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Mapping out the Scope and Contents of the DCFTAs with Tunisia and Morocco

Guillaume Van der Loo

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*Guillaume Van der Loo**

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Introduction

In December 2011, the Council decided to negotiate “Deep and Comprehensive Free Trade Areas” (DCFTAs) with Morocco, Jordan, Egypt and Tunisia. Negotiations have meanwhile been launched with Morocco and Tunisia and are envisaged with Jordan. The objective to conclude such ambitious DCFTAs was developed in the framework of the European Neighbourhood Policy (ENP). The key objective of the DCFTAs is not only to liberalise most goods and services and to cover all other relevant trade-related areas (e.g. public procurement, competition, technical barriers to trade), but to also gradually integrate these countries into the EU Internal Market on the basis of legislative approximation. These DCFTAs will build upon the current legal framework for trade relations between the EU and these Mediterranean countries, i.e. the Euro-Mediterranean Association Agreements (EMAAAs) and several sectoral agreements.

Because EU-Morocco relations were suspended by Morocco in February 2016 as a reaction to the General Court’s judgement in *Frente Polisario v. Council* (partially annulling the Council Decision concluding the latest EU-Morocco agricultural agreement) and because DCFTA negotiations were just launched with Tunisia (November 2015), several legal and political hurdles still have to be overcome before these far-reaching trade deals are concluded. It is therefore a useful exercise to map out the potential scope and contents of these envisaged trade agreements. An interesting point of reference for this are the DCFTAs that the EU signed in 2014 – as a part of the overall new Association Agreement – with Ukraine, Moldova and Georgia.¹ Although these countries have a different political, legal and economic relationship with the EU, these “Eastern DCFTAs” were developed in the same policy framework (i.e. the ENP) and have the same objectives (i.e. a comprehensive coverage and integration into the EU Internal Market on the basis of legislative approximation) as the “Mediterranean DCFTAs”.

In order to unravel the potential scope and contents of the envisaged DCFTAs with Tunisia and Morocco, this contribution will first explore the current legal framework of these countries’ (trade) relationship with the EU (1). Then, the key principles and mechanisms of the DCFTAs will be scrutinised (2). Next, the potential scope and contents of the Tunisia and Morocco DCFTAs will be explored, taking the Eastern DCFTAs as a point of reference (3). In particular, the possible “deep” and “comprehensive” dimension of these trade agreements will be discussed. The impact of the General Court’s judgement in *Frente Polisario v. Council* on the EU-Morocco DCFTA negotiations will also be analysed. Finally, some concluding remarks and policy recommendations are formulated.

¹ For the text of these agreements, see *OJ*, 2014, L 161/3 (Ukraine); *OJ*, 2014, L 260/4 (Moldova) and *OJ*, 2014, L 261/4 (Georgia).

**1. The Current Legal Framework:
the Euro-Mediterranean Association Agreements and
Sectoral Agreements**

1.1 The Euro-Mediterranean Association Agreements

The legal framework of the EU's trade relations with Tunisia and Morocco (and most other Mediterranean ENP partners) are still the Euro-Mediterranean Association Agreements (EMAAAs). Most of these bilateral agreements were signed with the Mediterranean countries in the late nineties in the context of the Barcelona Process.² The 1995 Barcelona Declaration envisaged the gradual establishment of a Free Trade Area by 2010 "covering most trade with due observance of the obligations resulting from the WTO." This Euro-Mediterranean Free Trade Area had to be realised by (i) the conclusion of bilateral FTAs between the EU and the Mediterranean partners – as a component of the overall Euro-Mediterranean Association Agreements – and (ii) regional integration among the Mediterranean partners. The FTAs included in the EMAAAs (hereinafter: "the EMAA FTAs") had to cover tariff and non-tariff barriers to trade in manufactured products and progressively liberalise trade in agricultural products and services with due regard to multilateral trade negotiations.

Despite the ambitious trade agenda of the Barcelona Declaration, the scope and contents of the FTAs established by the EMAAAs was rather limited. The EMAA FTAs provide for trade liberalisation of manufactured goods with free access for Mediterranean exports and gradual tariff dismantling over a transitional period of a maximum 12 years for EU exports (this transitional period closed for Tunisia in 2008 and for Morocco in 2012). With regard to agricultural products, the EMAAAs initially created only a limited market opening, excluding sensitive products from tariff elimination. However, the EMAAAs envisaged – carefully – further concession on agricultural products, "taking account of the patterns of trade in agricultural products between the Parties and the particular sensitivity of such products."³ The liberalisation of services and establishment was also restricted. Whereas the EMAAAs with Tunisia, Morocco, Egypt and Israel essentially contain basic provisions such as the confirmation of GATS principles, the EMAAAs with Jordan, Lebanon and Algeria include more detailed rules on service liberalisation as they were not WTO/GATS members at the time of signing their respective EMAAAs. Nevertheless, the EMAAAs all provide for the future widening of service liberalisation and the right of establishment. The agreements state that a few years after their entry into force (5 at the latest) the Association Councils have to examine the situation and make recommendations in this respect. However, so far these clauses have not resulted to additional service liberalisation. The EMAAAs also hardly regulate other sectors which have become increasingly important on the EU and global trade agenda such as public procurement, competition, intellectual property rights (IPR), technical barriers to trade (TBT), sanitary and phytosanitary measures (SPS), etc. Moreover, the EMAAAs' provisions

² For the text of the EMAAAs, see *OJ*, 1997, L 187/3 (Palestine); *OJ*, 1997, L 97/2 (Tunisia); *OJ*, 2000, L 70/2 (Morocco); *OJ*, 2000, L 147/3 (Israel); *OJ*, 2002, L 129/3 (Jordan); *OJ*, 2004, L 304/39 (Egypt); *OJ*, 2005, L 265/2 (Algeria); *OJ*, 2006, L 143/2 (Lebanon).

³ See, for example, Art. 18(2) EMAA Morocco.

on legislative approximation – a crucial element of the envisaged DCFTAs – were very vague. Several EMAAs such as the one with Morocco include a soft commitment stating that “cooperation shall be aimed at helping [Morocco] to bring its legislation closer to that of the Community.”⁴ In the spirit of an equal partnership, other EMAAs include a vague approximation clause stating that: “the Parties shall use their best endeavours to approximate their respective laws in order to facilitate the implementation of this Agreement.”⁵ Evidently, in practice, it is difficult to imagine that the Union made a commitment through these provisions to bring its *acquis* closer to the legislation of these Mediterranean countries.

Although the initial EMAA FTAs were modest trade agreements, from the very outset (i.e. the 1995 Barcelona Declaration) the parties agreed to further broaden and deepen the EMAA FTAs and to gradually establish a free-trade area covering most goods and services by 2010. Although this deadline was “missed” (De Ville & Reynaert, 2010, pp. 193-206), several bilateral EMAA FTAs were gradually updated and broadened to match them with the revamped trade objectives of the ENP and the Union for the Mediterranean.⁶ For example, in its first ENP Communication, the European Commission stated that further market opening towards the ENP partner countries “should cover more fully the goods and service sectors” (European Commission, 2003, p. 10) and cover regulatory convergence, TBT, SPS IPR, etc. However, “DCFTAs” as an integral part of a new bilateral Association Agreement were first only offered in 2007/2008 to the eastern ENP countries in the framework of the Eastern Partnership (EaP), whereas for the southern ENP countries the existing EMAAs had to be “deepened and expanded to include other regulatory areas such as [...] SPS, IPR, public procurement, trade facilitation and competition, etc.” (European Commission, 2003). Therefore, the EU concluded the last decade several sectoral agreements with different EMAA countries which were added as Protocols to the respective EMAA.

1.2 Sectoral Agreements and Protocols

Agricultural and Fisheries Products

An important area where the EMAAs were broadened through sectoral agreements is agriculture and fisheries products. The EU concluded bilateral agreements on agricultural, processed agricultural and fisheries products with several Mediterranean partners which, once concluded in the form of an Exchange of Letters, were added as a protocol to their respective EMAAs. Such agricultural protocols have been concluded with Israel and Egypt (entered into force in 2010), Morocco (entered into

4 See, for example, Art. 52 EMAA Morocco.

5 See, for example, Art. 48 EMAA Egypt, Art. 69 EMAA Jordan (emphasis added).

6 For example, at the 10th Anniversary of the Barcelona Declaration the EU and its Mediterranean partners adopted a five-year work programme which included, *inter alia*, the progressive liberalisation of agricultural products and services and the partners’ approximation to standards, technical legislation and conformity assessment, and support and assistance to that end, so as to pave the way for the negotiations of Acceptance and Cooperation Assessment Agreements on Industrial Products (ACAAs).

force in 2012), Jordan (entered into force in 2007) and Palestine (entered into force in 2012).⁷ These protocols significantly widened the scope of the EMAAs, but sensitive agricultural products are still only partially liberalised. For example, the Moroccan Protocol established a transitional period for Morocco which must lead to the liberalisation of 70% of imports from the EU in terms of value over a period of ten years. The EU, on the other hand, immediately liberalised 55% of its imports from Morocco. However, for the most sensitive products, trade will not be fully liberalised.⁸ The protocol basically keeps seasonal tariff-rate quotas (TRQs) and minimum entry prices for sensitive Moroccan agriculture products such as tomatoes. Moreover, in April 2014, a unilateral modification of the calculation method of the entry prices to the EU market of fruits and vegetables caused a row between the EU and Moroccan authorities, but this conflict is now settled.⁹

Also in the area of agriculture, the EU signed a Fisheries Partnership Agreement with Morocco in 2006, which forms part of the EU-Morocco EMAA.¹⁰ Its protocol gave EU vessels certain fishing rights in Moroccan waters in return for financial assistance. However, the European Parliament refused to renew the protocol in 2011 as it argued that it had a low cost-benefit ratio, that it did not guarantee the sustainability of the stocks exploited and that it did not respect international law since it was not clear whether the agreement benefited the population of the disputed Western Sahara region (European Parliament, 2011). The European Parliament called on the Commission to negotiate a new, more environmentally and economically beneficial deal, which should take account of the interests of the Sahrawi population. Following a lengthy negotiation process, a new protocol approved by the European Parliament and the Council was signed at the end of 2013 (entered into force in 2014).¹¹ The new protocol addresses the European Parliament's concerns over the cost-benefit ratio, through increased fishing opportunities for a reduced EU financial contribution (€30 million per year, of which €16 million is for access rights and €14 million for developing Moroccan fisheries policy) and it also undertakes to promote sustainable and responsible fishing. However, the references to human rights and the interests of the Sahrawi population are still very limited.¹²

It has to be noted that the legality of both the Agricultural Agreement and the latest Fisheries Protocol with Morocco is being challenged before the European Court of Justice by the Front Polisario – the National Liberation Movement of the Western Sahara.

7 For the text of these agricultural agreements with the EMAA partners, see *OJ*, 2012, L 241/4 (Morocco); *OJ*, 2011, L 328/5 (Palestinian Authority of the West bank and the Gaza Strip); *OJ*, 2010, L 106/41 (Egypt); *OJ*, 2006, L 43/3 (Jordan); *OJ*, 2009, L 313/83 (Israel).

8 The degree of market opening varies between the different agreements. For example, in the agreement with Palestine the EU gives full duty-free access to the EU market for all agricultural products (but the entry price system still applies).

9 In order to improve the transparency of the customs duty collection of tomatoes under the entry price system, the method to calculate the Standard Import Value (SIV) was updated to take into account the increasing broader selection of specialty varieties (e.g. cherry tomatoes), generally of higher value. See the Commission Statement on tomato import rules on 20 June 2014, http://ec.europa.eu/agriculture/newsroom/166_en.htm

10 For the text of the Agreement, see *OJ*, 2006, L 141.

11 For the text of the Protocol, see *OJ*, 2013, L 238.

12 With regard to human rights, the protocol states that it has to be implemented in accordance with the essential element clause of the EMAA (Art. 2). There are no specific provisions concerning the impact of the protocol on the local population of the Western Sahara.

With regard to the Agricultural Agreement, the Front Polisario sought to annul the EU Council Decision concluding the agreement as it argued that it violated EU law and international law by including the Western Sahara under the ambit of the agreement. Eventually, the General Court annulled on 10 December 2015 in *Frente Polisario v Council* (Case T-512/12) the Council Decision concluding the Agricultural Agreement insofar as it approves the application of the agreement to the Western Sahara. The Court recognised that there is no “absolute prohibition” for the EU to conclude international agreements with a third country which could lead to the application of that agreement in a territory controlled by that third State, without the sovereignty of the third State over that territory being internationally recognised.¹³ Moreover, the Court acknowledges that the Council has a broad power of appreciation in signing international agreements. However, the Court ruled that the Council had the duty to consider, prior to the adoption of the agreement, the possible consequences of the implementation of the agreement. This includes, in an agreement applicable to a non-self-governing territory, an assessment of its effects over the fundamental rights of the population of that territory. The Court stated that the Council had to ensure that “there is no evidence of exploitation of the natural resources of the territory of Western Sahara under Moroccan control to the detriment of its inhabitants and violating their fundamental rights.”¹⁴ For the Court it is of no importance that the EU will not be directly responsible for such violations: “if the EU allows exports to its Member States of products originating in that country that were manufactured or produced under conditions that violate the fundamental rights of the population of the territory from which they come, it might indirectly encourage such violations or benefits therefrom.”¹⁵ In other words, the Court partially annulled the Council Decision concluding the agricultural agreement because the Council failed to fulfil its duty to ensure that the agreement does not “indirectly encourage” violations of fundamental rights, and that the EU does not benefit from them.¹⁶ This ruling clearly upset the Moroccan Government, which “expressed its astonishment” on the outcome of this case.¹⁷ This issue was also the subject of discussion during the latest EU-Morocco Association Council meeting of 14 December 2015 (Council of the European Union, 2015a).¹⁸ The same day, the Council also decided to lodge an appeal against this judgment of the EU General Court and also “agreed that an application should be made for interim measures in the form of suspension of the operation of the judgment of the General Court” (Council of the European Union, 2015b). The agreement is still valid under international law, as the judgement only annuls the Council Decision concluding the agreement “insofar as it applies to the Western Sahara.” The appeal was lodged on 19 February 2016 by the Council, but this appeal will have no suspensory effects on the judgement of the General Court. Despite the EU’s “quick reaction” by deciding

¹³ *Frente Polisario v. Council*, Case T-512/12, para. 146.

¹⁴ *Ibid.*, para 241.

¹⁵ *Ibid.*, para 231 and 228.

¹⁶ On this argument, and for an interesting comment on this case, see G. Vidigal in EJIL Analysis, 11 December 2015, <http://www.ejiltalk.org/13901-2/>

¹⁷ Press release of the Ministry of Foreign Affairs of Morocco, 11 December 2015, (https://www.diplomatie.ma/Portals/26/Press%20Release/2015/Communique_Cour_UE_Ang.pdf)

¹⁸ Press release on the 13th meeting of the EU-Morocco Association Council, 14 December 2015.

unanimously to appeal against the judgement of the General Court, the Moroccan Government again expressed on 24 February 2016 its “total rejection” of the judgement and even suspended all contacts with the EU (cf. *infra*) (Déclaration de M. le ministre, 2016). The case brought by Front Polisario against the Council seeking to annul the Council Decision concluding the latest Fisheries Protocol is still pending.¹⁹

The EU and Morocco also concluded negotiations in January 2015 on an agreement to mutually protect their Geographical Indications (GIs) in the area of agri-food products (European Commission, 2016). Once approved by the Council and European Parliament, this agreement will provide a higher level of protection than that provided under the TRIPS agreement as it will protect names against any direct or indirect commercial use, any misuse, imitation or evocation of the product, any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product or any other practice liable to mislead the consumer as to the true origin of the product. The agreement covers 30 Moroccan GIs and about 3,000 EU GIs.²⁰

The negotiations on further liberalisation of agricultural, processed agricultural and fisheries products with Tunisia were put on hold as the Parties could not agree on the scope of further market opening. However, after the terrorist attacks in Sousse on 26 June 2015, the EU decided as a support measure to boost the Tunisian economy to import 70,000 tonnes of Tunisian olive oil (Tunisia’s main agricultural export). The EU offers a temporary, unilateral duty free tariff rate quota of 35 000 tonnes annually (70,000 in total) for Tunisia’s exports of olive oil, in the form of autonomous trade measures. Such a quota will be made available for a period of two years, from 1 January 2016 until 31 December 2017. This additional volume will be opened once the existing duty free tariff rate quota of 56,700 tonnes, enshrined in the EMAA, is exhausted. This measure was approved by the European Parliament on 25 February 2016 but to meet concerns of the EU olive producers, MEPs inserted additional safeguards, such as a mid-term assessment which gives the Commission the competence to adopt an implementing act in order to introduce corrective measures if it turns out that they harm EU olive oil producers and a “tracking clause” obligation which has to ensure that all olive oil under the quota is obtained entirely in, and transported directly from, Tunisia (European Parliament, 2016a).

Dispute Settlement Protocols

Another batch of trade-related Protocols that has been concluded to strengthen the legal framework of the EMAA FTAs relates to dispute settlement. For disputes relating to the application or interpretation of its provisions, the EMAAs initially included only a standard

¹⁹ *Front Polisario v. Council*, Case T-180/14, pending.

²⁰ For an overview of the Moroccan GIs to be protected by agreement, see *OJ*, 2013, C 232.

diplomatic dispute settlement procedure. The Association Council could settle disputes by means of a binding decision, which required consensus between the two Parties, and the arbitration procedure was very weak (e.g. the agreement of both Parties was needed and it lacked procedural deadlines and binding rules for compliance with the arbitration ruling).²¹ Following a 2006 Council Decision which authorised the Commission to open negotiations with the EU's EMEA partners to establish a dispute settlement mechanism (DSM) related to the EMEA trade provisions, dispute settlement protocols have been concluded with Tunisia, Jordan, Egypt, Lebanon and Morocco.²² Similar to the dispute settlement mechanisms included in other recent EU FTAs, these DSM Protocols establish a quasi-judicial model of trade adjudication, reflecting the procedures of the WTO Dispute Settlement Understanding (DSU). These new DSMs foresee that if the parties have failed to resolve the dispute by recourse to consultations, the complaining party may request the establishment of an arbitration panel which shall rule on the dispute. An important difference with the previous standard diplomatic DSMs is that either side has the right to establish an arbitration panel and that one party cannot block the initiation of arbitration proceedings by refusing to appoint its arbitrator. Rulings of the arbitration panel shall be binding and each party must take the necessary measures to comply with them. If the party complained against fails to take such measures to comply with the ruling without offering a temporary compensation, the other party is entitled to suspend obligations arising from the EMEA's trade provisions "at a level equivalent to the nullification or impairment caused by the violation." Although these procedures look nice on paper, it has to be mentioned that in practice these are very rarely used.

Services and Establishment

In 2008 bilateral negotiations were also launched with Morocco, Egypt, Israel and Tunisia to further liberalise trade in services and establishment, as foreseen in their respective EMEA FTAs (cf. supra).²³ However, these negotiations have been unsuccessful as the EU and its Mediterranean partners could not agree on the scope of increased market access. Whereas the EU has a comparative advantage in GATS mode 1 (cross-border supply) and 3 (commercial presence), the Mediterranean Partner Countries have interests in liberalisation of modes 2 (consumption abroad, e.g. tourism) and mode 4 (presence of natural persons). Nevertheless, reaching an agreement has appeared to be impossible and the negotiations have been put on hold. However, Jordan, Morocco and Tunisia have agreed to continue services and establishment liberalisation in the framework of the DCFTA negotiations. It is expected – or hoped – that an agreement on services can now be found in the broader context of the DCFTA negotiations as the coverage of these trade talks is much wider, and that trade-offs with other sectors are possible.

21 See, for example, Art. 86 Morocco Association Agreement.

22 For texts, see Tunisia (*OJ*, 2010, L 40/75); Jordan (*OJ*, 2011, L 177/1), Egypt (*OJ*, 2011, L 138/2); Morocco (*OJ*, 2011, L 176/2) and Lebanon (*OJ*, 2010, L 238/20).

23 Already in July 2004 the Euro-Mediterranean partners adopted the Istanbul Framework Protocol, which was a non-binding framework to be used as a basis for the liberalisation of trade in services.

**2. Towards the Mediterranean DCFTAs:
“Deep” and “Comprehensive” FTAs?**

2.1. Key Principles of the DCFTAs

As mentioned above, the concept of “DCFTAs” was developed in the framework of the ENP. The first Commission Communication on the ENP contained the vague objective to offer the ENP partners “a stake in the EU’s Internal Market” and further integration and liberalisation to promote the free movement of the four freedoms (European Commission, 2003, p. 10). These objectives were further developed and in 2006 the Commission proposed to conclude “deep and comprehensive free trade areas (DCFTAs)” with the ENP partners (European Commission, 2006a). According to the Commission, these DCFTAs have to go beyond traditional FTAs – which mainly address tariffs and quotas for trade in goods – by covering substantially all trade in goods and services, addressing non-tariff barriers and including legally binding commitments on legislative approximation which will contribute to the gradual integration of the partner countries into the EU Internal Market. The concept of these ENP DCFTAs was largely inspired by the 2006 Global Europe Strategy (European Commission, 2006b). This strategy proclaimed the ambition of the EU to conclude a new generation of FTAs with the key trade partners, which are “comprehensive and ambitious in coverage, aiming at the highest degree of trade liberalisation including far-reaching liberalisation of services and investment.”²⁴ In this strategy the Commission identified two *economic* criteria (i.e. market potential and the level of protection against EU export interests) to identify (potential) FTA partners. Considering that the ENP countries only count for around 7.5% of the total EU external trade (1.9% for the EaP countries and 5.5 for the Mediterranean countries) (European Commission, 2015a), it is no surprise that these countries were not identified, pursuant to the Global Europe’s “economic” criteria as a priority for the EU trade agenda. Instead, as noted above, the DCFTAs are mainly developed as an instrument to achieve the ENP’s political objectives, i.e. the promotion of security, stability and prosperity beyond the EU’s borders. Moreover, the ENP DCFTAs also differ from other recent EU FTAs as these agreements aim to gradually integrate the partner countries in the EU Internal Market on the basis of legislative approximation. Such an ambitious level of economic integration is not envisaged in any other EU FTA.

Now what is a “Deep” and “Comprehensive” FTA and what is the difference with a traditional FTA? The “comprehensive” dimension of the DCFTAs implies that these trade agreements aim to have a broad range, covering all relevant trade(-related) areas and going beyond mere tariff-dismantling of trade in goods. Therefore, the ENP DCFTAs do not only envisage mutual market opening for trade in goods, but also to gradually liberalise services and to include ambitious provisions related to TBT, IPR, SPS, public procurement, competition, energy, and so on. As such, the comprehensive character of

²⁴ New trade strategies were adopted in 2010 (i.e. “Trade, Growth and World Affairs. Trade Policy as a Core Component of the EU’s 2020 Strategy”, COM (2010) 612, 9 November 2010) and 2015 (“Trade for all”, (http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf))

the DCFTAs is not revolutionary as, in the light of the Global Europe Strategy, all the recent EU FTAs have such a broad scope.

The “deep” dimension of the DCFTAs refers to the process of integration into the EU Internal Market on the basis of legislative approximation. As will be explained below, the DCFTAs (will) include binding legislative approximation commitments that oblige the partner country to implement in its domestic legal order a selection of EU secondary legislation. These provisions not only aim to tackle non-tariff barriers but also to create a common legal space. The goal is to create a level playing field with uniform rules for economic operators, based upon EU Internal Market rules. In the words of former Trade Commissioner Karel De Gucht, by approximating to the EU acquis as foreseen in the DCFTAs “local manufacturers will meet the EU standards and norms simply by respecting their own rules and regulations.” Moreover, the Commission argues that the EU’s legislation offers a blueprint for economic reforms, which can lead in the long term to a stable legal environment for businesses that can attract more foreign direct investments. The specific objective of the DCFTAs to “integrate” the partner country into the EU Internal Market on the basis of binding legislative approximation clauses is unique. In no other FTA concluded by the EU does the partner country make a binding commitment to approximate to a predetermined selection of EU acquis in order to obtain (additional) market access. Obviously, such an ambitious form of liberalisation or economic integration is only feasible with countries with a smaller economy – in transition – who have less to gain from setting their own standards and who mainly trade with the EU due, for example, to geographical proximity. On top of this economic rationale, the partner countries must also politically be willing to liberalise trade relations in such a “deep and comprehensive” way and to partly give up the right to regulate their own economy. Whereas the ENP countries fall in this category, larger developed trade partners of the EU (e.g. TTIP with the USA or CETA with Canada) do not.

2.2 State of Play

As just mentioned, within the context of the ENP, the EU initially (in 2006) proposed to negotiate DCFTAs only with the eastern ENP countries. In the policy framework of the EaP, DCFTA negotiations were launched – as a part of overall talks on new Association Agreements – with Ukraine in 2008 and with Moldova and Georgia in 2012. The three EaP Association Agreements were signed in 2014. Although the EMAA FTAs were broadened through sectoral agreements and protocols (cf. supra), even these “broadened” EMAA FTAs are still a far cry from the three EaP DCFTAs. It was only after the Arab Spring that DCFTAs were offered to the Mediterranean partners as “an

economic and trade answer” to the revolutionary developments in the region (Lannon, 2014). The Council adopted negotiating directives for DCFTAs with Morocco, Jordan, Egypt and Tunisia in December 2011. Several reasons explain why only these four countries were selected for the conclusion of DCFTAs. First, they are all WTO members, a *conditio sine qua non* for the EU to launch (DC)FTA negotiations.²⁵ Second, these countries already made progress in sub-regional economic integration, which was a key objective of the Barcelona Declaration. They are all parties to the 2004 Agadir Agreement and have each concluded several bilateral FTAs with other Mediterranean partners. However, despite these different “south-south FTAs”, trade among the different southern Mediterranean countries remains very limited.²⁶ Third, they were perceived – at that time – as having implemented sufficient economic and political reforms, including the bilateral ENP Action Plans. For example, Morocco and Jordan obtained in the context of the ENP an “advanced status” and Tunisia a “Privileged Partnership”, reflecting the ambition to strengthen bilateral cooperation with the EU and to further support economic and political reforms.

Meanwhile, negotiations have only been launched with Morocco and Tunisia. Those with Morocco started in March 2013, but despite considerable progress on most chapters during the first four negotiation rounds Morocco insisted on introducing a break in July 2014. Before continuing the trade talks, the Moroccan government wants to assess the results of its own new sectoral impact assessments, which were called for by the Moroccan civil society, fearing negative impacts on key sectors of their economy and the government’s ability to regulate economic and social sectors.²⁷ Moreover, the relaunch of the negotiations is further complicated through the judgment of the General Court on 10 December 2015 on the Agricultural Agreement (cf. supra). In an official press release the Moroccan government “rejected totally the judgement” and “denounced its political character, its unfounded arguments, its biased reasoning and its conclusions contrary to international law.” Moreover, Morocco stated that it will not accept “to be treated as a mere object of a judicial procedure, neither to be buffeted between different services and institutions of the EU.” Therefore, “until receiving the proper explanations and the necessary guarantees from the EU, the Government [of Morocco] has decided to suspend all contact with the EU institutions” (Déclaration de M. le ministre, 2016). Therefore, the DCFTA negotiations will not be relaunched as long as this issue is not settled and Morocco maintains this position. The EU reacted in a statement declaring that it is “prepared to provide further clarification and assurances on response to Morocco’s concerns in order to fully re-establish contact and cooperation as soon as possible” (European External Action Service, 2016). However, it seems unlikely that Morocco will soften its stance before the judgement on the appeal comes out. With

25 Several Mediterranean ENP countries are still not WTO members: Lebanon, Syria, Libya and Algeria.

26 Intra-regional trade in the southern Mediterranean is a small fraction (5.9% in exports, 5.1% in imports) of the countries’ total trade, one of the lowest levels of regional economic integration in the world (European Commission, <http://ec.europa.eu/trade/policy/countries-and-regions/regions/euro-mediterranean-partnership/>)

27 For the Commission’s impacted assessments of the DCFTAs with the Mediterranean countries, see <http://ec.europa.eu/trade/policy/policy-making/analysis/sustainability-impact-assessments/assessments/#study-12>

Tunisia negotiations were launched in October 2015. In the first round of negotiations “discussions remained preliminary but were also open and constructive based on the already existing good cooperation on many of the areas to be covered by the future DCFTA” (European Commission, 2015b). The next negotiation round is expected in the spring of 2016. In February 2016, the European Parliament also expressed its strong support for the Tunisian DCFTA in a resolution and urged the Commission to negotiate “a progressive and asymmetrical agreement which takes account of the significant economic disparities between the parties, to demonstrate flexibility, responsiveness, openness to innovation, transparency and adaptability in the negotiations, and to bear in mind that the agreement must benefit the economies and societies of Tunisia and the EU” (European Parliament, 2016b). With Jordan the EU is finalising its scoping exercise, i.e. a process in which both parties explore the possible scope and ambitions of the potential trade deal. The EU and Jordan still need to agree on several technical issues (such as on IPR and public procurement) before DCFA negotiations can be launched. A DCFTA scenario has become very unlikely for Egypt considering its fragile post-Arab Spring political climate.

3. The (Potential) Scope and Contents of the Tunisia and Morocco DCFTAs: Lessons from the Eastern Experience

In order to explore the potential scope and contents of the envisaged DCFTAs with Morocco and Tunisia, the DCFTAs already signed with the Eastern ENP countries (i.e. Ukraine, Moldova and Georgia) are a useful point of reference. Both groups of DCFTAs are developed in the same ENP policy framework and have the same objective to be “deep” and “comprehensive” and to gradually integrate the partner countries into the EU Internal Market on the basis of legislative and regulatory approximation. Moreover, during the first DCFTA negotiations with Ukraine, the Council explicitly stated that certain aspects of the EU-Ukraine DCFTA “can serve as a model for other ENP partners in the future” (Council of the European Union, 2007) and Commission officials confirmed that the Council’s negotiating directives for the Mediterranean DCFTAs are very similar to those adopted for the EaP countries.²⁸

Nevertheless, there are obvious political and economic differences between the relationships of these two groups of countries with the EU. The Mediterranean partners are not eligible for EU membership and do not have EU accession ambitions.²⁹ Consequently, they will be less eager to make far-reaching and demanding commitments, such as approximation to huge chunks of the EU acquis. The three EaP countries have done so in their respective DCFTAs partly to substantiate their – sometimes inconsistent and ambiguous – EU membership aspirations. The starting point for economic integration is also completely different. Whereas the three EaP countries immediately jumped from limited non-preferential Partnership and Cooperation Agreements (concluded in the early nineties) to ambitious DCFTAs, the Mediterranean countries already have in place a basic legal framework for trade liberalisation with the EU in the form of the EMAA FTAs and their different sectoral protocols. This implies that the increased market access, as a result of the DCFTAs, will be much smaller for the Mediterranean countries. The easiest part is already liberalised with the EMAA countries (e.g. trade in industrial goods and non-sensitive agricultural products) and the difficult left-overs now remain (e.g. services and establishment). Another important difference is that the DCFTAs with the 3 EaP partners were an integral part of new ambitious Association Agreements. These EaP Association Agreements also include an important title on economic and sectoral cooperation. This title covers several policy areas which will be incremental for the implementation of the DCFTAs such as company law, environment, transport, industry and enterprise policy and taxation, including binding legislative approximation commitments. These sectoral issues are not – or hardly – covered in the EMAAs.³⁰ Most likely, the Mediterranean DCFTAs will be added as a Protocol to the existing EMAAs and replace the trade-related provisions of these Association Agreements. Thus, the EMAAs will remain the overall legal framework for political dialogue and economic cooperation.

²⁸ Interviews with officials of the European Commission, June 2015 and February 2016.

²⁹ Morocco applied in 1987 to join the European Economic Community but its application was rejected on the ground that Morocco is not a European country.

³⁰ See, for example, Title V of the Morocco EMAA.

3.1 The Potential Comprehensive Dimension

As explained above, the comprehensive dimension of the DCFTAs implies that these trade deals will not only cover trade in goods, but will also tackle all other relevant trade-related areas including trade in services, public procurement, competition, IPR, and so on. In order to fully grasp the comprehensive dimension of the DCFTAs, the table of contents of the Ukrainian DCFTA is copied below (Table 1). The structure of the Mediterranean DCFTAs will be very similar, but there will be some differences. For example, the Moroccan DCFTA will presumably not cover a chapter on tariff-reduction for goods as the EU-Morocco EMAA already liberalised trade in industrial goods and the 2012 Agricultural Agreement created further market opening for agricultural and fisheries products. Although the Moroccan side would like to further increase its preferential access to the EU market (for example, reduce or eliminate the existing TRQs on several sensitive products such as tomatoes), the EU side is very reluctant to put agricultural products on the negotiation table again. It seems that the current Agricultural Agreement is as far as the EU is willing to go at this stage. However, for Tunisia there is still some room to negotiate because it did not manage to conclude such an Agricultural Agreement with the EU. The Commission has stated that the Tunisia DCFTA “will notably provide for further liberalisation of trade in agriculture” (European Commission, 2015c) and the earlier negotiations on agricultural products will be incorporated into the DCFTA talks. However, it is already clear that further liberalisation of agricultural products with Tunisia will not be a walk in the park as southern EU member states (and a large group of their MEPs) want to avoid increased competition of agricultural products from the southern Mediterranean. By way of illustration, in January 2016 the Committee on Agricultural and Rural Development of the European Parliament adopted an Opinion on the Commission’s proposal for a temporary additional duty-free TRQ on Tunisian olive oil (cf. supra), stating that these measures “cannot serve as a precedent in negotiations between the Union and Tunisia on the establishment of a Deep and Comprehensive Free Trade Area (DCFTA)” (European Parliament, 2016c). In a resolution on the Tunisia DCFTA, the European Parliament stated in February 2016 that “the EU and Tunisia have everything to gain from better reciprocal access to their agricultural markets,” but added that the EU and Tunisia should take into account “the fact that there are several sensitive agricultural products on both sides of the Mediterranean, for which exhaustive lists will have to be agreed upon in the negotiation process, and to provide for transitional periods and appropriate quotas for these sensitive products, or even their exclusion from the negotiations” (European Parliament, 2016b).

Another difference between the Eastern and Mediterranean DCFTAs with regard to their comprehensive dimension relates to investment liberalisation and protection, which is

not included in the EaP DCFTAs.³¹ The TTIP negotiations on investment liberalisation and protection have triggered a heated debate in the EU about fairness and the need to preserve the right of public authorities to regulate their economies. This debate has led to new Commission proposals on investment protection for the TTIP negotiations and other envisaged EU FTAs.³² In the light of these new proposals the Commission will most likely propose in the Mediterranean DCFTAs a text which includes market access, national treatment and MFN obligations related to investors of the other Party (including their investments), subject to several reservations. With regard to investment protection, the Commission will insist on precise standards and definitions related to, *inter alia*, expropriation, fair and equitable treatment (FET), the right to regulate and to achieve legitimate policy objectives and the prohibition of (indirect) expropriation. In line with the Commission's TTIP proposals for the resolution of investment disputes – already used in the EU-Vietnam FTA and the EU-Canada CETA –,³³ the Commission will abandon the old investor-state dispute settlement (ISDS) and propose instead a public Investment Court System composed of a tribunal of first instance and an appeal tribunal operating like traditional courts with publicly appointed judges, including a strict code of conduct and ethical requirements. Whether Tunisia and Morocco will accept such a far-reaching dispute mechanism remains to be seen.

A final structural difference with the EaP DCFTAs is that those envisaged with Tunisia and Morocco do not need a new DSM for trade-related disputes (with the notable exception for disputes related to investment – cf. *supra*). As explained above, the EU has already concluded a Protocol with Tunisia and Morocco establishing an elaborate DSM for trade disputes. These DSMs, which are almost identical to those included in the EaP DCFTAs, can also apply for the disputes related to the interpretation and application of the envisaged DCFTAs. However, these two DSM Protocols will need to be updated to include a mechanism for disputes related to the interpretation of EU legislation, included in the DCFTAs (cf. *infra*).

Table 1. Table of Contents EU-Ukraine DCFTA

1. Market access for goods and National Treatment	9. Intellectual Property
2. Trade Remedies	10. Competition
3. Technical Barriers to Trade	11. Trade-Related Energy
4. Sanitary and Phytosanitary Measures	12. Transparency
5. Customs and Trade Facilitation	13. Trade and Sustainable Development
6. Establishment, Trade in Services and Electronic Commerce	14. Dispute Settlement
7. Current Payments and Movement of Capital	15. Mediation Mechanism
8. Public Procurement	

31 The EaP DCFTAs do not include such a chapter as the Council's negotiation mandate for these agreements was adopted before the Lisbon Treaty entered into force, which brought investment protection in the realm of the EU's exclusive Common Commercial Policy.

32 See, for example, the EU's proposal for investment protection and Court System for TTIP, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1396>

33 For the text of the investment chapter in the EU-Vietnam FTA, see http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf. In February 2016 the EU and Canada agreed to include the EU's new approach on investment protection and investment dispute settlement in CETA, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1468>

3.2 The Potential Deep Dimension of the DCFTAs

Legislative Approximation and Market Access Conditionality

Whereas the comprehensive scope will be very similar in the two groups of DCFTAs, the deep dimension will be different. In order to gradually integrate into the EU Internal Market, Ukraine, Moldova and Georgia made far-reaching commitments to approximate to sections of the EU acquis. Several chapters of the EaP DCFTAs include binding legislative approximation provisions which oblige the partner country to approximate to a predetermined selection of EU legislation, annexed to the agreement. These commitments go beyond the vague “best endeavour” approximation clauses included in the EMAAs (cf. supra). Moreover, in several chapters of the EaP DCFTAs, implementation of these legislative approximation commitments is linked with increased market access. This *market access conditionality* implies that the partner countries have to first implement the annexed EU acquis in their domestic legal order, within a certain time span. The implementation of these approximation commitments will be monitored by the European Commission and, following a positive assessment, the EU will grant a specific type of additional market access to the EaP partner by way of a decision of the Association Council or another joint body.

These legislative approximation obligations are in the EaP DCFTAs also flanked by mechanisms to ensure the uniform interpretation and application of the annexed EU acquis. In order to (partially) integrate into the EU Internal market, it is crucial that the partner countries interpret and apply as uniformly as possible the EU acquis, annexed to the DCFTA. Although the EaP DCFTAs do not go as far as the European Economic Area (EEA), which includes the objective of a “homogeneous” interpretation of the EU Internal market acquis, the DCFTAs include several mechanisms which envisage a uniform interpretation and application of the annexed EU acquis. Not only do several DCFTA chapters contain dynamic mechanisms to update the annexed EU legislation in order to catch-up with relevant legislative developments at the EU-level, in several areas the partner countries are also obliged to interpret the annexed EU legislation in conformity with the relevant case-law of the ECJ.³⁴ In addition, the DSM of these EaP DCFTAs includes a unique preliminary ruling procedure to the Court of Justice of the European Union (CJEU) for disputes related to the interpretation of the annexed EU legislation.³⁵ In order to ensure the uniform interpretation of the annexed EU acquis and to guarantee the CJEU's exclusive competence to interpret EU law, the arbitration panel established by the DCFTA DSM is in the case of such a dispute obliged to ask the CJEU for a binding interpretation. A similar procedure will have to be incorporated into the DSM Protocols concluded with Tunisia and Morocco.

³⁴ For a detailed analysis of these mechanisms, see Van der Loo, G. (2016). *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: a new legal instrument for EU integration without membership?* Boston/Leiden: Brill Nijhoff.

³⁵ See, for example, Art. 322 EU-Ukraine AA.

Obviously, these approximation obligations, including the different procedures to ensure the uniform interpretation and application of the EU acquis, are very far-reaching from an economic integration and sovereignty point of view. It implies that the partner countries lose to a certain extent the right to regulate their economy in order to (partially) integrate into the EU Internal Market. The three EaP countries agreed to such demanding commitments not only out of economic reasons, but also because this served their EU accession ambitions. Because Morocco, Tunisia and the other Mediterranean ENP countries are not eligible for EU membership and have no accession ambitions, these countries will be much more reluctant to make similar commitments vis-à-vis the EU acquis. Two areas where “deep” integration into the EU Internal market is realised in the EaP DCFTAs and which could be taken over in the Morocco and Tunisia DCFTAs is TBT and services.

Technical Barriers to Trade

The Tunisia and Morocco DCFTAs will aim to reduce obstacles to trade arising from technical barriers to trade (TBT), i.e. the preparation, adoption and application of technical regulations, standards and conformity assessment procedures as defined in the WTO TBT agreement. Just as in the EaP DCFTAs and other recent EU FTAs, this chapter will include provisions on the affirmation of the WTO TBT agreement, rules on marking and labelling of products and cooperation in the field of technical regulations, standards, metrology, market surveillance, accreditation and conformity assessment procedures. However, the EaP DCFTAs go a step further by including a strict form of market access conditionality: only after implementing a selection of EU TBT-related legislation the 3 EaP countries will be offered additional access into the EU Internal Market by the conclusion of an Agreement on Conformity Assessment and Acceptance of Industrial products (ACAA). The 3 EaP countries are essentially obliged to approximate to the EU’s New Approach Directives which are currently being updated by the new legislative framework.³⁶ These Directives define on the one hand (by product group) the “essential requirements” related to health, safety and environment issues that products placed in the EU market have to meet (i.e. sectoral Directives) and, on the other, how the institutional framework related to accreditation, market surveillance, conformity assessment, and verification of product safety should be organised (i.e. horizontal Directives). In addition, they have to progressively transpose the corpus of European standards, the voluntary use of which shall be presumed to be in conformity with the essential requirements of the New Approach Directives. Moreover, the three EaP countries have to withdraw conflicting national standards and fulfil the conditions for membership of the European Standardisation Organisations. The EU will only conclude an ACAA if it concludes, after a monitoring procedure, that the three EaP partners have

³⁶ On the New Legislative Framework, see http://ec.europa.eu/growth/single-market/goods/new-legislative-framework/index_en.htm

sufficiently implemented these approximation commitments. An ACAA is a kind of a mutual recognition agreement (MRAs) which foresees mutual recognition of regulatory and verification procedures for industrial products. By concluding an ACAA the parties agree that industrial products listed in the Annexes of an ACAA, fulfilling the requirements for being lawfully placed on the market of one party, may be placed on the market of the other party without additional testing and conformity assessment procedures, thus leading to a partial “integration” into the EU Internal Market. At the same time, the level of health and safety protection existing in the EU would not be compromised as the partner country has first aligned its national legislation and institutional framework to the EU’s system.

Tunisia and Morocco also envisage the conclusion of an ACAA with the EU.³⁷ Their EMAAs now include a vague provision stating that they will align with relevant EU rules and practices in the area of standardisation, conformity assessment and metrology. However, a specific selection of EU legislation is not identified, nor is there an explicit link with the conclusion of an ACAA.³⁸ Therefore, their respective DCFTAs will have to include more detailed provisions such as an Annex including a specific selection of EU legislation (such as the sectoral and horizontal New Approach Directives) and a timeframe for implementation. Moreover, there will have to be a clear link with the conclusion of an ACAA. The Association Council or another joint body will need to have the competence to agree on the scope of the ACAA and to add it as a protocol to the EMAA FTA/DCFTA. Whether Tunisia or Morocco will agree to a far-reaching form of market access conditionality such as those enshrined in the EaP DCFTAs, including strict monitoring procedures from the EU, is difficult to predict. In any case, as the legislative and institutional requirements for the conclusion of an ACAA are so demanding, it will be crucial for Tunisia and Morocco to prioritise specific sectors that they (first) want to see covered by an ACAA, instead of aiming at an immediate and full approximation to all the vertical and horizontal New Approach Directives. Prioritising is possible because an ACAA consists of a framework agreement, providing for the recognition of equivalence of the conformity assessment and accreditation procedures, and one or more annexes setting out the different product areas covered. Tunisia and Morocco should clearly identify those sectors where they have a comparative advantage to export to the EU and where it makes sense to align with the relevant EU sectoral Directives. Tunisia has already identified electronic and electrical products and construction materials as priority sectors, whereas Morocco pursues an ACAA covering low voltage equipment, construction materials, toys and electronic products.³⁹

Services and Establishment

With regard to establishment, the Tunisia and Morocco DCFTAs will aim to provide for national treatment and MFN treatment. This means that the EU and Morocco/Tunisia will

³⁷ The EU has concluded an ACAA with Israel. However, this ACAA only covers good manufacturing practice (GMP) for pharmaceutical products (for text, see *OJ*, 2013, L 1).

³⁸ Article 51 EMAA Morocco.

³⁹ See, for example, the 2015 ENP Progress Reports of Tunisia and Morocco (SWD[2015] 73 and SWD[2015] 70).

have to grant as regards the establishment and operation of subsidiaries, branches and representative offices of legal persons of the other party, treatment no less favourable than that accorded to its own legal persons, branches and representative offices or to any third-country legal persons, branches and representative offices, whichever is the better. However, for several economic activities both the EU and Tunisia/Morocco will have reservations that restrict national treatment or MFN treatment, (partially) replicating several of the parties' reservations under the GATS. The list of EU reservations will be complicated due to the fact that it includes both EU-wide and member state-specific reservations. Remarkably, in the EaP DCFTAs these reservations were listed in a negative list. This means that the EU and EaP partners will liberalise all sectors (i.e. the default position), except for those listed in an Annex where reservations apply. A positive list on the other hand, traditionally used by the EU, includes only the service sectors which are being liberalised and, by means of reservations, the market access and national treatment limitations. Most likely, the EU will pursue a positive list for the Mediterranean DCFTAs.⁴⁰

The section on Cross-Border Supply of Services will cover the supply of a service (i) from the territory of a party into the territory of the other party (GATS Mode 1) and (ii) in the territory of a party to a service consumer of the other party (GATS Mode 2). The EU and Morocco/Tunisia will have to accord services and service suppliers of the other party market access and national treatment, but both parties will again apply reservations. In the sectors where market access commitments are undertaken, the EU and Tunisia/Morocco will not be able to (i) limit the number of service suppliers, (ii) limit the total value of service transactions or assets in the form of quotas or the requirement of an economic needs test, and (iii) limit the total number of service operations or the total quantity of service output by quotas or the requirement of an economic needs test.

This section on temporary presence of natural persons for business purposes will cover measures of the parties concerning the entry into and temporary stay in their territory of categories of natural persons for business purposes (GATS mode 4) such as key personnel, graduate trainees, business sellers or independent professionals and contractual service suppliers. The EU and Morocco/Tunisia will have to allow the entry and temporary stay of these different categories of persons; however, they will again insist on several reservations. As mentioned above, Morocco and Tunisia will be particularly interested in obtaining concessions in this area. However, EU member states are traditionally reluctant to engage in GATS mode 4 liberalisation because of broader policy concerns relating to migration and access to their labour market.

40 A notable exception to the EU's positive list approach is the EU-Canada CETA, which also uses a negative list. However, in a resolution on the EU-Canada CETA, the European Parliament stated that the Commission's choice to include a negative list in the CETA "should be seen as a mere exception and not serve as a precedent for future negotiations" (European Parliament resolution of 8 June 2011 on EU-Canada trade relations, P7_TA(2011)0257). In its resolution of 25 February 2016 (see footnote 31), the European Parliament also called for a positive-list approach.

Finally, the services and establishment chapter will include a section on “Regulatory framework”. This section will tackle regulatory barriers to trade in those service sections where the parties have made specific commitments. For example, some basic rules for licensing will be defined (i.e. the process through which a service supplier or investor is required to obtain a license from a competent authority before being allowed to supply a service). Presumably, similar to other EU FTAs, the DCFTAs with Morocco and Tunisia will require that licensing and licensing procedures proceed in a clear, transparent and pre-established manner and that it is proportionate to a legitimate public policy objective. Moreover, judicial, arbitral or administrative tribunals or procedures have to be established to review licensing decisions.

Whereas the establishment and service sections described above are included in every recent EU FTA, the EaP DCFTAs (especially the one with Ukraine) provide for a unique form of partial integration into the EU Internal Market on the basis of legislative approximation. For 4 service sub-sectors, i.e. (i) Postal and Courier Services, (ii) Electronic Communications, (iii) Financial Services and (iv) International Maritime Transport, Ukraine has made a strong commitment to approximate to a list of relevant EU legislation. After the EU has determined that Ukraine has effectively implemented these EU services and establishment Directives and Regulations, the EU and Ukraine may decide (within a joint DCFTA committee) to grant the reciprocal “internal market treatment” with respect to the services concerned. This is again a clear example of the DCFTA’s market access conditionality. The internal market treatment means that there shall be no restrictions on the freedom of establishment of juridical persons of the EU or Ukraine in the territory of either of them and that juridical persons of one party shall be treated in the same way as juridical persons of the other party. This shall also apply to the freedom to provide services in the territory of the other party (EU-Ukraine Association Agreement, 2014, Annex XVII, Article 4). In practice, this means that for these 4 specific sub-sections, the reservations of the EU and Ukraine on market access and national treatment, listed in the corresponding annexes, will be lifted (EU-Ukraine Association Agreement, 2014, Annex XVI-A, point 1[3], Annex XVI-B, point 7).

Although the Commission sees this Internal Market Treatment as a concrete example of “integration” into the EU Internal Market for the Ukraine DCFTA, this approach will most likely not be followed in the Tunisia and Morocco DCFTAs. Because the legislative approximation conditions to obtain this internal market treatment are very demanding (e.g. Ukraine has to implement over 85 EU Directives or Regulations), Morocco and Tunisia will not be keen to make such far-reaching commitments. Moreover, it appears that the Commission acknowledges that this is not a realistic scenario for Tunisia and

Morocco and will therefore not put this conditional internal market treatment on the negotiation table. As mentioned above, it will already be challenging to agree on the “traditional part” of the service negotiations.

3.3 The Scope and Contents of the Other DCFTA Chapters

Most likely, the other DCFTA chapter will not have a specific “deep” dimension. Although these chapters will significantly liberalise or facilitate trade in several important areas, they will not foresee actual “integration” of Morocco or Tunisia into the EU Internal Market on the basis of legislative approximation.

For example, the chapter on IPR will provide detailed rules related to copyrights, designs, trademarks patents and GIs, often going beyond the WTO TRIPS agreement. Although it is unlikely that this chapter will include explicit legislative approximation commitments, it could be that provisions of the IPR chapter reflect or copy specific elements of EU IPR legislation. For example, the EaP DCFTAs include rules on civil enforcement of IPR which are largely based on the EU’s IPR enforcement Directive⁴¹ and rules on liability of intermediary service providers (e.g. online service providers) which are copied from the EU’s E-Commerce Directive.⁴² GIs are with Morocco already covered in a specific protocol (cf. supra). Presumably, the negotiations on (the enforcement of) IPR negotiations with Morocco will not pose serious challenges as the country is already a signatory party to the Anti-Counterfeiting Trade Agreement (ACTA).

In the area of competition, the EMAA FTAs include already now substantive provisions. The EMAA FTAs with Morocco and Tunisia include provisions on cartels, abuse of dominant position and state aid which have to be interpreted and applied in conformity with the relevant EU Treaty provisions and secondary legislation.⁴³ However, the implementation of these rules required decisions of the Association Councils, which were never adopted. The DCFTAs with Tunisia and Morocco could maybe take over some provisions of the EaP DCFTAs which are more detailed and focus more on the implementation and enforcement of competition legislation, including rules on procedural fairness and the right of defence. Especially in the area of state aid the Commission would prefer to include more specific and binding provisions. The EaP DCFTAs go beyond the WTO Agreement on Subsidies and Countervailing Measures (SCM) and reflect Article 107(1) TFEU by stating that any aid granted by the EaP partner or the EU Member States through state resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the proper functioning of the AA insofar as it affects trade between the parties. They list

41 Directive 2004/48 EC on the enforcement of intellectual property rights.

42 Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

43 See, for example, Art. 36 EMAA Morocco.

the types of state aid that “shall” or “may be considered to” be compatible with the functioning of the agreement and which are largely taken over from Article 107(2) and (3) TFEU, including the aid to achieve objectives allowed under the EU horizontal block exemption regulations.⁴⁴ Moreover, the EaP DCFTAs also specify how a state-aid authority should be organised, i.e. an independent authority that shall have the powers to authorise state aid schemes, as well as the powers to order the recovery of state aid that has been unlawfully granted. The EU and the EaP partners also agreed to notify annually to the other party the total amount, types and sectoral distribution of state aid which may affect trade between the parties.

With regard to the public procurement chapters of the DCFTAs with Morocco and Tunisia, the EU will presumably aim to gradually liberalise the public procurement markets on the basis of national treatment. These rules will only apply to contracts above certain thresholds. Whereas the EaP DCFTAs envisage a gradual and “deep” integration on the basis of the EaP partners’ approximation to the EU’s public procurement Directives, the DCFTAs with Tunisia and Morocco will most likely be less ambitious and follow a more traditional approach based on national treatment commitments for the goods and services covered – without legislative approximation requirements. However, several specific rules of the EaP DCFTAs could be taken over in the Tunisia and Morocco DCFTAs such as provisions on key principles related to the award of contracts, including non-discrimination, equal treatment, transparency and proportionality. Moreover, the functioning of an appropriate institutional framework for public procurement will be addressed, with provisions on an independent body that can review decisions taken by contracting authorities or entities during the award of contracts. Proper judicial protection for persons having an interest in obtaining a particular contract and who are being harmed by an alleged infringement will also be the subject of discussion during the negotiations. Although Tunisia and Morocco are not a party to the (revised) WTO Agreement on Government Procurement (GPA), the DCFTAs could incorporate several principles of this plurilateral WTO agreement.

As in all recent EU FTAs, the Tunisia and Morocco DCFTAs will also include a chapter on sustainable development. This chapter will not pursue market access or trade liberalisation objectives but will reaffirm the parties’ commitment to promoting the development of international trade in such a way as to contribute to the objective of sustainable development and to ensuring that this objective is integrated and reflected at every level of their trade relationship. Although recognising the right of the parties to establish and regulate their own levels of domestic environmental and labour protection and sustainable development policies, this chapter will most likely include commitments

⁴⁴ See, for example, Art. 262 EU-Ukraine Association Agreement.

in the area of labour standards, environmental protection, climate change, sustainable fishing, and so on. Instead of referring to EU legislation – as in the case of other DCFTA chapters –, this chapter will mainly rely on international conventions and treaties such as different ILO Conventions, the UNFCCC Paris Agreement, the Agenda 21 on Environment and Development of 1992, the Johannesburg Plan of Implementation on Sustainable Development of 2002, the Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work of 2006, and so on. Just as in other sustainable development chapters of recent EU FTAs, a provision will also be included stating that it is inappropriate to encourage trade or investment by weakening the levels of protection afforded in domestic environmental or labour laws, but adding that these laws may also not constitute a disguised trade restriction or unjustifiable discrimination between the parties. In addition, EU sustainable development chapters establish a joint Trade and Sustainable Development Sub-Committee, which is responsible for the monitoring of the implementation of this chapter and provide for institutionalised cooperation with civil society organisations. However, the overall enforcement mechanisms of these sustainable development chapters is rather weak as they are excluded from the general DSMs included in these FTAs.⁴⁵

⁴⁵ See, for example, Art. 300(7) EU-Ukraine Association Agreement.

Conclusion and Policy Recommendations

This contribution made it clear that the DCFTA negotiations with Morocco and Tunisia will not be a walk in the park. The EMAAs and the different sectoral agreements have already liberalised the “easiest” sectors (e.g. trade in industrial goods and most non-sensitive agricultural products) and the difficult left-overs now remain (e.g. services and establishment and further liberalisation of sensitive agricultural products). Several legal and political hurdles will need to be overcome before the DCFTAs can be concluded. In particular, the trade talks with Morocco are currently in limbo. The Moroccan government has become increasingly reluctant towards the DCFTA project and first wants to study its own sectoral impact assessments. Moreover, as a reaction to the General Court’s judgement in *Fronte Polisario v. Council* with regard to the agricultural agreement, Morocco has even suspended all contacts with the EU. Most likely this issue will not be settled before the Court of Justice rules on this case in appeal. Moreover, if the Court of Justice upholds the ruling of the General Court, a swift relaunch of the DCFTA negotiations will become even more unlikely. This would also imply that before concluding a DCFTA – or any other trade agreement – with Morocco, the Council would first need to analyse if the DCFTA would not indirectly encourage violations of fundamental rights of the Sahrawi people, and that the EU does not benefit from them. It appears that it would not be sufficient to simply request a report on the situation in the Western Sahara (e.g. drafted by the European External Action Service) and refer to it in a recital of the Council Decision concluding the DCFTA, or the DCFTA as such. The General Court explicitly stated that the examination of the Council should be “careful and impartial” and that the elements at hand must “support the conclusion drawn.”⁴⁶ If such a report leads to the conclusion that the DCFTA would (indirectly) violate the fundamental rights of the Sahrawi people, the application of the DCFTA in relation to products originating in the territory of the Western Sahara would need to be precluded. An option would for example be to require the labelling of products originating in the Western Sahara, similar to the EU’s policy in relation to Israeli goods originating from occupied Palestinian territory.⁴⁷ Another option could be to declare in a Joint Declaration or in a Final Act to the DCFTA that the agreement will only apply to the territory of Morocco as recognised under international law or as recognised by the EU (member states), similar to the Final Act that was adopted between the EU and Ukraine to prevent the application of the Ukraine DCFTA on the territory of Crimea, annexed by Russia (Council of the European Union, 2014). However, it seems very unlikely that Morocco would agree to such scenarios.

If the EU succeeds in finalising its DCFTA negotiations with Morocco and Tunisia, this contribution unravels their potential scope and contents. These ambitious trade deals will in any case have a comprehensive dimension: i.e. they will have a broad coverage, liberalising trade in services and including detailed provisions in the area of TBT, SPS,

⁴⁶ *Front Polisario v. Council*, para. 225, op. cit. footnote 13.

⁴⁷ European Commission, Interpretive note on indication of origin of goods from the territories occupied by Israel since June 1967, C(2015) 7834, 11 November 2015. On this point, see also G. Vidigal, op. cit., footnote 16

IPR, public procurement, competition, and so on. The potential deep dimension of these trade deals (i.e. the actual “integration” into the EU Internal Market on the basis of legislative approximation) will be more challenging. As explained above, integration into the EU Internal Market is not offered on a silver platter. In order to gradually integrate into a section of the EU Internal Market, the EU will require that Morocco and Tunisia implement in their domestic legal order a selection of relevant EU legislation. Moreover, procedures are needed to ensure the uniform interpretation and application of this selection of EU law. Therefore, Morocco and Tunisia will have to find a balance, on the hand, between approximating to the EU *acquis* in order to integrate into a section of the EU Internal Market and to modernise their economy and, on the other, maintaining the right to regulate and not to overburden their economy with EU legislation that will not directly result in additional market access or is not useful for their domestic reform agenda. Whereas such a form of deep integration seems to be too ambitious in the area of services and establishment (as foreseen in the Ukraine DCFTA), it could be a realistic scenario with regard to TBT (i.e. the conclusion of an ACAA). The latest ENP review of the European Commission and HR/VP already recognised that for those partner countries that do not want to commit to demanding DCFTAs, the EU will offer more “flexibility where possible, with lighter options” (European Commission, 2015d). The DCFTAs with Morocco and Tunisia will be the first test case for this approach, together with a new bilateral agreement for Armenia.⁴⁸

The implementation of the DCFTAs, especially the legislative approximation commitments, will pose serious challenges for Morocco and Tunisia. It will be crucial that Tunisia and Morocco match their DCFTA commitments with their broader domestic economic policies. This is a two-way process. On the one hand, should the domestic economic reform policies be reflected and incorporated into the respective DCFTAs and, on the other, will the DCFTAs have to become part of the overall economic reform agenda of Tunisia and Morocco. The EU will have to support this process with tailored assistance. Early experiences in the EaP context illustrate that proper DCFTA implementation and enforcement are really only feasible if the fundamental “systemic” democratic structures and principles are in place (e.g. rule of law, anti-corruption policies and independent judiciary). Therefore, in order to prepare Morocco and Tunisia for DCFTA implementation, the EU should not only increase its technical support for economic modernisation under the European Neighbourhood Instrument (ENI), e.g. via twinning projects and projects for SMEs, but also its assistance for systemic reforms, e.g. budget support with clear conditionalities. Finally, in order to properly assist these two countries with their legislative approximation

⁴⁸ Armenia finalised its negotiations on an Association Agreement and DCFTA in July 2013, but eventually rejected the agreement and joined the Eurasian Economic Union instead in January 2015. Nevertheless, on 7 December 2015 the EU and Armenia launched negotiations on a new bilateral agreement.

commitments, the European Commission and the respective EU Delegations should develop, jointly with the partner countries, detailed implementation strategies. These should go beyond the mere listing of broad priorities or copying and pasting of DCFTA annexes.

References

- Council of the European Union** (2007, June 19). Strengthening the European Neighbourhood Policy – Council Conclusions, 11016/07. Retrieved from <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2011016%202007%20INIT>
- Council of the European Union** (2014, September 20). Final Act between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Association Agreement. OJ, 2014, L 278/4. Retrieved from [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0920\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0920(01)&from=EN)
- Council of the European Union** (2015a, December 14). EU: Press Release on the 13th meeting of the EU-Morocco Association Council. Retrieved from http://www.consilium.europa.eu/press-releases-pdf/2015/12/40802206726_en_635857962000000000.pdf
- Council of the European Union** (2015b, December 14). 3438th Council Meeting, Foreign Affairs. Retrieved from http://www.consilium.europa.eu/en/meetings/fac/2015/12/st15278_en15_pdf/
- Déclaration de M. le ministre de la Communication Porte-Parole du Gouvernement au sujet de l'évolution des relations entre le Royaume du Maroc et l'Union européenne** (2016, February 25). Retrieved from <http://www.maroc.ma/fr/actualites/declaration-de-m-le-ministre-de-la-communication-au-sujet-de-levolution-des-relations>
- De Ville, F., & Reynaert, V.** (2010). The Euro-Mediterranean Free Trade Area: An Evaluation on the Eve of the (Missed) Deadline. *L'Europe en Formation*, 356.
- European Commission** (2003, March 11). Wider Europe-Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours [COM (2003) 104 final]. Retrieved from http://eeas.europa.eu/enp/pdf/pdf/com03_104_en.pdf
- European Commission** (2006a). ENP-A Path towards Further Economic Integration. Non-Paper. Expanding on the Proposals Contained in the Communication “Strengthening the ENP” [COM (2006) 726 final]. Retrieved from http://ec.europa.eu/world/enp/pdf/non-paper_economic-integration_en.pdf
- European Commission** (2006b, October 4). Global Europe: Competing in the World [COM (2006) 567 final]. Retrieved from http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf
- European Commission** (2015a, March 25). Implementation of the European Neighbourhood Policy – Statistics [SWD (2015) 77 final]. Retrieved from http://eeas.europa.eu/enp/pdf/2015/enp-statistics-report-2014_en.pdf
- European Commission** (2015b). Report of the First Round of DCFTA Negotiations with Tunisia. Retrieved from http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153918.pdf
- European Commission** (2015c, September 17). Proposal for a Regulation of the European Parliament and the Council on the Introduction of Emergency Autonomous

Trade Measures for the Republic of Tunisia [COM (2015) 460]. Retrieved from <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015PC0460>

European Commission (2015d, November 18). Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Review of the European Neighbourhood Policy [JOIN(2015) 50 final]. Retrieved from http://eeas.europa.eu/enp/documents/2015/151118_joint-communication_review-of-the-enp_en.pdf

European Commission (2016, January 16). The EU and Morocco Strike a Deal on Geographical Indications. Press Release. Retrieved from http://europa.eu/rapid/press-release_IP-15-3440_en.htm

European External Action Service (2016, February 26). Statement by the Spokesperson on EU-Morocco Relations. Retrieved from http://eeas.europa.eu/statements-eeas/2016/160226_02_en.htm

EU-Ukraine Association Agreement. OJ, 2014, L 161/3. Retrieved from http://eeas.europa.eu/ukraine/docs/association_agreement_ukraine_2014_en.pdf

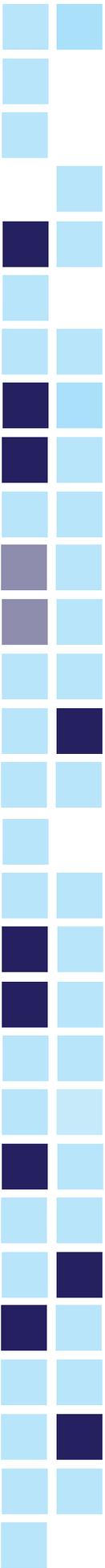
European Parliament (2011, December 14). MEPs Reject Extension of the EU-Morocco Fisheries Agreement and Call for a Better Deal. Press Release. Retrieved from <http://www.europarl.europa.eu/news/en/news-room/20111213IPR34070/pdf>

European Parliament (2016a, January 25). Trade MEPs Back More Duty-Free Olive Oil Imports to Help Tunisia but Want Safeguards. Press Release. Retrieved from <http://www.europarl.europa.eu/news/en/news-room/20160223IPR15498/MEPs-back-more-duty-free-olive-oil-imports-to-help-Tunisia-but-want-safeguards>

European Parliament (2016b, February 25). Opening of Negotiations for an EU-Tunisia Free Trade Agreement [P8_TA-PROV(2016)0061]. Retrieved from <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2016-0061&format=XML&language=EN>

European Parliament (2016c, January 12). Opinion of the Committee on Agriculture and Rural Development for the Committee on International Trade on the Proposal for a Regulation of the European Parliament and of the Council on the Introduction of Emergency Autonomous Trade Measures for the Republic of Tunisia, 2015/0218 (COD). Retrieved from <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-569.814&format=PDF&language=EN&secondRef=02>

Lannon, E. (2014, January). An Economic Response to the Crisis: Towards a New Generation of Deep and Comprehensive Free Trade Areas with the Mediterranean Partner Countries. In *European Parliament, Policy Department Workshop: The Euromed Region after the Arab Spring and the New Generation of DCFTAs* (pp. 37-61). Retrieved from [http://www.europarl.europa.eu/RegData/etudes/workshop/join/2014/433756/EXPO-INTA_AT\(2014\)433756_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/workshop/join/2014/433756/EXPO-INTA_AT(2014)433756_EN.pdf)



EuroMeSCo

Comprising 102 institutes from 32 European and South Mediterranean countries, the EuroMeSCo (Euro-Mediterranean Study Commission) network was created in 1996 for the joint and coordinated strengthening of research and debate on politics and security in the Mediterranean. These were considered essential aspects for the achievement of the objectives of the Euro-Mediterranean Partnership.

EuroMeSCo aims to be a leading forum for the study of Euro-Mediterranean affairs, functioning as a source of analytical expertise. The objectives of the network are to become an instrument for its members to facilitate exchanges, joint initiatives and research activities; to consolidate its influence in policy-making and Euro-Mediterranean policies; and to disseminate the research activities of its institutes amongst specialists on Euro-Mediterranean relations, governments and international organisations.

The EuroMeSCo work plan includes a research programme with four publication lines (EuroMeSCo Joint Policy Studies, EuroMeSCo Papers, EuroMeSCo Briefs and EuroMeSCo Reports), as well as a series of seminars, workshops and presentations on the changing political dynamics of the Mediterranean region. It also includes the organisation of an annual conference and the development of web-based resources to disseminate the work of its institutes and stimulate debate on Euro-Mediterranean affairs.

