoma de Barcelona 2000) p. 389, cited by D. Miralles Sole, *An Instrumental Analysis of the European Union's Capability to Act in Conflict Response* (Catalunya, Grup Artyplan-Artympres 2004) p. 27; C-12/86 *Demirel* v *Stadt Schwäbisch Gmünd* [1987] *ECR* 3719, para. 9-10; C-12/86 *Demirel* v *Stadt Schwäbisch Gmünd* [1987] *ECR* 3719, para. 9-10; R. Leal-Arcas, 'The European Community and Mixed Agreements', 6 *EFA Rev.* (2001) pp. 483-513.

[6] Communication of 4 October 2006 on a Global Europe.

has fallen into an economic and financial crisis. The Commission clearly states that priority will be given to the conclusion of DCFTAs with rapidly growing economies, such as Korea, the Mercosur countries, the countries that belong to ASEAN,[7] India and Russia. These countries maintain high trade barriers to European imports which the EU intends to abolish through the conclusion of DCFTAs.[8] Free trade with these emerging economies will result in huge economic benefits for the EU. The DCFTAs with developing countries, such as the Mediterranean countries, will not offer the EU the same economic benefits, and become less important for the EU.

2.2. Criteria and steps to fulfill before the launch of the negotiations of the DCFTA

The launch of the negotiations for a DCFTA is possible only after assessment of multiple economic indicators by the Commission.[9] Firstly, accession of the (Mediterranean) country to the World Trade Organisation (WTO) is an absolute requirement for the conclusion of a DCFTA. Secondly, the size and growth of the country will be assessed.[10] Thirdly, protective measures against European exports such as non-tariff barriers (NTBs) or regulatory barriers, sanitary and phytosanitary standards (SPS), technical barriers to trade (TBT) will be evaluated. Fourthly, European access to resources such as energy, metals and primary raw materials play an important role. Finally, the impact of the DCFTA on European markets and economies will be considered. Besides economic standards, also political criteria are taken into account: the respect for democracy and human rights, the adherence to key multilateral instruments and the geostrategic relevance of the Mediterranean country.[11] A final criterion concerns the possible detrimental effect of the DCFTA on other neighbours of the EU. This means that preferential access currently enjoyed by the neighbouring countries of the EU, should not be eroded by the future DCFTA.[12]

If all conditions are fulfilled, the Commission will launch a feasibility study on the scope of the DCFTA and will verify the (Mediterranean) country's willingness to negotiate on the various topics of the future DCFTA. On 14 December 2011, the EU Council of Foreign Affairs authorised the opening of trade negotiations with four willing Mediterranean countries: Egypt, Jordan, Morocco and Tunisia.[13] The EU Commissioner of Trade, Karel De Gucht said: 'We are offer-

[7] Association of Southeast Asian Nations. See A.C. Robles Jr., Negotiating Services with the ASEAN: The EU between WTO and Japan, *EFAR* 16: 379-400, 2011.

[8] Communication of the Commission of 4 October 2006, *Global Europe: Competing in the World*. p. 9.

[9] Annex to the Communication of the Commission of 4 October 2006, *Global Europe: Competing in the World (A Contribution to the EU's Growth and Jobs Strategy*, SEC (2006) 1230.

[10] The assessment of market potential has never been a condition for concluding Euro-Med AAs.

[11] Annex, p. 17.

[12] Communication of 4 October 2006 on a Global Europe, p. 9.

[13] Egypt, Jordan, Morocco and Tunisia signed a free trade agreement amongst themselves, called the Agadir Agreement in February 2004, which came into force in March 2007.

ing Egypt, Jordan, Morocco and Tunisia progressive economic integration into the EU single market and want to improve the conditions for market access to the EU for these four WTO members as they engage in a process of democratic and economic reform.' The Commission made recommendations for the negotiations between the EU and those four Mediterranean neighbours. The Ministries of Economy of Egypt, Jordan, Morocco and Tunisia have to submit an Action Plan for the implementation of these recommendations in the future.

2.3. **Content of the DCFTAs**

The terms 'deep' and 'comprehensive' indicate that the Mediterranean countries and the EU want to establish a form of integration which goes beyond the level of integration established through free trade agreements. *Deep* integration refers to the removal of legal, regulatory and institutional barriers between the EU and the Mediterranean countries. *Comprehensive* integration does not imply a full harmonisation of laws, regulation and institutions, but implies an appropriate degree of regulatory and institutional convergence. The extent to which harmonisation will take place will be analysed for each Mediterranean country separately. The Working Group on Services, established by the Euro-Med Ministers of Trade in 2003, for example, is assessing the extent to which liberalisation in the field of services with the Mediterranean countries should take place.

The DCFTAs should largely cover all trade, including energy, and aim at the 'highest possible degree' of liberalisation.[14] The criterion of the 'highest possible degree' signifies that the agreements will only exclude a number of areas, for example, some agricultural products, from full liberalisation. The DCFTAs will encompass several chapters of which the most important are the free movement of goods and further liberalisation of trade in services and capital.[15] Free movement of goods (industrial goods, agricultural products, processed agricultural products and fishery products) will be established through a system of well-functioning Euro-Med rules of origin, Agreements on Conformity Assessment and Acceptance of Industrial Products (ACAAs), the mutual recognition of SPS standards for agricultural and food products, standards and conformity assessment procedures etc.. Next, further liberalisation of services and capital will be obtained via provisions on mutual recognition of legal and institutional frameworks, better conditions for establishment of companies, more opportunities for persons to be temporarily present in the territory of the parties for business and recognition of diplomas.[16] Other chapters include horizontal issues and institutional provisions. Horizontal issues will include provisions on competition issues and state aid, on intellectual, industrial and commercial property, on public procurement, safeguards, anti-dumping and countervailing

[14] Communication of the Commission of 4 October 2006, *Global Europe: Competing in the World* (A Contribution to the EU's Growth and Jobs Strategy), COM (2006) 567 final.

[15] Based on the expected outline for the DCFTA with Georgia.

[16] Communication from the Commission to the European Parliament and the Council, Eastern Partnership, COM (2008) 823/4, p. 4-5.

measures. The chapter on institutional provisions will include amongst others a dispute settlement mechanism.[17]

3. THE EURO-MED LIBERALISATION OF GOODS IN THE DCFTAS

3.1. **The current state of play: (free) movement of goods between the EU and its Mediterranean neighbours**

All Euro-Med AAs ensure the import and export of goods between the Mediterranean countries and the EU.[18] The AAs make a distinction between trade in industrial products, on the one hand, and agricultural, fishery and processed agricultural products, on the other hand. *Industrial goods* originating in a Mediterranean country which are imported into the EU are completely free of 'customs duties' and 'charges having equivalent effect' (similar to article 30 TFEU) upon entry into force of the AAs. Industrial goods originating in the EU which are imported into a Mediterranean country are still subject to 'customs duties' and 'charges having equivalent effect', but a lot of these duties and charges have been progressively abolished according to the timetables in the Annexes to the Euro-Med AA. As concerns trade in *agricultural, fishery and processed agricultural products*, the EU and all Mediterranean countries will progressively establish greater liberalisation, according to agreed schedules included in the Euro-Med AAs. At this moment many agricultural, fishery and processed agricultural products remain subject to customs duties.[19] The Mediterranean countries and the EU examine on a regular basis in the Association Council, product by product, the possibilities of granting each other further concessions. There is no 'free' movement of agricultural products, fishery products and industrial products with an agricultural component between the Mediterranean countries and the EU.

The prohibition of quotas and equivalent measures (similar to article 34 TFEU) only applies to fully liberalised goods, namely industrial goods. Agricultural products, fishery products and industrial products with an agricultural element and some industrial products can still be subject to quantitative restrictions or measures having the same effect. The prohibition of quantitative restrictions and equivalent measures encompasses direct or indirect obstacles to trade between the EU and the Mediterranean country. 'Direct' restrictions concern

[17] For the establishment of a Euro-Med free trade area, a network of bilateral agreements needs to be established between the Mediterranean partners itself, inspired at the model of the European Economic Area and will be called Neighbourhood Economic Community (NEC), see Non-paper ENP – a path towards further economic integration' of spring 2007. This non-paper is expanding on the proposals contained in the Communication of the Commission of 4 December 2006 COM (2006) 726 final.

[18] PA: 2001; Tunisia: 2010; Morocco: 2012, Jordan: 2014; Egypt: 2016; Algeria: 2017 and Lebanon: 2018.

[19] The Communication of the Commission on its new neighbourhood policy in an enlarged Europe also points out that there is still room to deepen the Euro-Med AAs in the domain of trade in agricultural products.

quotas or other bans related to the quantity of trade in industrial goods. 'Indirect restrictions' or 'measures having the same effect as quantitative restrictions' result from contradictory technical and regulatory standards between the Mediterranean country and the EU.[20]

3.2. **Recommendations for deeper and comprehensive Euro-Med trade of goods**

With the establishment of the EU Internal Market, the Member States realised that free movement of goods entailed the risks which differ by product sector: allowing medicines, for example, presents higher risks than allowing bread. Low-risk products were not subjected to harmonisation at European level. Trade as regards 'non-harmonised' goods, relies on the '*mutual recognition'* principle.[21] For high-risk products, the EU introduced detailed technical rules. The harmonisation process based on detailed technical rules proceeded extremely slowly and was replaced by a new harmonising tool, called the 'New Approach'.[22] The New Approach directives define *essential requirements* related to health, safety and environment issues. Products must meet these requirements in order to be placed on the European market.

The DCFTAs aim at the highest degree of liberalisation of movement of goods, which will practically result in the establishment of Euro-Med Internal Market of goods. The establishment of the Euro-Med Internal Market of goods takes place along the same principles used in the EU Internal Market.

3.2.1. *The mutual recognition principle in non-harmonised areas*

In the EU Internal Market, the mutual recognition principle emerged from the *Cassis de Dijon* case of the ECJ: EU Member States must allow all products from other Member States to their territory if these products have been lawfully produced in the exporting Member State.The Member State of destination may refuse the marketing of a product when this is strictly necessary for the protection of, for example, public safety, health or environment.[23] The applica-

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[20] All Euro-Med AAs contain the possibility of derogations from the (free) movement of goods. All AAs contain an infant industry clause for industrial products which can only be invoked by the Mediterranean countries that want to restrict imports from the EU to protect new and infant industries or sectors undergoing restructuring or facing serious difficulties in their country. See 'Anti-dumping and Safeguards in the Euro-Mediterranean AAs', study carried out in collaboration with UNCTAD Technical Cooperation Project on Trade Relations and Economic Cooperation in the Mediterranean Region (INT/93/A34), April 1998.

[21] See 3.2.1. *Mutual recognition principle in non-harmonised areas*.

[22] P. Brenton and M. Manchin, Trade Policy Issues for the Euro-Med Partnership, *Working Paper published by the CEPS Middle East and Euro-Med Project* (2003) p. 8 and paragraph 3.2.2. *Euro-Med movement of products harmonised at EU level*.

[23] Case 120/78, *Rewe-Zentral AG* v *Bundesmonopolverwaltung für Branntwein* [1979] *ECR* 649. See also Regulation No 764/2008 of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EU, *OJ* 13.08.2008, L 218/21.

tion of the principle of mutual recognition for goods in the Euro-Med context in non-harmonised areas requires a substantial amount of confidence in the other party. The development of trust in the Euro-Mediterranean relationship will take time.[24] Trust can be improved by setting up test facilities and inspection services that ensure and certify the quality of products for which there is no harmonisation in the EU. Still, different views and practices used in the testing facilities on both shores of the Mediterranean Sea might lead to disagreements as concerns the testing of goods. Study visits of members of European testing facilities to their Mediterranean colleagues and *vice versa* might mean a step forward in improving confidence. Encountered problems and different practices on-site can be resolved during Euro-Med workshops. Another solution is the conclusion of Mutual Recognition Agreements (MRAs). The MRA is an international agreement by which countries recognise one another's conformity assessments procedures, such as testing methods, surveillance methods, inspections services, certification services for goods for which there is no harmonisation. MRAs will not involve any legislative alignment to European norms, but concerns the guarantee of quality of products through the acceptance of conformity assessment procedures of other countries. Only Israel signed a MRA on Good Laboratory Practices (GLP) with the EU, which entered into force in May 2000, by which some goods enter the EU without need for double testing.[25]

3.2.2. *Euro-Med movement of products harmonised at EU level*

The Euro-Med AAs do not offer interesting concepts as how to enhance Euro-Med trade in goods for which harmonisation (New Approach) is necessary. They only stipulate that the Mediterranean countries should approximate their legislation to that of the EU in the areas covered by them but do not explain how this approximation process should be initiated and developed. For example, in the case of the Maghreb countries, the Euro-Med AAs state that 'the cooperation shall be aimed at helping to bring the legislation closer to that of the EU'.[26] In the case of Lebanon and Jordan, they stipulate that 'the Parties shall use their best endeavours to approximate their respective laws in order to facilitate the implementation of this Agreement.' The Euro-Med AAs define that the Mediterranean countries will make use of EU rules in standardisation, metrology, quality control and conformity assessment.[27] Aligning to EU standards and technical requirements will lower double testing and certification

[24] M. Jakubiak et al., *Countries Bordering the EU and Enhanced Economic Integration* (Warsaw, Centre for Social and Economic Research 2006, pp. 22-23.

[25] Agreement on mutual recognition of OECD principles of good laboratory practice (GLP) and compliance monitoring programmes of 9 October 1999 between the European Community and the State of Israel, *OJ* L263/7.

[26] Art. 48 AA Egypt, for example, stipulates: 'The Parties shall use their best endeavours to approximate respective laws in order to facilitate the implementation of this Agreement.' Art. 52 AA Morocco, for example, stipulates: 'Cooperation shall be aimed at helping Morocco to bring its legislation closer to that of the Community in areas covered by this Agreement.'

[27] Art. 55 AA Algeria; Arts. 40 and 51 AA Morocco, Arts. 40 and 51 AA Tunisia, Art. 47 AA Egypt; Art. 48 AA Lebanon; Art. 68 AA Jordan.

costs, which will lead to an increase in Euro-Med trade. At present, a number of important harmonisation steps across the Euro-Mediterranean region have been taken. A working group on trade measures started the approximation of legislation in the field of standards, technical regulations and conformity assessment procedures in 2003.[28] Since the Mediterranean countries have no prospect of accession to the EU, they are not obliged to implement all EU standards and technical requirements.

3.2.2.1. *Industrial goods*

The Mediterranean countries should implement those EU standards and requirements that will lead to economic development of the Mediterranean countries, namely those that cover industrial goods which constitute a significant part of Mediterranean countries' export to the European market. Each Mediterranean country has to indicate which EU harmonisation directives it wants to implement. The Mediterranean countries have already identified priority areas for harmonisation and have started adopting some relevant EU.

Harmonisation is closely related to standardisation. The setting of standards will help the Mediterranean manufacturers to comply with the essential health and safety requirements in the EU directives. In practice, the Mediterranean importer to the European market provides the attestation of conformity which ensures that his product is in conformity with the European technical specifications. Manufacturers will need to be aware of the content of EU norms which apply to their products. For the Mediterranean manufacturer of construction products this means that he needs to know the content of the Construction Products Regulation (CPR)[29] according to which it is mandatory for manufacturers to apply CE-marking to products which comply with the EU standards. The organisation of specialised training courses for manufacturers, authorised representatives and their trade associations of the Mediterranean countries will contribute largely to the improvement of understanding of the EU standards and requirements in particular fields in the region.

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[28] Conclusions of the Euromed Trade Ministerial Conference in Palermo of 7 July 2003, 64 *Euromed Report* (2003) para. 6. The Ministers instructed the working group to implement a six-point work programme that defines the steps required to approximate legislation in this field: (1) identification of priority sectors; (2) acquaintance with the applicable EU legislation and conduct a gap analysis on the basis of the existing legislation; (3) transposition of the necessary framework legislation and sectoral legislation; (4) creation/reformation of existing institutions; (5) set up necessary certification and conformity assessment bodies; (6) identification of technical assistance needs and make most of existing programmes. For an overview of the progress of approximation of legislation in the field of standards, technical regulations and conformity assessment procedures, see Annexes A, B and C of the Report on the Approximation of Legislation of 15 July 2004, available at: <http://europa.eu.int/comm/enterprise/ enterprise_policy/ind_coop_programmes/med/doc/f1947_en.pdf>.

[29] Regulation (EU) No 305/2011 of the European Parliament and the Council of 9 March 2011 of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC, *OJ* L 88/5, 4.4.2011 was adopted on 9th March 2011 and published as regulation No 305/2011. The first parts of the Regulation will come into force 20 days after publication. The provisions on human health and environment (dangerous substances) shall apply as from 1st July 2013.

After the adoption of the relevant EU *acquis*, the Mediterranean countries should establish an adequate infrastructure in the field of standardisation, accreditation and conformity assessment (metrology, certification, analyses and tests) as well as market surveillance. Testing of products of the Mediterranean countries is necessary for export of these products to the EU. The standardisation, accreditation, conformity assessment bodies and market surveillance authority in the Mediterranean country must meet several requirements.[30] If no such institution is present in a Mediterranean country, institutions from neighbouring countries can be asked to deliver certification services.[31] Further, the Mediterranean countries should participate in European and international standardisation bodies.

This approximation process and the establishment of the necessary infrastructure will lead to negotiations about the establishment of Agreements on Conformity Assessment and Acceptance (ACAAs) for industrial products.[32] ACAAs are a specific type of a MRA and will probably be included as an addendum to the DCFTA.[33] An ACAA is an MRA but based on the alignment of the legislative system of the Mediterranean country with the EU legislation and establishment of infrastructure that fulfills all EU requirements. ACAAs are currently being prepared with Algeria, Egypt, Jordan, Lebanon, Morocco, the PA and Tunisia in industrial sectors where the legislation is harmonised at EU level. A first ACAA for medicinal products, active pharmaceuticals excipients or mixtures thereof, for human and veterinary use has been concluded with Israel in the form of a Protocol annexed to the Euro-Med AA.[34] The ACAA

[30] <http://www.industrie.gov.tn/marquage-ce/www/en/doc.asp?mcat=59&mrub=150>.

[31] S. Rawdan and J.-L. Reiffers, *FEMISE Report on the Euro-Mediterranean Partnership 2006: Analysis and Proposals of the Euro-Mediterranean Forum of Economic Institutes* (Marseille, Institut de la Méditerranée 2006) p. 33.

[32] See Commission Staff Working Paper of 25 August 2004 on Agreements on Conformity Assessment and Acceptance of Industrial Products (ACAAs), SEC (2004)1071.

[33] See V. Movchan and V. Shportyuk, EU-Ukraine DCFTA: the Model for Eastern Partnership Regional Trade Cooperation, No. 445/2012, for CASE (Centre for Social and Economic Research), 2012, Warsaw, p. 15.

[34] Council Decision on the signing, on behalf of the European Union, of a Protocol to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, on Conformity Assessment and Acceptance of Industrial Products (CAA); *OJ* L 145 of 11/06/2010, p. 1. There are objections claiming that the ACAA must be rejected because Israel violates human rights in the West Bank and the Gaza Strip, legally based on Article 2 EU-Israel AA defines that the relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect for human rights and democratic principles. Example of a reservation to the Protocol: Opinion of the Committee on Foreign Affairs of 13 June 2012 for the Committee on International Trade. "*At the present Israel applies all the agreements concluded with the EU in the whole of "the territory of the State of Israel" as defined in Israeli national law, including the territories she has occupied since 1967. The EU does not recognise Israel's application of these agreements to the occupied territories, nor does it recognise any Israeli legislation advocating the annexation and settlement of those territories (e.g. the Basic Law: Jerusalem, Capital of Israel adopted by the Knesset on 30th July 1980 annexing East Jerusalem), which it considers to be contrary to international law. EU authorities, therefore, are required to refrain from giving effect to them in any way whatsoever, since it is prohibited by current Community law and by the EU's international obligations. In this context, the terms of the proposed text might allow Israel to implement the Protocol on the basis of its national law defining the territorial scope of its domestic market, hence*

provides for two mechanisms, first, alignment of the specific EU *acquis* by Israel. Israel aligned its legislation to EU law that sets essential requirements for medicinal products in harmonising directives (New Approach) and participates in the European organisations in the sector covered by it.[35] Thus the ACAA allows medicinal products, which fulfil all essential requirements, to be placed on the Israeli market without needing any further authorisation, and *vice versa*.[36] A second mechanism is the mutual acceptance of medicinal products that are lawfully placed on the market in one of the parties. For medicinal products for which there exist no harmonising directives, these products may be traded between Israel and the EU on the basis of the principle of mutual recognition: a product lawfully traded on the Israeli market, will be lawfully imported in the EU and *vice versa*.[37]

3.2.2.2. *Agricultural products, processed agricultural products and fish and fishery products*

The Mediterranean area is very depending on imported agricultural products to feed its population. Therefore, further liberalisation in trade in agricultural products, processed agricultural products and fish and fishery products is of utmost importance and will happen in accordance with the Euro-Med Roadmap for agriculture (Rabat Roadmap) adopted by the Euro-Med Ministers of Foreign

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including the territories she has occupied since 1967 which are not under Palestinian economic administration. If that were to happen, the EU would be failing to comply with its Community law and its obligations under international law. In addition, when conducting its foreign policy, the EU must not deviate from the provisions of the Treaty of Lisbon which imposes an explicit requirement on the EU to ensure consistency between different areas of its external action and between these external policy areas and other policies. With this regard, the EU's common commercial policy shall be conducted in the context of the objectives of the Union's external action, in the spirit of the principles the EU is founded on, including the respect for human rights and fundamental freedoms. These obligations also apply to the EU's revised Neighbourhood Policy, which relies on positive conditionality ("more for more"). Against this background, current Israeli government policies, with special regard to the continued building and expansion of settlements in East Jerusalem and the West Bank and the blockade of the Gaza Strip, as well as the situation of Arab citizens of Israel and the increasing pressure on human rights NGOs in the country raise serious concerns about the political context of this agreement."

Israel serves as a good example as how to integrate further in the EU market of industrial products: Israel created an infrastructure in the field of standardisation, accreditation, conformity assessment and metrology; EU sectoral legislation was transposed in the priority sectors: i.e., pharmaceuticals legislation and standards in the areas of pressure equipment and medical devices. There is convergence with certain EU sanitary and phytosanitary rules and Israel became a member of the European standards bodies CEN and CENELEC. This should be the end goal of all Mediterranean neighbours.

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[36] On 23 October 2012, the European Parliament (EP) approved the ACAA. The protocol is not yet published in the *OJ* and thus has not entered into force.

[37] Cf. *supra* 3.2.1 the mutual recognition principle in non-harmonized areas.

Affairs on 28 November 2005.[38] The liberalisation agreement will take the form of an Exchange of Letters which amends the Euro-Med AA and its Protocols.

Also here, the Mediterranean countries should implement EU directives covering agricultural goods which constitute an important part of Mediterranean countries' exports to the European market in order to establish trade corridors for agricultural goods. In the future this approximation process should lead to the establishment of trade corridors, in the form of Agreements on Conformity Assessment and Acceptance (ACAAs) for agricultural products, processed agricultural products and fish and fishery products. The Mediterranean country involved will have to align its legislation to harmonising EU directives which contain essential requirements for agricultural and fishery (New Approach). Agricultural products, processed agricultural products and fish and fishery products for which there exist no harmonising directives in the EU, may be traded between the Mediterranean country and the EU on the basis of the principle of mutual recognition.

Agricultural products, processed agricultural products and fish and fishery products must comply with all sanitary and phytosanitary (SPS) rules such as additives and toxic substances in food or drink, and technical barriers to trade (TBT) measures, such as labelling of composition of food; quality requirements for fresh food; volume, shape and appearance of packaging etc. These are also tested upon conformity by strong independent institutions before they enter the EU. At present a Common Declaration on SPS and TBT issues is added to the Euro-Med AAs.[39] Some Euro-Med AAs mention the need for harmonisation of SPS standards[40], such as article 46 of the Israel/EU AA. Other Euro-Med AAs such as the Morocco/EU AA do not mention anything about SPS measures.Only the EU and Morocco concluded a special *Agreement concerning reciprocal liberalisation measures on agricultural products and fishery products* in which it is clarified which SPS and TBT measures should be implemented before trade can start.[41] The EU and Morocco have to apply the following SPS measures: those that derive from the 'WTO Agreement on

[38] Five Year Work Programme adopted at the 10th Anniversary of the Euro-Mediterranean Summit, Barcelona 27-28 November 2005, see http://www.euromed-seminars.org.mt/archive/documents.htm.

[39] See for example Annex III of the EU/Egypt Agreement in the form of an Exchange of Letters between the European Community and the Arab Republic of Egypt concerning reciprocal liberalisation measures on agricultural products, processed agricultural products and fish and fishery products, the replacement of Protocols 1 and 2 and their annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part, 28/04/2010, L 106, p. 41.

[40] Annex A of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). The SPS Agreement entered into force with the establishment of the World Trade Organization on 1 January 1995. It concerns the application of food safety and animal and plant health regulations.

[41] Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the King-

the Application of SPS Measures[42] and the standards, procedures and recommendations of international standards organisations.[43] As concerns the TBT standards, the EU and Morocco must oblige with standards, technical regulations, and conformity assessments of the WTO Agreement on Technical Barriers to Trade. The European Parliament welcomed this EU/Morocco special Agreement, yet emphasised that access of Morocco and other Mediterranean neighbours to the EU's internal market should not only be subject to compliance with SPS and TBT standards but also to environmental standards.[44] Nevertheless, the special Agreement does not mention environmental standards.

For the West Bank and Gaza Strip, the EU designed a different Agreement in order to support the building of a Palestinian state. The agreement gives immediate access and full liberalisation, for a transitional period of 10 years to the EU market, with possible further extension in time, to all agricultural products, processed agricultural products and fish and fishery products originating in the West Bank and Gaza Strip.[45]

3.2.3. *Derogations in the DCFTA and the Rule of Reason concept in the Euro-Med context*

3.2.3.1. *Provision in the DCFTA, its interpretation and some illustrations*

Similar to what is stated in the TFEU,[46] the parties to the DCFTAs may derogate from the principle of free movement of goods on the grounds of: (i) public morality, public policy or public security; (ii) the protection of life and health of humans, animals or plants; (iii) the protection of national treasures possessing

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dom of Morocco, of the other part, 7.9.2012, *OJ* L 214/4, p. 4. This Agreement can be seen as the result of Morocco's steps to democracy by reforming its constitution and conducting fair elections.

[42] *All* Mediterranean neighbours should adopt *all EU SPS standards* on the protection of: (a) animal or plant life or health from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; (b) human or animal life or health from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; (c) human life or health from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or (d) to prevent or limit other damage from the entry, establishment or spread of pests, see articles 12-14, Annex A to the Agreement on the Application of Sanitary and Phytosanitary Measures, available at www.wto.org.

[43] These international standards organisations are the Codex Alimentarius Commission, the World Organisation for Animal Health, the International Office of Epizootic Diseases, the International Plant Protection Convention and the European and Mediterranean Plant Protection Organisation.

[44] European Parliament Resolution of 16 February 2012 on the Agreement between the EU and Morocco concerning reciprocal liberalisation measures on agricultural products and fishery products (2012/2522(RSP) P7_TA-PROV(2012)0055.

[45] Agreement in the form of an Exchange of Letters between the European Union, of the one part, and the Palestinian Authority of the West Bank and the Gaza Strip, of the other part, providing further liberalisation of agricultural products, processed agricultural products and fish and fishery products and amending the Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other, 10.12.2011 *OJ* L 328/5.

[46] Article 36 TFEU.

artistic, historic or architectural value; (iv) the protection of intellectual, industrial or commercial property; (v) rules related to gold and silver; and (vi) the conservation of exhaustible natural resources.[47] The national measure which derogates from the free movement of goods must be the least restrictive on the free movement of goods.[48]

This provision applies to industrial goods as well as to agricultural, fishery and agricultural processed products. When a Mediterranean country believes that religion or culture are undermined by certain trading activities, they are likely to impose trade restrictions, especially on the grounds of public morality and public policy, and are given wide liberty by the EU to do so.[49] An interesting case of the European Court of Justice (ECJ) is that of *Omega Spielhallen* of 14 October 2004.[50] In this case, the ECJ ruled that a restriction on the free movement of goods between the Member States was possible to protect fundamental values laid down in the national German constitution. If the same principle is also applied in the Euro-Med relationship, many goods will be prohibited from entering the Mediterranean region because of their strict national constitutions.[51] Also according to the ECJ, the concept of 'public policy' in the EU context must be interpreted strictly; public policy may be relied on only if there is *a genuine and sufficiently serious threat to a fundamental interest of society*.[52] But the interpretation given by the ECJ to the derogation provision Article 36 TFEU is not necessarily valid for the derogation principles in the Euro-Med AAs. The ECJ ruled that a similarity of terms is not a sufficient reason for transposing ECJ case law to the provisions of the international agreement. The interpretation in the Euro-Med context is different; more restrictions are allowed in the Euro-Med context, since the DCFTA do not aim at full acceptance of all EU *acquis*, but at deep and comprehensive integration.[53] However, the *deeper and more comprehensive* the Euro-Med integration in the field of goods, the *fewer exceptions* will be tolerated. Derogations from the Euro-Med move-

[47] Art. 27 Algeria AA; Art. 28 Morocco AA; Art. 28 Tunisia AA; Art. 26 Egypt AA; Art. 27 Jordan AA ; Art. 27 Israel AA and Art. 27 Lebanon AA. The derogation regarding the conservation of the exhaustible natural resources is only provided for in the Lebanon AA (Art. 27 Lebanon AA).

[48] See for example Art. 27 EU/Algeria AA: Nothing in this Agreement shall preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security, of the protection of health and life of humans, animals or plants, of the protection of national treasures possessing artistic, historic or archaeological value, of the protection of intellectual, industrial and commercial property or of regulations concerning gold and silver. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Parties.

[49] Hakura, EU-Mediterranean and Gulf Trade Agreements (Isle of Wight, Palladian Law Publishing 2000) p. 12.

[50] C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberburgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

[51] See C-54/99, *Association Eglise de Scientologie de Paris* [2002] ECR I-1335.

[52] *Cf. supra* n. 51 at para. 17.

[53] According to settled case law, a mere similarity in the wording of a provision of the EC Treaty and an international agreement between the EC and a non-member country is not sufficient to give to the wording of that agreement the same meaning as it has in the EC Treaty, see *Polydor* case, paras. 14 to 21; Case 104/81 *Kupferberg* [1982] *ECR* 3641, paras. 29 to 31, and C-312/91 *Metalsa* [1993] *ECR* I-3751, paras. 11 to 20.

ment of goods will no longer be possible after the Mediterranean countries and the EU have concluded the ACAA.[54] In the EU, article 114 TFEU provides restrictions by Member States even after harmonisation at the European level. The exception defines that, after the adoption of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of *major needs* referred to in Article 36 TFEU, or relating to the protection of the environment or the working environment, the Member State will notify the Commission of these provisions as well as the grounds for maintaining them. Such an additional exception is not (yet) available under the Euro-Med relationship.

In the Euro-Med relationship, goods will be prohibited from entering the Mediterranean region because of their strict national measures inspired by religion, tradition and culture in the Middle East and North Africa. When Mediterranean countries believe that religion or cultures are undermined by trading activities, they are likely to impose trade restrictions, especially on the grounds of public morality and public policy.[55] Trade in alcohol (wine, beer, spirits) for example between the EU and the region will be subject to restrictive measures in many Mediterranean countries. Another illustration concerns the protection of national treasures. The EU Internal Market led to an increase of stolen art goods since stolen goods could be transported between the Member States without border control. To prevent this, the EU took some measures to protect national artistic, historic or archaeological treasures,[56] such as Directive 92/280 on the procedure of restitution of treasures that have been taken illegally from one EU country to another which includes a basic list of protected national treasures.[57] Beyond this list, EU Member States are free to take restrictive national measures under the article 36 TFEU exception and add other

[54] Case C-1/96 *The Queen* v *Minister of Agriculture, Fisheries and Food, ex parte: Compassion in World Farming Ltd* [1998) *ECR* I-1251.The ECJ made it clear that a Member State could not rely on the views or behaviour of a section of national public opinion in order to unilaterally challenge a harmonising measure (in this case a directive) adopted by the EC institutions.

[55] Hakura, *supra* n. 49 at p. 12.

[56] Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, *OJ* L 74, 27.3.1993, p. 74. See also C. Barnard, *The Substantive Law of the EU, the four freedoms* (Oxford, 2010), p. 163; Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods, *OJ* L 39, 10.2.2009, p. 1–7; C. G. Jernigan, Protecting National Treasures in a Single-Market EC, *Boston College International and Comparative Law Review (B.C. Int'l & Comp.L. Rev.)* (1994), Volume 17, Issue 1, 153.

[57] The annexes 14-15 set out 14 categories of items ranked as national treasures: (1) archaeological discoveries more than 100 years old; (2) objects (including furniture) from artistic, historical, or religious monuments more than 100 years old; (3) paintings executed prior to 1600; (4) engravings and prints; (5) sculpture; (6) constructions and composite works; (7) photographs; (8) manuscripts more than 100 years old; (9) books more than 200 years old; (10) archives over 50 years old; (11) philatelic specimens; (12) fauna, flora, minerals, or anatomy of historical, archaeological, paleontological, ethnographic, or numismatic interest; (13) motor vehicles over 75 years old; (14) antiques over 100 years old. A second list indicates minimum monetary value for an object to be considered a national treasure: paintings dated between 1600 and 1900 with a value of at least 75,000 ECUs; paintings dated after 1900 with a value of at least 150,000 ECUs; engravings and prints worth at least 7,500 ECUs; sculpture worth at least 50,000 ECUs; constructions and composite works worth at least 100,000 ECUs; photographs worth at least 7,500 ECUs; philatelic specimens worth at least 25,000 ECUs; furniture or musical antiques worth at least

national treasures. The Netherlands has compiled an additional list of approximately 300 objects that need governmental permission to leave the country. The Mediterranean countries consider much more objects as a part of the cultural heritage. In Greece, anything dating back before 1830 is considered state property. Italy considers over 30 million works of art as falling within the article 36 TFEU category.[58] The protection of national artistic, historic or archaeological treasures in the Mediterranean area will be a challenging task due to the general lack of documentation and information in the cultural and artistic field.

3.2.3.2. *The concept of the Rule of reason in the Euro-Med context*

In the *Cassis de Dijon* case about the rule of reason, the ECJ stated that other restrictions to the free movement of goods within the EU were also possible.[59] Restriction of free movement of goods is allowed, in anticipation of harmonisation of laws in particular fields at EU level, if a mandatory requirement or public interest needs to be satisfied such as the protection of public health, the protection of consumers, the protection of the environment, the protection of traffic safety, or the proper functioning of telecommunication services.[60] The national measure that restricts trade must be of a non-economic nature, applicable without any distinction at the national level as to imported products. Also the proportionality principle must be met. The rule of reason can only be applied in the Euro-Med relations in anticipation of harmonisation of particular fields if a mandatory requirement or public interest needs to be satisfied. The Mediterranean countries and the EU aim at aligning their legislation in certain fields only, such as areas where the Mediterranean countries have vital export interest to the EU.[61] In such fields, in anticipation of harmonisation of laws, it can be argued that the rule of reason also applies between the Mediterranean countries and the EU.

20,000 ECUs; or any other antique under category 14 worth at least 50,000 ECUs. *Id.* see also annex with list of possible treasures.

[58] Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the implementation of Council Regulation (EEC) n° 3911/92 on the export of cultural goods and Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, COM/2000/0325 final.

[59] Case 120/78 *Rewe-Zentral AG* v *Bundesmonopolverwaltung für Branntwein* [1979] *ECR* 00649.

[60] This list in not exhaustive.

[61] For example, Jordan has vital export interests to the EU as concerns pharmaceuticals; Morocco exports mainly agricultural products to the EU and Egypt exports energy, chemicals and textiles and clothes to the EU.

4. THE EURO-MED LIBERALISATION OF SERVICES THROUGH THE DCFTAS

4.1. **The current provisions of movement of services in the Euro-Med AAs**

All Euro-Med AAs, except for the PA-EU Interim AA, include provisions on the movement of services.[62] The provisions in the AAs with Morocco, Tunisia, Israel and Egypt differ from those in the AAs with Algeria, Lebanon and Jordan since these countries were members of the World Trade Organisation (WTO) at the time the AAs were drafted. These countries basically refer to the services provisions as provided for in the GATS (General Agreement on Trade in Services) in general and the MFN (Most Favoured Nation) treatment in particular.[63] The MFN treatment will not apply when WTO parties decide to conclude a 'preferential economic integration agreement on services' as provided for in Article V of the GATS.[64] In the event of such a preferential agreement, the partners to the agreement will grant each other preferential treatment, which is different from the treatment of all other countries.[65] Jordan, Algeria and Lebanon were not a member of the WTO at the time the AAs were drafted.[66] These Mediterranean countries had to create a legal framework concerning the movement of services themselves, since they could not simply refer to the GATS and the MFN treatment. Jordan and the EU included a best endeavour clause which should lead to a gradual supply of services by European and Jordanian companies.[67] Algeria grants treatment to European cross-border service suppliers no less favourable than that accorded to companies of any third country.[68] Lebanon only included a reference to the obligations under the GATS, which will take effect from the date of accession of Lebanon to the

[62] On 23 June 2005, the Commission adopted a proposal to open negotiations on the liberalisation of services and investment with the Mediterranean countries. This marks an important step towards the creation of the free trade area between Europe and the Mediterranean.

[63] Art. II(1) GATS and Art. 32 Morocco AA; Art. 30 Tunisia AA; Art. 31 Israel AA and Art. 29 Egypt AA.

[64] See, for example, Art. 30(2)(a) Tunisia AA.

[65] The 'preferential economic services agreement' must fulfill all conditions set out in Article V of the GATS.

[66] It must be noted that Jordan has become a member of the WTO in 2000. For Jordan, the GATS provisions and the Euro-Med provisions apply. As regards the interaction between the relevant services provisions in the Jordan/EU AA and the GATS, article 44 of the Jordan/EU AA stipulates that treatment granted by a party to the other shall, as from the day one month prior to the date of entry into force of the relevant obligations of the GATS, in respect of sectors or measures covered by the GATS, in no case be more favourable than that accorded by such first party under the provisions of the GATS and this in respect of each service sector, subsector and mode of supply.

[67] Art. 37 Jordan AA.

[68] Art. 31 Algeria AA.

WTO.[69] Jordan, Algeria and Lebanon also included the possibility of concluding a preferential agreement on services.[70]

The AAs with Morocco, Tunisia, Egypt and Israel refer to the GATS and its 'derogation from the movement of services' provisions. The Lebanon-EU AA does not provide for derogations from the movement of services. The Jordan and Algerian AAs offer several possibilities to derogate from the movement of services, such as restrictions on grounds of public policy, public security or public health;[71] restrictions as regards services connected to the exercise of official authority;[72] measures for prudential reasons to protect investors, depositors or to ensure the integrity and stability of the financial system;[73] particular rules concerning the establishment and operation in one party's territory of branches of companies justified by legal or technical differences.[74]

4.2. **Towards a deeper and more comprehensive integration as regards services between the EU and the Mediterranean area**

Most Mediterranean countries and the EU wish to create a preferential integration agreement on services. Contrary to the Euro-Med movement of goods, there are almost no binding provisions in the Euro-Med AAs as regards the Euro-Med movement of services. To become DCFTAs, the Euro-Med AAs should encompass binding legal provisions; a mere referral to the provisions in the GATS will not be sufficient anymore. The future agreements must include similar provisions on services for all Mediterranean countries in order to ensure consistency of the legal framework. However, also specific provisions will be inserted in the agreements which will take into account the special economic situation and financial needs of the least-developed Mediterranean countries. After the inclusion of binding provisions in the Euro-Med AAs, it should be assessed whether further liberalisation of the movement of services is feasible via approximation of legislation and/or the application of the mutual recognition principle in the field of services. The Istanbul Framework Protocol serves as a non-binding basis for negotiations about the liberalisation of services between the Mediterranean countries and the EU.[75] The EU and the different Mediter-

[69] Art. 30 Lebanon AA: Treatment granted by either party to the other with respect to the rights of establishment and the supply of services shall be based on each party's commitments and other obligations under the GATS. This provision shall take effect from the date of the final accession of Lebanon to the WTO. The parties shall not, between the date of entry of into force of this agreement and Lebanon's accession to the WTO, take any measures or actions which will render the conditions for the supply of services by the EC or Lebanese service suppliers more discriminatory than those existing on the date of entry into force of this Agreement.

[70] Art. 65 Jordan AA.

[71] Art. 35, para. 1 Algeria AA and Art. 41 Jordan AA.

[72] Art. 35, para. 2 Algeria AA and Art. 41 Jordan AA.

[73] Art. 46 Jordan AA and Art. 35 para. 4 Algeria AA.

[74] The Jordan and Algerian AAs also stipulate that the movement of services do not apply to air transport, inland waterways transport and maritime transport: Art. 34 Algeria AA and Arts. 31 and 39 Jordan AA.

[75] Negotiating Trade in Services: A Practical Guide for Developing Countries, International Trade Department of the World Bank, May 2009, available at http://siteresources.worldbank.org/INTRANETTRADE/Resources/239054-1248204247129/Negotiating_Trade_in_Services.pdf.

ranean partners will negotiate about the liberalisation of services on the 'voluntary participation' model. Negotiations will be opened with Mediterranean partners 'willing' to enter into such an agreement.[76] **T**he negotiations with the 'willing' partners will be made public to the non-willing countries. This allows all Mediterranean partners to be aware of and acquire the best offer made by the EU in any sector to any country. The future preferential services agreement as part of the DCFTA includes a vertical dimension meaning that Mediterranean countries open their sectors to the EU and *vice versa*, but includes also a horizontal dimension meaning that the different Mediterranean partners open their services markets to each other. The horizontal dimension is reflected in the *regional* Most Favoured Nation (MFN) clause: a Mediterranean country, which maintains a preferential treatment with the EU, should grant the other Mediterranean countries a preferential treatment that is not be less favourable than the one granted to the EU. This principle will be difficult to apply in practice, since there are almost no written agreements amongst the Mediterranean partners.

4.2.1. *Legal concepts as regards the Euro-Med movement of services in the DCFTAs*

The *free movement of services* is defined as the right of self-employed persons to move freely between Member States in order to provide services on a temporary basis. According to Hakura, a service within the scope of the Euro-Med AAs is an economic activity which is intangible and involves an element of commercial motivation, such as transport, advertising, construction, engineering, distribution, education and the transmission of television signals. For instance, situations where a French professor offers his educational services in Tunisia; where a Swedish constructor builds roads in Jordan; and where a Moroccan professional football player offers his services in the EU. It does not apply to state education and sports purely based on sporting interests, since these involve no economic element.[77] An economic activity in the Euro-Med AA means an activity of an industrial, commercial or professional character.[78] The Istanbul Framework Protocol adds that services include any service in any sector except services supplied in the exercise of governmental authority.[79]

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[76] This approach mirrors the Framework Protocol on Services, which was adopted by the Ministers of Trade in Istanbul in July 2004 and which served as a template in further negotiations.

[77] F.S. Hakura, *supra* n. 49 at p. 35. Films are considered as goods.

[78] Definitions are based on Art. 36 Algeria AA.

[79] In the EU, the movement of services resorts under articles 51–62 of the TFEU and the harmonisation Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (*OJ* L 376/36) aims at further dismantling of remaining barriers. There are many services are excluded from the scope of this EU Directive such as electronic communications; transport (urban transport, taxis, ambulances); financial services; audiovisual services; gambling; social services (housing, childcare, family support); taxation; public and private healthcare provided by professionals to patients; and pharmaceutical services. For those excluded services the general provisions on the free movement of services (articles 51– 62 of the TFEU) apply.

A provision on *temporary presence* should be inserted in the DCFTAs. Temporary presence relates to persons of one country temporarily entering the territory of another country to supply a service (for example, circus artists, lawyers, sportsmen or teachers). This concept is narrowly related to the movement of persons. Freedom to provide services across borders within the meaning of the EU Directive on Services means that a provider who is established in one EU Member State may temporarily or occasionally provide its services within the territory of another member state without having to settle there. The North American Free Trade Agreement (NAFTA)[80] includes an interesting provision about the temporary local presence of enterprises in the territory of the other party in the case of cross-border provision of services. The provision defines that no party may require the service provider of the other party to establish or maintain a representative office in any form or enterprise, or to be resident, in its territory as a condition for the cross-border of a service. According to the WTO, the notions *non-permanent or temporary* range from an employing period varying between 3 months to 5 years.

For each service there are different methods in which they can be supplied.[81] Mode 1 concerns the cross-border trade in services. To define the *cross-border* supply of services between the EU and the Mediterranean countries, other services liberalisation agreements may serve as an example. The NAFTA is used as an example to define the cross-border provisions of a service as follows: the provision of a service (a) from the territory of a party into the territory of another party, (b) in the territory of a party by a person of that party to a person of another party or (c) by a national of a party in the territory of another party.[82] Services under mode 1 are supplied through the telecommunications or postal infrastructure of a country and may include consultancy or market research reports, telemedical advice, distance training, architectural drawings being electronically transmitted etc. Mode 2 concerns consumption abroad which refers to European residents obtaining services in the territory of a Mediterranean country and *vice versa*. For example, it applies to an Algerian lawyer going to France to provide legal advice and European tourists visiting Morocco. Mode 3 concerns the delivery of services through commercial presence, such as the establishment of a branch office of a foreign bank in a partner country. Mode 4 concerns temporary movement of natural persons such an independent supplier (consultant, health worker, etc.) or an employee of a service supplier (for example employee of a consultancy firm, hospital, construction company). Free movement of services often implies movement of persons. Therefore mobility agreements will need to be negotiated.

Free movement of services implies the prohibition of quantitative restrictions and all measures having the same effect. A quantitative restriction is a non-discriminatory measure that imposes limitation on: (a) a number of service providers, whether in the form of a quota, a monopoly or an economic needs test, or by any other quantitative means; or (b) the operation of any service

[80] See http://www.nafta-sec-alena.org/en/view.aspx?conID=590.
[81] See Article I:2 GATS.
[82] See Nafta.

provider, whether in the form of a quota or an economic needs test, or by any other quantitative means.[83] A measure having the same effect as a quantitative measure might be for example the obligation for the service provider to obtain authorisation from the authorities of the country in which the service provider wants to provide its services. In the Euro-Med context however, full free movement of services is not the end goal. The desired degree of integration in the field of services is not yet clear, but there should be a *deep and comprehensive* movement of services. According to Müller-Jentsch, the purpose of the Euro-Med liberalisation of movement of services is the removal of the main tariff and non-tariff barriers that hinder the movement of services, reliant on the economic development of the Mediterranean country involved.[84] Since full Euro-Med liberalisation of services is not the end goal of the future DCFTAs, each party will have to explain all restrictions on the movement of services it wants to maintain. Services that will still be subject to quantitative restrictions and/or measures having the same effect should be notified to the other party and included in an Annex to the DCFTA. The same goes for the prohibition of discrimination based on nationality. This prohibition will not apply to the services included in the Annex to the DCFTA. To further liberalise Euro-Med trade in services, the EU and the Mediterranean country may, after a period of time, renegotiate and remove some services from the Annex.

4.2.2. *Mutual Recognition principle in non-harmonised areas*

In the EU, the ECJ introduced the principle of mutual recognition in the field of services[85]: *if a service was lawfully authorised in one Member State, the service should be acceptable throughout the EU*. In Euro-Med context, the mutual recognition principle would imply that a service lawfully supplied in a Mediterranean country should be accepted in the EU, even when this service does not fully comply with the rules of the EU and *vice versa*. There is one exception to this principle: the EU or an EU Member State may refuse the supply of the service in its present form as the refusal is strictly necessary for the protection of, for example, public safety, health or environment. In that case, the EU or the EU Member State must also demonstrate that its measure is the least trade-restrictive measure. In the EU, the application of the mutual recognition principle in the field of services seemed ineffective in practice: numerous barriers remained in the EU Member States and prevented providers from offering services in another EU Member State.[86] The application of the judicial principle of mutual recognition of services proved to be a challenging form of transna-

[83] See NAFTA, article 1207.

[84] D. Müller-Jentsch, Deep integration and trade in services in the Euro-Mediterranean Region, World Bank/European Commission, p. 15.

[85] Such as Case 205/84, *Commission of the European Communities v Federal Republic of Germany***,** ECR 1986, p. 3755.

[86] Claes-Mikael Jonsson, Paper for the ETUC Working Group on Social Policy and Legislation, Comparing the mutual recognition principle and the country of origin principle, 2005, at http://www.epsu.org/IMG/pdf/Mutual_recognition_prinEN.pdf, p. 10.

tional governance in the EU and will certainly be too demanding between the Mediterranean countries and the EU. Jakubiak correctly remarks that the principle of mutual recognition requires a substantial amount of confidence in the other party which will take time to develop in the Euro-Mediterranean relationship.[87] It implies the existence of and trust in each other's regulations on services, quality assessment mechanisms and testing facilities that should offer equivalent levels of protection. 'Equivalence' between levels of protection in the Mediterranean countries and those in the EU cannot be presumed. The Istanbul Framework Protocol defines that the EU and the Mediterranean countries shall provide recommendations on the criteria for the authorisation, licensing, operation and certification of service suppliers. The EU and the Mediterranean country involved will consider the level of correspondence of their respective regulations. When both parties decide that the recommendation is consistent with the provisions of the agreement, the recommendation will be implemented through a Mutual Recognition Agreement on requirements, qualifications, licenses and other regulations to be negotiated by the EU and the Mediterranean country involved. MRAs do not involve any legislative alignment to European norms, but concern the guarantee of quality of services through the acceptance of authorisation, licensing, operation and certification of service suppliers other countries. For example, through a mutual recognition agreement (MRA), qualified professional accountants from a Mediterranean country can practice in the EU without double testing.

4.2.3. *Approximation in harmonised areas*

The EU established another liberalisation mechanism through the Services Directive since the principle mutual recognition was not sufficiently effective.[88] The Directive regulates the mutual recognition principle (regulatory mutual recognition) which is different from the previous mutual recognition principle which was developed by the ECJ (judicial mutual recognition).[89] The implementation of the Services Directive in the different Member States was hindered by many legislative problems as well as practical problems such as language barriers and insufficient awareness.[90] Aligning their norms to other existing EU standards and legislation, such as EU legislation in the financial sector and banking sector, is not the priority of the Mediterranean countries at this moment

[87] M. Jakubiak et al., *supra* n. 24, pp. 22-23.

[88] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *OJ* L 376/36. Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications applies to all EU Member State nationals wishing to practise a regulated profession, on either a self-employed or employed basis, in a Member State other than that in which they obtained their professional qualifications.

[89] C-120/78 *Rewe-Zentral AG* v *Bundesmonopolverwaltung für Branntwein* [1979] *ECR* 649.

[90] In October 2011 the Commission has decided to refer Austria, Germany and Greece to the ECJ on the ground that they have so far only partially transposed the Services Directive.

and is be too costly and complex.[91] The Mediterranean countries have weak administrations with not much financial means and are trying to reform their state into a more democratic system and to improve their legislation on human rights. The example of Turkey that is in the process of aligning its legislation to the EU *acquis* as regards the movement of services demonstrates that liberalisation of services is very difficult to achieve at the legislative level and in practice. Negotiations between Turkey and the EU were opened in 2000,[92] but until now no progress has been made on the chapter on the freedom to provide services.[93] The Turkish example shows that such harmonisation is very time consuming and comes to a halt in times of political unrest in the country. At present there is no real progress as regards the alignment of Turkish legislation in the area of free movement of services and the right of establishment to the EU *acquis*. However, the Mediterranean countries could opt for harmonisation in certain fields. The Euro-Med liberalisation of services goes hand-in-hand with the protection of some vital principles, such as the protection of the consumer. The EU harmonised essential requirements for the protection of its consumers.[94] For the protection of such vital interests, the Mediterranean consumers could opt for alignment of their legislation to the already existing EU *acquis* on consumer protection.

4.2.4. *Standardisation projects in the Euro-Med area*

In the EU, standardisation in the services sector is heavily supported by the Commission. The Commission wants to open up standardisation to the widest range of services.[95] Also the Services Directive encourages the development

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[91] I. Dreyer, Trade Policy in the EU's Neighourhood, Ways Forward for the Deep and Comprehensive Free Trade Agreements, 2012, Paper for Notre Europe, available at http://www.notre-europe.eu/.

[92] Decision No 2/2000 of the EU-Turkey Association Council of 11 April 2000 on the opening of negotiations aimed at the liberalisation of services and the mutual opening of procurement markets between the EU and Turkey, SEC/2000/0476 final.

[93] Commission Staff Working Paper Turkey 2011 Progress Report of 17 October 2011, SEC (2011) 1201 final states as follows: *Work on the detailed alignment strategy is ongoing. Disproportionate requirements are still in place with respect to the right of establishment. There has been no progress in the area of freedom to provide cross-border services. The granting of work and residence permits to service providers established in an EU Member State remains subject to registration, license or authorisation requirements that are incompatible with the acquis. Alignment with the Services Directive still has to be achieved, and a Point of Single Contact for the provision of services has to be set up. No progress can be reported on mutual recognition of professional qualifications. Recognition of professional qualifications still has to be differentiated from recognition of academic qualifications.* It has to be noted that, in December 2006, due to the Turkish failure to apply to Cyprus the Additional Protocol to the Ankara Agreement the Council decided the chapter on right of establishment, the freedom to provide service and financial services will be put on hold until Turkey fulfills its commitments towards Cyprus.

[94] See Services Directive and Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, *OJ* L 255/22.

[95] Communication from the Commission to European Parliament, the Council and the European Economic and Social Committee, *A strategic vision for European standards: Moving forward to enhance and accelerate the sustainable growth of the European economy by 2020*, Brussels, 1.6.2011, COM (2011) 311 final, p. 14; Communication from the Commission: *Single Market Act:*

of European standards for services. The EU promotes its standardisation of services through technical assistance to the countries from the Mediterranean basin in order to create common a Euro-Med economic area.[96] According to several authors, the Euro-Med liberalisation of services will develop best when the different countries perceive this process as a form of 'cooperation' rather than a competitive process.[97] The best way to remove the barriers to the movement of services is for the EU and the Mediterranean countries to reach *agreement on a common set of standards*.[98]

There are different steps to be followed towards common standardisation in the field of services. Firstly, the types of services have to be selected. Since the Mediterranean countries have no accession prospect, the end goal is to establish a *deep and comprehensive* Euro-Med liberalisation of services. The EU and the Mediterranean countries will have to select the services they want to liberalise. An example of a chosen service concerns the information and communications technology (ICT) sector. The Commission wants common ICT standards for the entire European area, but also for the Euro-Med area. An ongoing Euro-Med standardisation process aims at common ICT standards so that the EU and the Mediterranean countries profit to the highest extent from ICT.[99] Second, training courses for the Mediterranean partners have to be initiated. An essential part of the 'Common Standardisation Process' exists out of the organisation of multiple training courses for officials of the willing Mediterranean countries by the EU to improve knowledge amongst these officials in the areas of standardisation, testing, certification, inspection, accreditation and metrology. An improved knowledge will result in educated officials which will be able to negotiate in an effective way about the opening of their markets to the EU. In the past CEN[100] organised training courses, called the 'EUROMED Quality Programme for the movement of goods'. Follow-up courses, called 'EUROMED Quality Programme for the movement of services' should be performed, in order to improve knowledge amongst the officials which will lead to better quality of services that move between the EU and the Mediterranean

Twelve levers to boost growth and strengthen confidence: Working together to create new growth, COM(2011)206/4; Commission Staff Working Document, *Delivering the Single Market Act: State of Play,* SWD(2012) 21 final.

[96] Commission staff working document, of 18 October 2004, on the challenges for European standardisation [SEC(2004) 1251 – Not published in the Official Journal], p. 10. Available at: http://ec.europa.eu/enterprise/policies/european-standards/files/standards_policy/role_of_standardisation/doc/staff_working_document_en.pdf.

[97] K. Nicolaïdis and S. K. Schmidt, Mutual Recognition on "Trial": The Long Road to Services Liberalization, Paper to be presented at the EUSA Tenth Biannual International Conference, Montreal, (2007), available at: http://aei.pitt.edu/7985/1/nicolaidis-k-03a.pdf, p. 31: citation from K. Nicolaïdis and G. Shaffer, 'Transnational Mutual Recognition Regimes: Governance without Global Government', *Michigan Review of International Law* (2005) 68: 267-322 and K. Schmidt, 'Mutual recognition as a new mode of governance', *Journal of European Public Policy (2005)* 14(5).

[98] P. Brenton and M. Machin, Trade Policy Issues for the Euro-Med Partnership, *Working Paper published by the CEPS Middle East and Euro-Med Project* (2003) p. 8.

[99] Communication from the Commission, *A strategic vision for European standards: Moving forward to enhance and accelerate the sustainable growth of the European economy by 2020*, Brussels, 1.6.2011, COM (2011) 311 final, p. 15.

[100] Comité Européen de Normalisation or European Committee for Standardisation.

countries.[101] The training courses should take place before the actual negotiations about the standardisation of certain services commence. It is essential that the Mediterranean partners are involved in the negotiations rounds at the very beginning of the standardisation process. Officials of the Mediterranean countries and the EU should involve important stakeholders, such as the relevant industry, academics, consumer groups and international organisations. Thirdly, the EU needs to know which regulations, rules and practices are in place in the Mediterranean countries and needs a better understanding of the regulation and practices of the delivery of the specific service in the Mediterranean area which should happen through in-depth studies of the rules governing the admission to and exercise of a profession. A good example of such a study is the comparative survey on called 'The accounting and auditing profession in the Mediterranean area'.[102] The study provides the regulatory framework governing the professions; use of professional titles by members of each national professional society; mandatory requirements of citizenship/residency as a condition for membership of the relevant national body; distribution of members in public practice, industry or governmental bodies; restrictions imposed by national law on the establishment and legal form of professional partnerships; general statistical information; statutory audit reports and listed companies audited. The study also focuses on the practice of the profession in the Mediterranean Area. A detailed analysis is offered on, *inter alia*, the range and scope of activities performed by members of each national professional body, as well as limitations and/or prohibitions imposed by national law on the performance of certain activities; accounting, auditing, practice and rules of professional conduct.[103] In the banking sector, a common Euro-Med study was performed through the exchange of information between the Mediterranean countries themselves and the EU. All Mediterranean countries and the EU were able to compare national rules and practices. This resulted in standards convergence both in the Mediterranean region and with the EU. Finally, the Mediterranean partners must become *member of the EU standardisation bodies*. Most Mediterranean countries have national standardisation bodies (Algeria, Egypt, Israel, Lebanon, Morocco, Jordan and Palestine), but competition between the different national standardisation bodies in the Mediterranean area will work contra-productive. Most Mediterranean countries are also affiliated with the European standardisation body.[104] Affiliation means no voting rights and simply implementing the produced standards. Mediterranean countries must become member of the existing European standardisation bodies so they will have a say in the standardisation process. Most standards of these bodies

[101] http://www.cen.eu/cen/Services/Visibility/EuromedQuality/Pages/default.aspx.

[102] Albania, Bulgaria, Cyprus, Egypt, France, Greece, Israel, Italy, Malta, Morocco, Romania, Serbia – including the special status territory of Kosovo, Spain, Tunisia and Turkey.

[103] http://www.fcmweb.org/

[104] Algeria (IANOR Institut Algerien de normalization), Egypt (EO Egyptian Organisation for Standardisation and Quality Control), Israel (Standards Institution of Israel), Lebanon (LIBNOR) Lebanese Standards Institution, Morocco (SNIMA Service de Normalisation Industrielle Marocaine) and Palestine (PSI Palestine Standards Institution) and Jordan (JSIM Jordan Institute for Standards and Metrology)

are voluntary, but some standards become mandatory when they are adopted by regulators as legal requirements. The abovementioned steps should result in the establishment of need to set up sectorial *Euro-Med Entities for Standardisation* that will coordinate the standardisation process for the selected services. The establishment of the central Euro-Med entity for Accountancy and Auditing, for example, is a sectorial standardisation body which will coordinate the standardisation process for the professions of accounting and auditing.[105] These sectorial Euro-Med entities can be compared with the DCFTA Task Force, composed of technical working sub-groups (such as market access; barriers to trade; financial services) which was set up for the liberalisation of services between the EU and Moldova.[106]

Trade in Euro-Med services will be hampered by inadequate mutual recognition of qualifications.[107] The EU and the Mediterranean countries should promote the development of mutually acceptable standards and criteria for licensing and certification of professional services suppliers on the basis of factors such as educational background, qualifying examinations and experience.[108]

4.2.5. *Derogations from the Euro-Med liberalisation of movement of services in the DCFTAs*

The Istanbul Framework Protocol provides us with a whole range of general restrictions: 1) protection of public morals or public order (the public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society); 2) protection human, animal or plant life or health; 3) conservation of exhaustible natural resources; 4) compliance with laws or regulations which are in line with the provisions of this Framework Protocol [109] etc. The Protocol also provides for security reasons and no country may be asked to furnish any information about essential security interests. Finally any country may action in pursuance of its obligations

[105] Final Conference of the EuroMed Market Programme Barcelona, 28-29 April 2009 Final Conclusions, available at http://www.fcmweb.org.

[106] See Quarterly Progress Report no. 1/2011 on the Action Plan for implementing the Recommendations of the European Commission for the future negotiations of the Deep and Comprehensive Free Trade Area (DCFTA). See DCFTA Task Force for the Moldova/EU DCFTA.

[107] I. Andersen et al. for the World Bank*, From Political to Economic Awakening in the Arab World: The Path of Economic Integration Deauville Partnership Report on Trade and Foreign Direct Investment,* Volume II: Main Report, May 2012, p. 40.

[108] Directive on mutual recognition of services in the EU is the mutual recognition of professional qualifications between the different Member States via Directive 2005/36/EC covering all recognition rules (except for those applicable to lawyers, activities in the field of toxic substances and commercial agents). I. Andersen et al. for the World Bank*, From Political to Economic Awakening in the Arab World: The Path of Economic Integration Deauville Partnership Report on Trade and Foreign Direct Investment,* Volume II: Main Report, May 2012, p. 75.

[109] Including those relating to: (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts.

under the United Nations Charter for the maintenance of international peace and security, even if it restricts the Euro-Med movement of services. The number of derogations from the Euro-Med movement of services depends on the degree of economic integration of services the EU and the Mediterranean partners envisage: the *deeper* the Euro-Med integration in the field of services, the *fewer exceptions* will be tolerated.

Further, the ECJ made it possible to restrict free movement of services on the grounds of the rule of reason within the EU. The ECJ accepts long list of public interest objectives that need to be safeguarded in services, such as for example in health care where it is in the public interest that there is no seriously undermining the financial balance of the social security system or overcapacity in the supply of medical care. Restriction of free movement of services is allowed, *in anticipation of harmonisation of laws in particular fields at EU level*, if a mandatory requirement or public interest needs to be satisfied such as the protection of public health, the protection of consumers, the protection of the environment, the protection of traffic safety, or the proper functioning of telecommunication services.[110] As regards the Euro-Med relationship, the rule of reason can be applied in the Euro-Med relations in anticipation of harmonisation of particular fields if a mandatory requirement or public interest needs to be satisfied. It can be argued that the rule of reason also applies between the Mediterranean countries and the EU in anticipation of harmonisation of laws in particular fields of services. Parties may restrict free movement of services if a mandatory requirement or public interest needs to be satisfied, in fields that are waiting of harmonisation.

5. CONCLUSIONS

By means of Deep and Comprehensive Free Trade Agreements (DCFTAs) the EU and the Mediterranean countries intend to establish a form of integration which goes beyond the level of integration established through free trade agreements. *Deep* integration refers to the removal of legal, regulatory and institutional barriers between the EU and the Mediterranean countries. *Comprehensive* integration implies a degree of regulatory and institutional harmonisation to the highest extent possible. The EU currently focuses on the four countries that created a free trade area by means of the conclusion of the *Agadir* Agreement; being Egypt, Jordan, Morocco and Tunisia. However, the European financial crisis and slowdown of the European economies resulted in a shift of focus of the EU towards more economically interesting countries, such as Korea, instead of free trade agreement with developing countries, such as the Mediterranean countries. The Mediterranean countries come now second in rank as concerns the conclusion of DCFTAs.

The movement of goods and services between the two shores of the Mediterranean Sea (will) happen(s) via legally enforceable provisions in the Euro-Med DCFTAs and further through the implementation in the Mediterranean

[110] This list in not exhaustive.

countries of the most essential EU *acquis*. For some goods for which there is no harmonisation, the principle of mutual recognition of goods will apply. The application of the principle of mutual recognition between the Mediterranean countries and the EU is only possible if goods are being tested by strong independent and trustworthy institutions. This means trustworthy institutions dealing with health, safety or environmental standards of goods should be established in the Mediterranean area. Independent and reliable test facilities responsible for standardisation, conformity assessment, metrology and market supervision should be established in all Mediterranean countries and/or the Mediterranean neighbours should participate in European and international standardisation bodies. As regards the future movement of services between the Mediterranean countries and the EU, the application of the principle of mutual recognition in the services sector will also require confidence. Therefore, institutions that develop standards for licensing and certification of professional service providers equal to those in force in the EU should be established with financial support of the EU. It can be stated that common Euro-Med standardisation projects are the best solution to establish an efficient Euro-Med system of movement of services.