

THE FUTURE POLISH CONSTITUTION IN THE PERSPECTIVE OF POLAND'S MEMBERSHIP OF THE EUROPEAN UNION

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1. The Accession in not too distant future to the European Union is treated as a priority by most political forces and public opinion in Poland. The same is also true for parallel actions towards intensification of cooperation with NATO within the program of Partnership for Peace which should eventually result, at least in the opinion of Poland, in the country's membership of the Alliance. The latter problem will not be discussed here but has to be mentioned as it provides a specific context for the trend to become involved in the process of European integration. On the whole, concerned here are the main determinants of the Polish reason of state in its modern interpretation within an extremely broad political consensus.¹ This is evidenced for example by the backing given by all the forces represented in the Parliament to Poland's application for the admission to the European Union, submitted by the centrist-leftist Cabinet. This aim of Poland has previously been expressed in the preamble of the European Agreement (on Poland's association with European Communities and their member states). The preamble states that the ultimate aim of Poland is to become member of the Communities and that, in the opinion of parties, association may help Poland towards this aim.

It is, however, beyond the scope of this paper to consider a variety of scenarios leading to or preventing Poland's accession to the European Union. The present point, instead, is to discuss the conditions which Poland (as well as the other candidates) has to meet to qualify for full membership of the integration structures, created for many decades now in Western Europe with both a great impetus and patient care. Only a fragment of this broad problem will be discussed, that is the constitutional conditions and prerequisites of membership of the European Union. This, however, seems to be a most important and timely fragment. In progress are the works of the Constitutional Committee of the National Assembly (a joint body appointed by the Diet and Senate) on preparation of a new fundamental law. The works base on constitutional drafts

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¹ For a broader discussion, see article by the Minister of Foreign Affairs in the years 1989 - 1993. K. Skubiszewski: „Racje stanu z perspektywy polskiej” [The Reason of State from the Polish Perspective], *Rocznik Polskiej Polityki Zagranicznej*, 1992, Warszawa 1994, p. 35 ff.

submitted by different political parties and by the President of the Republic of Poland. It is not unlikely that the Committee will also work on a civic constitutional draft, provided its initiators (the trade union "Solidarity" and certain rightist parties) manage to collect five hundred thousand signatures required by the law.

2. The question thus arises: what traits should the new constitution have to make the Polish state able to participate in European structures of integration?

To make this general question more specific, two different aspects of the matter can be mentioned — to begin with two groups of problems that require constitutional regulation in the perspective of membership of the European Union.

First, it is the values that provide the foundations of constitutional regulation and find expression in its specific provisions. They have to be consistent with the values that were shaped in the course of historical development of Western European states and acquired the leading position in the process of their integration. Depending on their inclusion in the constitution is the very possibility of participation in that process.

Second, it is the regulation of the fundamental questions resulting from membership in institutions with special competence (previously often called supranational) which take over certain competence of states and constitute a law that prevails over the domestic legal order. What depends on inclusion of such problems in the constitution, in turn, is the practical ability of becoming involved in European structures.

3. Speaking of values in the context of the present discussion, we mean first and foremost a democratic political system based on free elections, promotion of and respect for human rights (minority rights included), and respect for the basic rules of market economy. Of course, the catalogue of European values can be made to include many more details. It seems, however, that any values defined in greater detail would be but a specific deduction from the above three basic ones, and are therefore contained in them from the start.

As far as the constitution is concerned, the fact has to be borne in mind that however important, it may often prove insufficient just to proclaim values. What should therefore also be included in the sphere of values are not only certain general formulas but also systemic solutions aimed at securing observance of the values proclaimed. After all, it is the principles of electoral regulations that provide the test of attitude towards democracy.

In the period of formation of European Communities, their member states aimed first of all at a precise definition of their tasks and functioning. It was a novel approach which gave rise to many controversies. What is called values in the present paper was the responsibility chiefly of the Council of Europe composed of all the states involved in formation of the Communities. The treaties establishing Communities focus on the problems of operation.

After a time, it appeared that a specific gap emerged this way which decisions of the Court of Justice sought to fill. Extension of the competence of the Communities and their agencies, consolidation of their position, development of Community law etc.

necessarily brought to the fore the problem of values, and particularly of the democratic legitimization of the Communities and the guarantees of fundamental rights of the individual. In its decision of 12 October 1969, faced with moderation of the founding treaties, the Court sought a resolution of the dilemma in a reference to the constitutions of member states. Its argument was formulated as follows:

"In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community"².

In its subsequent decisions, the Court made references to this reasoning, with certain modifications in some cases.³ What is of special importance from the present point of view is the reference to common constitutional traditions which become part of the law of the Communities as the general principles of law. This way, the moderation of treaties with respect to the discussed issue of values resulted in those values being sought in the constitutions of member states. A clear indication follows: the constitution of a state applying for admission to the Union must necessarily make a reference to the values that are common to the constitutions of member states.

Later on, the problem of values began to occupy more and more space in the documents of the Communities and their agencies. In 1989, the European Parliament issued a special declaration relating to the fundamental rights binding for the Communities, suggesting a rather extensive catalogue of such rights.

Common values are also referred to by the European Agreements concluded by the Communities and their member states with the states of Central Europe. The Agreement with Poland devotes much attention to this question. The preamble contains a general mention of common values shared by parties. Stressed next is the involvement of Poland, the Communities and their member states in the consolidation of political and economic freedoms (which provides the grounds for association).

The preamble also points to achievements of the Polish nation in the process of prompt transition to the new political and economic order based on the rule of law and human rights, including the legal and economic framework for market economy and the many-party system with free democratic elections.

Finally, the parties state that the full realization of the association process should depend on Poland's genuine implementation of political, economic and legal reforms. There is no need to add that this connection should be stronger still if the association is with time to be transformed into membership of the Union.

As regards the frontal introduction of a specific system of values to the legal order of the European Union in the making, this was done by the Maastricht Treaty. Its preamble specifies the elements that were missing from the constitutional acts that once formed the Communities. What I mean here first of all are the formulations rela-

² Fragment of decision of 12 November, 1969, case N° 29/69 *ECR* 1969, p. 425.

³ See e.g. *£CÆ* 1974, p. 491.

ting to the adherence to the principles of freedom, democracy, respect for human rights and fundamental freedoms, and the rule of law.

Therefore, we no longer deal here with instructions deduced by judicial decisions and professional literature but with direct guidelines as to the main assumptions of the constitutional order in states applying for the admission to the European Union.

4. A variety of solutions concerning the admission of new members can be found in the practice of international organizations. Not going into details of this problem, one of its aspects should be stressed which is strictly relevant to the matters of interest for the present author: the conditions of membership. From this viewpoint, the provisions on the admission of new members can be roughly divided into two categories. The first one includes provisions that specify such conditions expressly (and, as can be assumed, no additional conditions should be set). The other category are provisions limited to the laying down of the admission procedure, and leaving the question of any conditions of membership open for negotiation.

The relevant provision of the Maastricht Treaty (Article 0) belongs to the second of the above categories. It states that any European state may apply for membership of the Union. Applications are to be filed with the Council which acts unanimously upon consultation with the Commission and consent of the European Parliament which should be granted by the absolute majority of votes. Therefore, the provision only regulates the formal and procedural elements. As regards the merits of conditions of membership which are the focus of the present paper, the Treaty provides that they should be defined in an agreement (and thus also negotiated) between member states and the state applying for membership.

This type of regulation is not too favorable for candidates. The conditions of the admission remain unclear, and the procedure of making decisions is multistage and rigorous (let me stress that the agreement with the admitted state has subsequently to be ratified by each of the member states of the Union).

Since the provision on the admission of new members fails to set down the conditions of membership, such conditions have to be sought in the whole of the legal order of the Communities and the European Union. Here, we seek guidelines relating to the candidate's constitutional order. Yet this is but a fragment of the discussed problem of conditions of membership. Hence the candidates, states of the Visegrad group in particular, keep insisting that the Communities and the Union make the conditions of their future membership more specific which might provide the departing point not only for negotiations but also for giving the proper direction to the adjustment actions in those countries. After all, deducing such conditions from the legal and economic system and so on is quite another thing that learning about the standpoint of one's prospective partner in the future negotiations.

Guided by these among other reasons, states of the Visegrad group availed themselves of an encouragement on part of their Western partners and sent to Brussels, on September 11, 1992, a memorandum on the consolidation of the integration with European Communities and on the prospects of accession.

The extensive memorandum aimed not only at presenting the merits of the appraisal of approximation between the Visegrad group and the Communities and an analysis of the problems encountered; it was also to bring about a standpoint on this matter to be taken by the Commission or even the then oncoming summit of the Twelve in Edinburgh.

The aim could be achieved to an extent. The memorandum, or an attempted answer to it to be exact, provided the departing point for a report by F. Andriessen (at that time, responsible within the Commission for external relations). The report was accepted by the European Council at the Edinburgh meeting, thus acquiring the nature of at least a semi-official document of the Communities.⁴

Beside many other most interesting theses and opinions, the report contained the conditions, this time specific, that have to be met for states of the Visegrad group to become members of the Communities (Union). In particular, the following has been specified in the report:

- the candidate's ability to undertake all duties of a member, that is to meet the requirements of *acquis communautaire*;
- stability of the institutions that guarantee democracy and the rule of law, and respect for human and minority rights;
- the functioning of market economy;
- support to the aims of political, economic and monetary union;
- ability to meet the principles of competition and forces of the market;
- readiness of the Union to admit new members with no detriment to the dynamics of integration processes.

The last of the above-mentioned conditions is irrelevant to the present discussion. Let me add, though, that it gives a relativistic quality to the remaining conditions: what it resolves itself into is that, even if the countries of the Visegrad group manage to meet the specified conditions, the Union anyway reserves the right to refuse the motion for admission. None the less, Andriessen's report was the first to provide definite grounds for the issue of those countries' future membership of the Union and paved the way for subsequent favourable signs.⁵

The conditions set down in the report fully confirm the present assumption that the candidacy for membership of the European Union has serious and far-reaching consequences for the constitutional order. From this viewpoint, the considerable delay in the process of creating a new Polish constitution (as compared to the expectations and to the other postcommunist states) may well prove advantageous. Namely, it offers the

⁴ See *BEEC* 1992, № 12, pp. 7 - 42.

⁵ For a broader discussion of this problem, see A. H a r a s i m o w i c z: „Po podpisaniu Układu Europejskiego. Perspektywy współpracy ze Wspólnotą Europejską. Aspekty polityczne” [After the Signing of the European Agreement. Prospects of Cooperation with the European Community. Political Aspects], and J.K. Bielecki: „Po podpisaniu Układu Europejskiego. Perspektywy współpracy ze Wspólnotą Europejską Aspekty gospodarcze [After the Signing of the European Agreement. Prospects of Cooperation with the European Community. Economic Aspects], *Rocznik Polskiej Polityki Zagranicznej*, 1992, Warszawa 1994, p. 57 ff and 69 ff.

chance for passing a constitution which would fully suit the Polish aspirations to participate in the processes of integrating and uniting Europe.

5. Will, however, this chance for passing precisely this constitution actually be used? At the present stage, elements of the answer to this question can be sought in the many constitutional drafts on which the Constitutional Committee of the National Assembly is now working. The author is fortunate here, being able to adduce a study of those drafts, carried out earlier this year by the Institute of Law Studies of the Polish Academy of Sciences. The study led to a comparative expertise based on many detailed reports.⁶

Basing on the analysis of the drafts, the authors were able to state that most drafts "suggest, in matters of key importance for the future social order of Poland, regulations consistent with the modern principles of democracy".⁷ This statement matters a lot for the nature of the future constitution, the fact considered that the drafts were prepared by various political forces, some of them sharply conflicting with one another.

What is of special importance from the viewpoint of the present discussion is the fact that the drafts refer to the conception of the rule of law. It has been functioning in the hitherto valid constitutional order since 1989 in the formula of "democratic state ruled by law". It expresses the autonomous function of law and its superior role in the state. It also limits the omnipotence of the state (state agencies only allowed to do what the law permits them to do) and creates systemic conditions for promotion of human rights (people are allowed to do all that is not prohibited by law).⁸

The reference to this conception in the drafts of a new constitution permits the assumption that the idea of the rule of law will be consolidated in Poland which no doubt brings us closer to the system of values shaped in the constitutional tradition of Western Europe, and thus also to the European Union. It is a process of great importance, considering the fact that the former system which persisted for many decades was based, among other things, precisely on the omnipotence of the party-state and on the instrumental treatment of law.

Also as opposed to the former system, the constitutional drafts are highly cautious towards the scope of the regulation of social relations, and open extensive possibilities for the development of self-government.

This caution — or perhaps rather moderation (as far as the scope of regulation is concerned) — prevents most drafts from attempting a closer characterization and regulation of the economic system. The drafts, however, do provide the general grounds

⁶ See "Jaka konstytucja? Analiza projektów konstytucji RP zgłoszonych Komisji Konstytucyjnej Zgromadzenia Narodowego w 1993 r." [Which Constitution? Analysis of Drafts of the Constitution of the Republic of Poland Submitted to the Constitutional Committee of the National Assembly in 1993], Warszawa 1993. Scientific editor: M. Kruk (Comparative analysis has been applied to seven drafts).

⁷ See *ibidem*, p. 10.

⁸ For a broader discussion, see J. Zakrzewska: „Spór o konstytucję” [The Constitutional Dispute], Warszawa 1993, Chapter II: „Konstytucja państwa prawa” [The Constitution of a State Ruled by Law].

for market economy — chiefly through the setting down of guarantees of the right to property and the right of inheritance, and through proclaiming freedom of economic activity. The differences concern the extent of state intervention and the treatment of market economy in rather liberal vs. rather social categories. All of the options, however, seem contained in the framework of the European system of values discussed here.

Instead, the drafts contain most extensive catalogues of human and civil rights. At any rate, this is true for political rights. The drafts differ much more from one another as regards economic and social rights.⁹ These particular rights tend to be better developed in the drafts submitted by the left wing, while the rest only regulate a definite minimum of that area — one that the authors consider feasible at the present stage of systemic transformation. Therefore, the Constitutional Committee is likely to face the need to compare the drafts with the European Social Charter so as to adopt at least appropriate solutions as to directions. Concerned here would be probably the development of a program which would take into consideration both the difficult economic conditions of today and the European perspective. This might result in the laying down in the constitution of the normative framework for the development of the discussed category of rights with the economic growth.

Finally, as regards the structure and principles of the functioning of a state, all drafts but one base on the conception of separation of powers which is given a flexible rather than rigorous treatment. Considerable differences are found in the shaping of relations between the legislative and the executive authority (between Parliament and President in particular), and of relations within the executive authority (Government — President).¹⁰ These different options, however, meet the European constitutional standards.

Therefore, if one were to imagine the future constitution basing on the submitted drafts (which is perhaps risky to some extent), the prospects would be rather optimistic. The chances are that the future constitution will base on the same values on which the legal order of member states of the European Union is based. The passing of this kind of constitution should thus bring Poland closer to the Union, at least in terms of the values shared.

6. What remains to be discussed is the other group of problems which would have to be regulated in the constitution in the perspective of the future membership of the European Union. As has already been mentioned, concerned here are not values but creation in the constitution of the functional possibilities of active membership of the Union. What I mean is first of all the constitutional framework for participation in the

⁹ See B. Zawadzka: „Problematyka ekonomiczna i społeczna w projektach konstytucji” [The Treatment of Economic and Social Problems in Constitutional Drafts], (in:) *Jaka konstytucja...*, op. cit., p. 94 ff.

¹⁰ See W. Sokolewicz: „Instytucja Prezydenta Rzeczypospolitej w świetle przepisów nowej konstytucji” [The Institution of President of the Republic in the Light of Provisions of the New Constitution], (in:) *Jaka konstytucja...*, op. cit., p. 148 ff.

organization (or perhaps already a union of states?) with most extensive material and formal competence.¹¹

Here, two problems seem particularly important. What I mean are the constitutional grounds, first, for handing over of a part of state's competence (or supreme powers, as some call them) to international agencies, and second, for recognition of the principle of the direct application of the law created by the Union (Communities) and its priority over domestic law. The latter entails also the need to abide by decisions of the Court of Justice in Luxembourg.

It has to be stated in the first place that both the currently valid constitutional order and the submitted drafts of a new constitution fail to offer sufficient conditions for the resolution of the above-mentioned functional problems. None the less, certain suggestions *de lege ferenda* have already been submitted; they will be discussed further on.

What can be added here is that the present constitutional order fails not only to include the discussed specific problems but even to define the position of international legal norms in domestic law. The issue has been subject of discussion in the doctrine for many decades. A variety of hypotheses were made which — in the situation where the constitution kept silent on that point — were to justify the validity in domestic law of international legal norms (international agreement in particular). What met with a relatively broad acceptance was a conception that international law is valid in domestic legal order by its own force (*ex proprio vigore*).¹² According to its advocates, it based on constitutional practice even if the constitution made no mention of this issue. A broader justification and criticism of this conception go beyond the scope of this paper. The following has to be stated, though: the conception was in fact rather arbitrary and, more importantly still, it was never actually taken up by the courts.

Thus in the practice, international agreements functioned in the domestic legal relations chiefly in the shape of reception or reference. Therefore, they functioned not *ex proprio vigore* but through domestic legislation which repeated provisions of an agreement (reception) or indicated its application (reference). What is more, in its decision of 25 July 1987, the Supreme Court frontally declared against the possibility of a direct application of international law (without transformation), at the same time recognizing the priority of statutes over international agreements.¹³ The decision met with a broad response due to its explicit political implications: the case concerned the application of an ILO convention on trade union freedoms (ratified by Poland) against a domestic statute inconsistent with that convention.

¹¹ See C. Banasiński: „Prawnokonstytucyjne problemy uczestnictwa państwa we Wspólnotach Europejskich” [Participation of State in European Communities: Problems resulting from Constitutional Law], *Państwo i Prawo*, 1993, № 11 - 12, p. 75 ff.

¹² This conception was put forward for the first time as early as 1962, and developed further somewhat later. See S. Rozmaryn: „Ustawa w Polskiej Rzeczypospolitej Ludowej” [The Statute in Polish People's Republic], Warszawa 1964, Chapter VI: „Ustawa a umowy międzynarodowe” [The Statute and International Agreements].

¹³ For thesis of the decision together with a gloss by K. Skubiszewski, see *Państwo i Prawo*, 1989, №6, p. 135 ff.

7. The systemic transformations in Poland, initiated in 1989, involved among other things the country's opening to the world, and thus also a greater openness to international law. This was expressed in the new trends of decisions of the Supreme Court, aiming at allowing the validity of international agreements, and in a growing interest of the Constitutional Tribunal in such agreements (although the Tribunal still lacks the competence in this respect). The changes consist mainly in interpretation and reinterpretation as no desired constitutional transformations have so far taken place in this sphere.

What is of some importance from the present viewpoint, though, is the inclusion of Parliament in the process of ratification of international agreements (in 1989). At present, this issue is regulated by the Constitutional Act of 17 October, 1992 on mutual relations between the legislative and executive authority and on local government, the so-called "Small Constitution". Mentioned in it explicitly are the categories of international agreements which may only be ratified by the President upon authorization expressed by the Diet by statute. Thus international agreements ratified according to this procedure become related to domestic legislation.¹⁴ It has to be stressed here that ratification of international agreements of consequence for the domestic legal order is likely to follow precisely this procedure as a rule, and to require a statutorily expressed authorization of the Diet. It is therefore a factor that actually promotes the evolution of judicature in the above-mentioned direction.

The submitted drafts of a new constitution aim at filling the acute gap consisting in the absence of an explicit definition of the position of international legal norms in the domestic legal order¹⁵ and, as a consequence, also the lack of constitutional guidelines concerning a possible clash between an agreement and a statute. Prevailing decidedly is the conception of the direct application of international law; differences can be found as to the proposed extend of priority of international law over statutes. Undoubtedly, such priority has to be secured for the international agreements which have acquired validity as a result of a statutorily expressed authorization by the Diet. Other agreements would prevail (in situations of conflict) over substatutory normative acts.

Most drafts provide for the possibility of agreements being reviewed (prior to ratification) by the Constitutional Tribunal. Yet the nature and procedure of such review of constitutionality of international agreements are defined differently by different drafts.

As can be seen, therefore, already at the present stage of constitutional works chances can be noticed for a much greater openness to international law and a more modern definition, consistent with European standards, of the position of international

¹⁴ See W. Czapliński: „Miejsce prawa międzynarodowego w porządku prawnym RP pod rządami Małej Konstytucji” [The Position of International Law in the Legal Order of the Republic of Poland under the "Small Constitution"], (in:) *„Mała Konstytucja” w procesie przemian ustrojowych w Polsce* [The "Small Constitution" in the Process of Systemic Transformations in Poland], (ed.:) M. Krulik, Warszawa 1993, p. 238 ff.

¹⁵ See A. Wasilkowski: "The Position of International Legal Norms within the Domestic Legal Order and the Issue of Constitutionality", (in:) *The Draft Polish Constitution 1991 in the Light of Comparative Law*, (ed.:) M. Piechowiak, R. Hłiwa, Poznań-Warszawa 1993, p. 108 ff.

legal norms in the domestic legal order. This is too little, though, to resolve the specific problems that result from membership of the European Union, although the situation may prove conducive to such resolution.

8. Direct references to the problems discussed in the present paper are made by some of the constitutional drafts only, but they differ from one another.

The first variant is a general constitutional authorization to participate in international cooperation and integration within broader communities.

The constitutional draft submitted by the Democratic Left Alliance states in Art. 17 point 2: "The Republic of Poland takes part in activities towards international cooperation and integration".

The draft submitted by the Confederation for an Independent Poland contains two provisions to this respect. Art. 3 point 2: the Republic may participate in a broader regional community of political, economic, or other nature. Art. 3 point 3: Becoming integrated within such community, the Republic preserves its separate identity, independence, and sovereign rights.

Thus what we deal with here is no doubt openness of the constitution to participation in integration groups (communities). The draft of the Confederation for an Independent Poland lays a special stress on participation in regional communities, making specific reservations which seem clearly to give preference to conceptions of the "Europe of Fatherlands" type.

A lot can be deduced from such authorizations, the fact considered that the constitution is a synthetic act, and a whole volume of interpretations and commentaries may well be added to a single one of its sentences. What is missing here, though, is the functional element discussed in the present paper. Unmentioned is an element of basic importance for the constitutional order: the consequences of participation in integration — European integration, as can be supposed, since no other one comes into consideration in the case of Poland after all. Also missing is an authorization to hand over certain competence of the state to the international level, to apply common legal provisions etc.

The other alternative, based precisely on a trend towards regulating these latter problems, is represented by a single constitutional draft, the one submitted by the President.

In its Art. 16 point 3, the draft contains the following formula: a statute may agree to the signing of an international agreement which authorizes an international (supranational) organization to exercise definite powers reserved by the Constitution for the agencies of legislative and executive authority. A statute ratifying such agreement requires the majority of three-fifths of votes.

The fact can hardly be overlooked that the above draft provision contains explicit technical defects. The qualification of an organization as supranational is the responsibility of the doctrine and not the constitution. A statute does not ratify an agreement but authorizes the Head of State to ratify it. Yet leaving aside this detailed reservation, it has to be stated that we deal here with the only constitutional draft which provides

concrete grounds for Poland's future membership of European Union. This way, the discussed issue has been formally introduced to the forum of the Constitutional Committee of the National Assembly.

Chances are that the Constitutional Committee will use the discussed proposition, formulating a provision which would anticipate Poland's future membership of the European Union.¹⁶ This way, the European option of a new constitution would find expression not only in the sphere of values and systemic arrangements but also in the practical political and the functional ones.¹⁷

9. To conclude, it can be stated that in the sphere of values and systemic arrangements the drafts of a new constitution provide solid grounds for Poland's future membership of the European Union.

But the functional problems resulting from such membership have not been given due consideration so far in the submitted constitutional drafts. The "latest" news can be added here, though: the Constitutional Committee of the National Assembly has recently decided to take up this particular problem, and approached specialists for appropriate expertises.

¹⁶The Constitutional Committee may also take into account other propositions. One of them was prepared as early as 1990 by a specially appointed team within the Legislative Council attached to the Prime Minister. The team (headed by the present author) dealt with preparation of draft constitutional provisions concerning the position of international legal norms within the domestic legal order and related issues.

Among other things, the team prepared a draft provision relating to the discussed issue which read as follows:

1. By force of an international agreement, some legislative, administrative and judicial powers may be handed over to an international organization provided such handing over is the condition of membership of that organization.
2. The passing of a statute by force of which the Diet agrees to such international agreement requires a qualified majority of votes.
3. Provided this follows from an agreement constituting an international organization, the law made by that organization shall be applied directly within the domestic legal order of State.

¹⁷For a broader discussion of this subject, see J. B a r c z: „Członkostwo Polski we Wspólnocie Europejskiej a nowa konstytucja” [Poland's Membership of the European Community and the New Constitution], *Państwo i Prawo*, 1993, №3, p. 78 ff.

LE TRAITÉ D'ASSOCIATION ENTRE LA POLOGNE ET LES COMMUNAUTÉS EUROPÉENNES (Problématique juridique et économique)*

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I. En essayant d'apprécier les dispositions du Traité d'Association entre la Pologne et les Communautés Européennes¹, j'avais essayé de le comparer avec les traités d'association antérieurs et avec les traités d'adhésion à la CEE des pays de la région méditerranéenne, dont l'intégration réussie aux pays développés de la Communauté sert d'argument encourageant la Pologne à suivre l'exemple des jeunes démocraties de cette région d'Europe. Les débats qui ont eu lieu jusqu'à présent sur le traité avec la CEE n'ont été que très rarement axés sur ses dispositions. La controverse opposant la majorité de l'opinion publique, qui se prononce résolument en faveur de la ratification du traité², et la minorité, qui y voit une menace pour la souveraineté et une influence croissante du libéralisme, semble refléter un conflit politique et idéologique plutôt que porter sur des solutions économiques concrètes.³ Il n'est pas douteux que l'intégration de la Pologne dans la CEE marque un déclin du concept de l'Etat traditionnel national et souverain et qu'elle aura des conséquences politiques et culturelles déterminées. La Pologne devra respecter non seulement les règles du jeu économique établies par Bruxelles mais aussi le système des valeurs politiques qui domine en Europe occidentale et les conceptions libérales des droits et libertés de l'homme. A titre d'illustration

* Cet article est un développement des thèses du rapport présenté à la réunion du Comité des Sciences Juridiques de l'Académie Polonaise des Sciences, tenue le 19 avril 1992. L'auteur, qui a participé à une partie des négociations de Bruxelles, tient à souligner que les opinions formulées dans l'article reflètent uniquement son point de vue personnel.

¹Le traité d'association conclu entre les Communautés Européennes et leurs Etats membres d'un côté, et la République de Pologne de l'autre (appelé dans le texte qui suit "traité" ou "accord d'association entre les CE et la RP"). Le 1^{er} mars 1992 est entrée provisoirement en vigueur la partie commerciale du traité, dont la ratification par les CE n'exigeait pas le consentement des parlements des Etats membres. Cette partie du traité, la plus importante et appelée "accord provisoire" (interim agreement) a été ratifiée par le Président de la République de Pologne en février 1992. Par la suite, le 20 octobre 1992 le Président de la République a ratifié le traité dans son intégrité. Le processus de ratification par les parlements des Etats membres et d'échange des notifications prévu à l'art. 121 du traité étant achevé vers la fin de l'an 1993, le traité est entré en vigueur le 1^{er} février 1994.

²D'après le sondage effectué en janvier 1992 par le Centre de consultation de l'opinion publique (CBOS) plus de 80 % des enquêtés déclarent que le traité d'association sera certainement ou plutôt avantageux pour la Pologne.

³Ce que souligne le commentaire du CBOS concernant l'enquête citée à la note 2 (ibidem, p. 6).

pertinente de ce problème on peut évoquer le récent jugement de la Cour Suprême d'Irlande, qui autorise une jeune fille, victime d'un viol, de se rendre en Angleterre pour y subir une interruption volontaire de grossesse en dépit de l'interdiction constitutionnelle de manœuvres abortives, en vigueur en Irlande.

En concentrant mon attention sur la partie commerciale du traité, j'avais essayé de démontrer qu'elle dérogeait sensiblement au modèle idéal du libre échange. Les dispositions du traité d'association illustrent le rôle croissant du droit commercial transnational qui reflète à son tour le rapport de forces réel dans le commerce mondial.

D'un autre côté, les efforts diplomatiques et politiques des pays est-européens, orientés vers l'obtention de la qualité de membre des CE, ont été intensifiés et s'expriment surtout par le dépôt de la demande d'adhésion par la Pologne et la Hongrie en avril 1994.

II. Les trois traités signés le 16 décembre 1991 à Bruxelles par la CEE avec la Tchécoslovaquie, la Pologne et la Hongrie portent le nom collectif de traités européens. Ils traduisent la politique d'extension des Communautés Européennes, réalisée simultanément avec l'approfondissement de l'intégration au sein de la CEE et de l'AELE. Bien que les Communautés Européennes aient déjà signé dans le passé plusieurs accords de coopération économique (accords d'association, unions douanières, traités de commerce), les traités européens dont nous parlons présentent une nouveauté essentielle dans la pratique des traités de ces Communautés, en raison surtout des dispositions sur le dialogue politique (art. 2 - 5) et la nécessité de rapprochement des systèmes juridiques des trois Etats associés du modèle qui règne au centre européen (art. 68 - 70) ainsi que des dispositions sur la coopération culturelle (art. 94). Cela ne signifie pas toutefois que l'intégration politique et économique envisagée soit différente de celle des traités d'association antérieurs, conclus entre les Communautés et, par exemple, les Etats du bassin méditerranéen. Les traités dont nous parlons visent la création de zones de libre échange (free trade areas) dans l'acception donnée à ce terme par l'art. 24 du GATT. Cela implique un modèle d'intégration économique quelque peu différent de celui de l'union douanière, comme c'est le cas dans les traités d'association avec la Turquie et la Grèce. L'union douanière c'est non seulement l'abolition des droits de douane mais aussi la mise en place d'une barrière douanière unique à l'égard des pays tiers.

Cette dernière question est liée à celle, non résolue, de l'admission de la Pologne à la CEE. L'union douanière est la condition absolue, que doit remplir le pays qui acquiert la qualité de membre de la Communauté. Cependant, malgré les efforts instamment déployés par ces trois pays de l'Europe centrale, on n'a toujours pas de déclaration expresse d'appui des CE à leur demande d'entrée dans la CEE.⁴ Dans le préambule du traité passé entre la Pologne et les CE il est dit que l'objectif ultime de notre pays — et non le but approuvé par les deux parties — consiste à obtenir la

⁴ La Commission de la CEE a informé officiellement le Parlement Européen que les traités européens ne pouvaient être considérés comme une promesse d'adhésion à la Communauté.

qualité de membre de la CEE. Le traité n'indique pas le délai d'adhésion ni les conditions que doit remplir la Pologne à cette fin. Une telle attitude des CE a eu des conséquences négatives pour nombre de solutions fondamentales adoptées dans les traités européens. En particulier, ni la Pologne, ni les deux autres pays concernés n'ont réussi à obtenir le consentement des CE à l'intégration de l'agriculture de notre région au marché de la CEE, ni même une promesse de limitation des subventions à l'exportation qui présentent une grave menace, notamment pour la Pologne et la Hongrie.⁵

Les chances de la Pologne d'obtenir, dans un traité, une promesse d'admission à la CEE dans un délai raisonnable, ont diminué après l'échec du putsch de Moscou en août 1992. Les trois pays concernés sont désormais considérés comme faisant partie des pays postcommunistes qui attendent de l'aide de la part de la CEE. L'aide à la Russie et à d'autres successeurs de l'ancienne URSS a gagné en importance stratégique. L'attitude retenue de la CEE à l'égard de la Pologne et des deux autres pays concernés a été critiquée au Parlement Européen. Les membres du Comité des Relations Economiques avec l'Etranger l'ont jugée "incorrecte et impropre", en faisant remarquer que les promesses d'admission faites dans les traités antérieurs d'association avec la Grèce et le Portugal, bien qu'elles aient eu avant tout une signification politique, avaient largement contribué à mobiliser les groupements en faveur de l'Europe dans les pays de la région méditerranéenne pour les programmes économiques susceptibles de relever le défi de l'intégration européenne.⁶ Cependant, cette opinion n'a pas contribué à modifier sensiblement l'attitude de la majorité des gouvernements des Douze et de la Commission de la CEE.⁷ Seul le ministre Genscher s'est dernièrement prononcé en faveur de l'admission des trois pays concernés à la CEE avant l'an 2000.

Les principes de base et le contenu du traité s'inspirent du Traité de Rome. Certaines de ses dispositions, notamment celles concernant les règles fondamentales de la libéralisation du commerce et de la circulation des capitaux, sont empruntées directement au Traité, sans modifications significatives. Par exemple, le traité prévoit la libre circulation de marchandises, de capitaux et de services, le droit de créer des entreprises et des filiales sur le territoire d'une autre partie, en tenant compte des législations nationales des pays parties au traité (freedom of establishment), l'unification des règles du droit antitrust, du droit antidumping, etc.

En accord avec les principes de base de la zone de libre échange, le traité limite efficacement la possibilité de pratiquer une politique unilatérale de protection du marché polonais au moyen du relèvement des droits de douane, de la fixation des quotas d'importation ou d'exportation et d'autres instruments protectionnistes semblables.

⁵Le ministre A. Olechowski l'a fait remarquer dans une des interviews accordées après la signature du traité.

⁶Report of the Committee on External Economic Relations on a General Outline for Association with the Countries of Central and Eastern Europe, *European Parliament*, March 13, 1991. Doc. FN/RR 105815, p. 11.

⁷Dans mes entretiens officiels à Bruxelles j'ai souvent entendu l'opinion que la CEE ne désirait pas renouveler la trop prompte promesse d'adhésion. Elle l'avait fait dans le traité d'association de 1973 avec la Turquie, mais cette promesse n'a pas été tenue.

Cependant les parties peuvent prendre des mesures extraordinaires de protection de leurs marchés ou balances des paiements, dans les limites rigoureuses prévues par le traité (mesures extraordinaires, instruments prévenant des perturbations sur le marché ou assurant la protection de la balance des paiements, restrictions et interdictions ayant en vue la protection de la santé ou de la morale, etc. - cf. p.ex. les art. 29 - 34, 36, 64). Après l'entrée du traité en vigueur les parties ne peuvent plus établir de nouveaux droits de douane, ni de quotas d'importation ou d'exportation dans les relations commerciales. La Pologne a obtenu la possibilité de recourir à des instruments extraordinaires de protection, mais seulement sous forme des droits de douane plus élevés pour protéger, si nécessaire, les branches d'industrie nouvelles (infant industries) ou des secteurs économiques en reconversion, là où surgiront de graves problèmes sociaux (p.ex. un chômage notable). La disposition autorisant le recours à ces instruments de protection du marché contient quelques restrictions importantes (art. 29). Ainsi l'augmentation des droits de douane ne doit pas dépasser 25 % de la valeur douanière de la marchandise importée, tandis que le volume global des importations provenant de la CEE, soumises à un régime spécial des droits de douane protectionnistes, ne peut dépasser 15 % de la valeur des marchandises industrielles importées de la CEE dans l'année civile précédente. En principe ces instruments ne peuvent être appliqués que durant les cinq premières années de la validité du traité. Une fois ce délai passé, leur application exige le consentement du Conseil de l'Association, donc pratiquement l'approbation de l'autre partie.

Le vaste chapitre VI du traité, consacré à la coopération économique concerne, entre autres, les questions de la coopération économique, la promotion et la protection des investissements, la coopération en matière des normes techniques, de la technique, de l'éducation et de la formation professionnelle, de l'atomistique et de la protection de l'environnement, des transports et des télécommunications, des problèmes bancaires et de la politique monétaire. On y trouve aussi des dispositions sur la lutte contre les drogues et le "blanchissage" de l'argent (*money laundering*).

Le traité parle aussi, d'une manière plus générale que des questions économiques, des formes du dialogue politique (art. 2 - 5), de la coopération culturelle (art. 94) et sociale (art. 86), de l'échange d'informations (art. 89). Ses derniers articles sont consacrés aux organes de coopération institutionnelle des parties, appelés à assurer le contrôle de l'exécution des obligations contractées. Le texte prévoit la mise en place d'un Conseil qui aura entre autres pour mission de surveiller l'exécution du traité, de rendre certaines dispositions d'application et de régler les différends. D'autre part il prévoit la création du Comité de l'Association et du Comité parlementaire de l'Association.

III. Le traité prévoit l'instauration progressive d'une zone de libre échange, étalée sur 10 ans au maximum à compter de l'entrée en vigueur du traité, et qui sera divisé en deux étapes de 5 ans chacune. Durant la première étape la CEE abolira à l'avance les tarifs des droits de douane, les quotas d'importation et autres restrictions semblables concernant de nombreuses marchandises importées de Pologne. Aux termes de l'art. 9(3) du traité, la CEE abolira toutes ces mesures avant la fin de la

cinquième année de la force obligatoire du traité. Cependant la majorité des quotas d'importation et des droits de douane frappant nos produits industriels seront abolis durant la première année de la force obligatoire du traité.

L'abolition en si bref délai de la majorité des droits de douane et des quotas d'importation des produits industriels polonais est indubitablement une concession importante. Cependant, presque toutes les marchandises polonaises importantes offertes à l'exportation n'auront d'accès libre aux marchés de la CEE qu'au bout de 4 - 6 ans. Cela concerne les produits agricoles, les textiles, la houille, l'acier, les poissons et conserves de poisson, de nombreux produits chimiques, le verre, les objets en cuir et le mobilier. La liste des marchandises que les CE trouvent "susceptibles" (sensitive products) relève des secteurs où la Pologne représente comparativement la plus grande compétitivité et dispose des chances d'accroissement rapide de ses potentialités à l'exportation. Pour près de la moitié des marchandises exportées vers la CEE par les pays associés la libéralisation d'accès est plus longue à atteindre.⁸

Une autre restriction importante à l'accès au marché de la CEE consiste en ce que les marchandises comportant moins de 60 % des composants ou du travail d'origine locale ne bénéficient pas d'exonération ou de facilités douanières. Des règles aussi rigoristes de qualification de l'origine des marchandises (rules of origin) rendent moins attractif le pays associé pour les investissements étrangers, destinés à assurer le montage et la transformation de précieux composants d'origine étrangère qui peuvent être réexportés vers la CEE.

Par ailleurs, le traité permet d'user envers la Pologne des mesures anti-dumping dont on abuse souvent à des fins protectionnistes. Cela peut menacer à l'avenir notamment les produits des aciéries et de l'industrie chimique polonaises.⁹ L'art. 34 du traité prévoit une certaine garantie contre le recours abusif aux sanctions anti-dumping et contre l'instrument, fort imprécis, de protection des fabricants contre les exportations en croissance rapide (art. 31). Cette disposition prévoit la participation du Conseil d'association aux différends entre les Parties et la possibilité de compromis au sein de ce Conseil, ainsi que le devoir de notification préalable à l'autre Partie de la sanction envisagée. Mais à défaut de compromis chacune des Parties peut user des mesures appropriées de protection de son marché.

Du côté polonais l'abolition des tarifs douaniers et des instruments, peu nombreux dans notre système, de protection extra-tarifaire du marché se fera plus lentement que du côté de la CEE. La majorité des droits de douane frappant les produits industriels en provenance de la CEE doivent être abolis entre la troisième et la septième année de la force obligatoire du traité, conformément au calendrier fixé à l'art. 10. Cependant

⁸A. Winters: The Association Process. Making it Work for Europe, dans: Materiały Konferencji EWG poświęconej umowom europejskim (Matériaux de la Conférence de la CEE consacrée aux traités européens), Bruxelles 27.11.1992, p. 3, 10 (citée dans le texte qui suit "Conférence CEE").

⁹Le fait de traiter les pays associés comme les pays "tiers" à la lumière du droit antidumping et l'insertion au traité d'une mesure de protection exceptionnelle au cas où l'accroissement des importations du pays associé causerait un grave dommage aux producteurs dans le pays d'importation (art. 31) risque de diminuer l'intérêt des investisseurs étrangers à investir en Pologne dans les branches où nos exportations comptent déjà sur les marchés.

certaines droits de douane sont abolis ou suspendus depuis le 1^{er} mars 1992 (c'est le cas, par exemple, de 30.000 voitures particulières exemptes de douane, importées en 1992). Etant donné toutefois l'écart entre le niveau de développement économique des CE et de la Pologne, le calendrier d'ouverture de notre marché doit être considéré comme très rapide et sans précédent dans l'histoire des relations économiques européennes de l'après-guerre. Le délai adopté de l'abolition des instruments tarifaires et extra-tarifaires de protection du marché est plus court que celui du processus analogue au sein de la CEE,¹⁰ sans parler du processus bien plus long de suppression des barrières douanières, prévu par les traités d'association des CE avec les pays du bassin méditerranéen.

Parmi les trois pays concernés de l'Europe centrale, c'est la Hongrie qui a obtenu, à l'issue de négociations, le plus long délai (9 ans) d'abolition des droits de douane et des limitations non tarifaires. Le même délai est prévu par le traité CEE — Tchécoslovaquie, mais ce document semble impliquer de sensibles réductions des droits de douane pour nombre de marchandises durant les 5 premières années après son entrée en vigueur.¹¹ Quant à la Pologne, le délai d'ouverture de son marché aux produits industriels de la CEE est de sept ans, donc le plus bref (art. 10). Tout en tenant compte de la durée de ce processus, des listes de marchandises concernées par une libéralisation progressive et de la cadence à laquelle baisseront les droits de douane pendant la période transitoire, il faut tout de même constater que c'est la Hongrie qui a obtenu le calendrier le plus long pour l'ouverture de son marché. La prudence des Hongrois et le caractère graduel des réformes, caractéristique de leur politique économique, suscite des réactions positives de la part de nombreux observateurs occidentaux qui, pour cette raison entre autres, considèrent la Hongrie comme le marché du moindre risque dans notre région.¹² Etant donné que la Hongrie et la Tchécoslovaquie sont des pays plus développés que la Pologne et que leur potentiel d'exportation per capita est plusieurs fois supérieur au nôtre, il y a lieu de douter si la stratégie d'une nouvelle thérapie de choc sans précédent laisse augurer d'un succès.

IV. Le traité déroge au modèle de la zone de libre échange dans deux secteurs très importants de notre commerce: ceux des produits agricoles et des poissons. Dans le premier nous n'avons pas noté de progrès considérable, sauf l'augmentation annuelle de 10 % de certains contingents, l'abolition de certaines restrictions quantitatives des importations prévues par l'ordonnance n° 3420/83 de la CEE et la réduction progressive des droits de douane frappant certaines marchandises agro-alimentaires. De son côté, la Pologne s'est engagée à abolir les contingents

¹⁰ Plus de 11 années se sont écoulées (1957 - 1968) entre la signature du Traité de Rome par les six pays fondateurs de la CEE et l'abolition des droits de douane et des instruments non tarifaires de protection du marché.

¹¹ Cf. l'art 4 du traité entre la CE et la Tchécoslovaquie (Interim Agreement on Trade and Related Matters du 16 décembre 1991 (avec l'art 4 du traité analogue CE — Hongrie).

¹² Ainsi Wall Street Journal du 2 mars 1992 cite cette énonciation de L. Kawan, homme d'affaires belge: "La Hongrie est plus prudente. Elle avance plus lentement mais avec moins de bruit Voilà pourquoi la Hongrie est le pays le plus stable dans cette région".

d'importation de denrées agricoles énumérées à l'annexe IX du traité. S'agissant d'autres secteurs, les Parties s'engagent à des concessions mutuelles équivalentes, en négociant à l'avenir la libéralisation successive "d'un produit à l'autre" (art. 20). Les CE ont refusé de s'engager à une quelconque abolition des subventions à l'exportation et des quotas d'importation appliqués dans le cadre du programme de la Politique agricole commune. Le traité ne prévoit pas la liquidation des droits de douane frappant les denrées agricoles, même au delà des dix années de la période dite transitoire. D'après l'Institut Allemand de la Recherche Economique, la politique agricole de la CEE exige une révision urgente, car elle empêche l'accroissement des échanges avec les trois pays associés pendant la période la plus difficile pour eux.¹³ Le rapport souligne que l'ouverture du marché agricole de la CEE est favorable aux intérêts des consommateurs et à la protection de l'environnement, menacé par l'intensive politique agricole de la CEE.

S'agissant du commerce de poisson le traité ne contient pratiquement aucune disposition qui libéraliserait les échanges, excepté la déclaration relative à la continuation des négociations en vue d'aboutir à l'ouverture équilibrée des marchés, suivant la même formule qui a été adoptée pour les denrées agricoles (art. 24).

Les produits agro-alimentaires représentent environ un quart du volume global et se placent en tête de la liste de nos marchandises exportées vers cette zone.¹⁴ La continuation des programmes de la Politique Agricole Commune par la CEE non seulement empêche de compenser la supériorité des pays de la Communauté dans le domaine des produits industriels, des services et de la propriété intellectuelle, mais encore menace les exportations de denrées agricoles polonaises vers les pays tiers, notamment les pays successeurs de l'Union Soviétique. La Pologne n'est pas en mesure d'aider efficacement ses agriculteurs au moyen de subventions aux exportations. Pour donner une idée de l'importance de la concurrence déloyale dont souffre notre agriculture, disons qu'en 1989 le Marché Commun a dépensé environ 300 Ecus par habitant à titre de subventions, tandis qu'en Pologne cette dépense correspondait à l'équivalent de 13 à 30 Ecus (en Pologne, le montant des dépenses calculées en Ecus dépend du cours du zloty). La politique commune de la CEE, favorisée notamment par le gouvernement français et par les pays moins développés (p.ex. l'Espagne), est considérée comme une justification du programme des subventions américaines à l'exportation, qui permettront prochainement d'effectuer d'importantes livraisons de denrées agricoles à la Communauté d'Etats Indépendants. La déclaration unilatérale de la République de Pologne, annexée au traité d'association, exprime "la profonde conviction que la CEE prendra des mesures efficaces en vue de combattre l'éviction (displacement) des livraisons polonaises aux marchés des pays tiers par suite de leurs subventions à l'exportation". La menace d'élimination de nos marchés traditionnels de l'ancien

¹³Zu den Assoziationsverträgen der EG mit Polen, Ungarn und Tschechoslowakei, *DIW Wochenbericht* 1991, no 50.

¹⁴Dans le cas de la Hongrie cette position est encore plus importante car elle représente environ le tiers de ses exportations vers la CE; v. CEC 1991. Les données citées datent de 1984.

Comecon pèse sur de nombreuses marchandises polonaises — non seulement agricoles — et sera aussi la conséquence de la concurrence loyale des fabricants plus productifs des marchandises occidentales, d'une qualité supérieure. La CEE aperçoit ce problème, qui n'a pas été résolu jusqu'ici ni dans les traités européens, ni dans d'autres accords.¹⁵

V. Le chapitre III du traité est en avance sur les négociations GATT concernant la libéralisation du commerce de services, car il prévoit l'abolition quasi-totale des restrictions à l'accès aux marchés respectifs des Parties par les prestataires de la forte majorité de services, ressortissants de l'autre Partie. L'art. 56 du traité prévoit entre autres la liberté de circulation du personnel clé du prestataire de services et le droit au séjour temporaire de ce personnel sur le territoire du destinataire de la prestation. Cependant cette disposition ne concerne pas les personnes qui s'occupent de la vente directe de marchandises ou de services. Les personnes physiques ont le droit de séjourner temporairement sur le territoire de l'autre Partie, si elles représentent la maison du prestataire de services ou leur propre entreprise, en vue de négocier et de conclure des contrats. Ce chapitre prévoit également une libéralisation restreinte des services de transport.

S'agissant des services, l'asymétrie dans la cadence du processus d'ouverture des marchés est encore plus spectaculaire. Le marché de la CEE s'est ouvert à nos prestataires de services en principe dès le 1^{er} mars 1992. Le marché polonais sera libéralisé progressivement, à mesure de l'élargissement des domaines où les sociétés des CE bénéficieront de la liberté d'exercer une activité économique sur la base des mêmes principes que les sujets économiques nationaux (*freedom of establishment*). Deux faits majeurs s'opposent à la mise à profit de cette ouverture de marché. Le premier, qui a un caractère objectif, c'est le manque d'expérience et de capitaux dont souffrent les banques polonaises, les compagnies d'assurances et la majorité des autres prestataires de services. Le second résulte des restrictions juridiques imposées par les CE. Le traité autorise seulement l'emploi du personnel de direction et du personnel spécialisé, originaires du pays du prestataire de services et fait dépendre l'utilisation de la main-d'œuvre polonaise du consentement du pays où cette prestation s'effectue.¹⁶ De cette façon ont été restreintes les chances d'accroissement substantiel de l'exportation de nos services dans le domaine du bâtiment, domaine où nos entreprises peuvent être compétitives, en raison notamment du coût de la main-d'œuvre moins élevé. D'un autre côté, une telle solution offre d'excellentes perspectives à l'exportation en Polo-

¹⁵ Cf. P. Norman: EEC Should Expand Trade with Eastern Europe. *Financial Times* du 5 juillet 1991. Un plan concret de financement par l'Occident des exportations de produits alimentaires et d'autres marchandises des pays de notre région vers les anciennes républiques de l'URSS, a été présenté conjointement par la Pologne, la Hongrie et la Tchécoslovaquie. Ce plan a connu un soutien modéré du groupe de 7 Etats les plus industrialisés. D'autre part, la législation américaine connaît p.ex. des limitations, difficiles à modifier, de telles possibilités de financement des exportations de marchandises agricoles étrangères au détriment des intérêts des farmers américains.

¹⁶ Le traité emploie l'expression "Le personnel clé" (*Key personnel*). Cf. les art 53, 54 et 58 du traité. A. Meylieu: Association Agreements rapport à la Conférence de la CEE, v. supra, p. 3, a attiré l'attention sur les conséquences de cette restriction pour les pays associés.

gne des services de bâtiment par les sociétés de la CEE, qui, après avoir obtenu des commandes, peuvent mettre conjointement à profit leur supériorité financière, technique et l'emploi de la main-d'oeuvre locale bon marché.

La CEE n'a pas consenti à une entière libéralisation des marchés de services aériens, maritimes, fluviaux et de transport routier. Nous avons compté sur la possibilité d'accroissement de nos exportations dans certains secteurs, par exemple les transports maritimes et automobiles. Mais ce sont là les services fortement protégés par la législation communautaire contre la concurrence étrangère. Le traité oblige la Pologne à adapter sa législation relative aux transports au modèle de la CEE et interdit à l'avenir aux Parties la conclusion avec des pays tiers, des accords bilatéraux par exemple sur les transports maritimes, qui seraient en contradiction avec le modèle du libre échange.

A. Winters souligne à juste titre que les chapitres des traités européens consacrés aux services prévoient la libéralisation imminente des services prêtés par des professionnels qui ne sont pas tributaires de l'emploi d'une main-d'oeuvre bon marché, ainsi que la libéralisation progressive des services qui réclament d'importantes mises de fond. L'art. 47 du traité prévoit aussi, pour le Conseil d'Association, la possibilité de prendre des mesures tendant à la reconnaissance de l'équivalence des diplômes et qualifications nécessaires à la prestation des services professionnels qui font l'objet d'une réglementation spéciale en Pologne ou dans les pays de la CEE.

VI. La libéralisation des services est possible avant tout grâce à l'insertion au traité de la disposition déclarant la liberté d'exercice d'une activité économique en son propre nom (*freedom of establishment*). Ce terme peut être interprété aussi comme le droit de fonder et de diriger une entreprise, sa filiale ou représentation, car la majorité des services ne peuvent être effectivement prêtés que si l'entreprise du fournisseur peut avoir un accès direct au client. Cette règle est aussi hautement utile dans d'autres domaines (p.ex. dans l'industrie minière, la fabrication de machines et installations, etc.). La liberté d'exercer une activité économique, accordée aux ressortissants de l'autre partie au traité, signifie une égalisation en droits quasi complète des sujets économiques nationaux et étrangers en vertu de la clause dite de traitement national. L'octroi de ce statut aux ressortissants des CE a notamment pour effet l'impossibilité d'appliquer à leur égard la législation polonaise relative aux représentations commerciales et les sociétés à participation du capital étranger. L'octroi du droit d'exercer une activité économique implique le traitement des filiales et des représentations des sociétés de la CEE sur un pied d'égalité avec les filiales et représentations polonaises, ce qui est expressément interdit par la législation en vigueur. L'art. 48 du traité autorise seulement des dispositions réglementaires régissant l'activité des filiales et représentations étrangères uniquement dans les limites justifiées par l'existence des différences juridiques et techniques entre les filiales (représentations) polonaises et leurs équivalents étrangers. La compétence législative des Parties va un peu plus loin dans le cas de la réglementation des activités des banques et autres sujets étrangers qui assurent des services financiers.

Comme dans le domaine des échanges de biens corporels, la CEE ouvre bien plus rapidement son marché à nos prestataires de services, en principe immédiatement après l'entrée en vigueur du traité. La Pologne s'engage à ouvrir son marché de services en trois phases: après l'entrée en vigueur du traité, vers la fin d'une première période quinquennale et avant l'expiration de la période transitoire (10 ans). Par ailleurs, elle garde le droit d'introduire, dans certaines circonstances particulières, une législation dérogatoire au principe du libre exercice de l'activité économique, adopté par le traité (art. 51). De telles réglementations provisoires, destinées à protéger les sujets économiques polonais, p.ex. durant la période de restructuration ou de création de nouvelles branches industrielles, ne peuvent en principe être unilatéralement mises en place que pendant les sept premières années de la force obligatoire du traité. Jusqu'à la fin de la période transitoire (10 ans) la Pologne garde sa compétence de garantir la protection aux sujets nationaux exerçant une activité économique dans quelques secteurs (les plus) névralgiques: les services financiers, l'acquisition des biens nationaux soumis à la procédure de privatisation, les immeubles, les ressources naturelles et la protection de services juridiques.

Dès l'entrée en vigueur du traité, les sujets de la CEE peuvent acquérir des immeubles, prendre à bail des ressources naturelles, des terrains agricoles et des forêts, si l'exercice de leur activité économique sur le territoire de la République de Pologne l'exige (art. 45, al. 7). Ce droit appartient aussi aux filiales et représentations de l'autre Partie pendant 5 ans à compter de l'entrée en vigueur du traité. Seuls l'achat et la vente de terrains agricoles, de forêts et de ressources naturelles ne bénéficient pas de ce régime de liberté (annexe XII). Au plus tard à l'expiration de la période transitoire prévue à l'art. 6, donc au bout de 10 ans, les sujets de la CEE seront traités sur un pied d'égalité avec les sujets polonais, entre autres en ce qui concerne l'exercice de l'activité bancaire (sauf les fonctions assurées par la banque centrale) et celle d'assureur, l'acquisition d'immeubles et de biens nationaux en voie de privatisation appartenant à des personnes morales, le courtage dans les transactions immobilières, l'exploitation des ressources naturelles, la prestation de services juridiques, etc. Après l'expiration des délais prévus pour les secteurs économiques libéralisés progressivement, un régime préférentiel ou restrictif dans l'intérêt des sujets polonais ne peut être temporairement prolongé que sur autorisation et à des conditions fixées par le Conseil d'Association. Cependant il convient de souligner que le calendrier de la libéralisation du marché polonais de services, ainsi que les instruments de sa protection établis à l'issue des négociations, sont un peu plus avantageux pour le pays associé que dans les deux autres traités européens.

VII. Le traité prévoit la libre circulation des capitaux, le droit des investisseurs de rapatrier les bénéfices des investissements effectués et engage les deux Parties à garantir le paiement en monnaies convertibles au titre des échanges de marchandises, de services et de prestations du travail (art. 60 - 61). Il prévoit aussi que dans le deuxième quinquennat de la force obligatoire du traité le Conseil d'Association examinera la possibilité de l'entière mise en oeuvre dans les rapports avec le pays associé,

des normes de la CEE relatives à la libre circulation des capitaux, ce qui signifie également l'abolition des restrictions concernant le marché des changes en Pologne et l'investissement par les sujets nationaux sur le territoire des CE (art. 62).

L'art. 66 impose à la Pologne l'obligation d'accorder la protection de la propriété intellectuelle au degré analogue à celui en vigueur dans les pays de la CEE. Cette obligation doit être remplie avant la fin de 1997 (art. 66). La Pologne s'est engagée à adhérer, durant la même période, à de nombreuses conventions sur la protection de la propriété intellectuelle (annexe 13). Bien que ces obligations doivent accroître sensiblement les frais d'accès de la Pologne aux réalisations technologiques et culturelles dans la difficile période des transformations qu'elle traverse, cette question n'a pas fait l'objet de sérieuses négociations, cela pour deux raisons. La bataille concernant la cadence et les orientations du renforcement des monopoles de la propriété intellectuelle a pris fin dès la ratification du traité de coopération économique entre la République de Pologne et les Etats-Unis, signé le 21 mars 1991. Ce traité, qui prête à controverse, impose à la Pologne des obligations allant plus loin que celles du traité d'association avec la CEE, et le législateur polonais devait les remplir au cours de 1992. Le calendrier des changements concerté avec les CE, bien que sensiblement plus court par rapport aux délais d'adaptation accordés par le passé aux Etats adhérant à la CEE¹⁷, doit être réalisé dans ses points essentiels quatre ans avant le délai concerté à Bruxelles, car la Pologne ne peut insérer dans sa législation de normes discriminatoires, même temporairement, à l'égard des pays de la CEE.¹⁸ Il est hors de doute que le rapprochement en cette matière de notre législation du modèle de la CEE est nécessaire. Le problème consiste seulement en ce que la cadence des changements des règles de la compétition économique, avantageuses pour la partie la plus forte, déroge, en ce point également, aux périodes transitoires dont ont profité les pays plus développés que le nôtre, et aussi à celles que prévoit le code de protection intellectuelle GATT (TRIPS), conclu avec la participation des Etats-Unis et de la CEE.¹⁹ Des trois pays nouvellement associés à la CEE seule la Hongrie a conservé la possibilité réelle de bénéficier de

¹⁷L'Espagne et le Portugal ont, par exemple, bénéficié de périodes transitoires de 6 - 7 ans pour la mise en place d'une entière protection par brevets des produits chimiques et des médicaments. Par un accord passé avec les Etats-Unis, la Pologne est tenue d'apporter ces modifications coûteuses, et d'autres, jusqu'à la fin de 1992.

¹⁸L'octroi par la Corée, le Taiwan et la Rép. Pop. de Chine des concessions dans le domaine de la propriété intellectuelle en faveur des Etats-Unis seulement a suscité une vive réaction de la CEE, qui a abouti à l'octroi de semblables préférences aux sujets de la CEE en Corée. A présent la Commission de la CEE demande résolument des mesures semblables à l'égard de la Chine. Cf. EC protests at China's trade deals with US, *Financial Times* du 18 février 1992.

¹⁹Annex on Trade Related Aspects of Intellectual Property Rights, concerté au début de 1992 au GATT donne aux pays postcommunistes un délai de 4 ans pour les modifications législatives exigées (cf. l'art. 65, al. 3 du Code). Sur ce point également, la Hongrie a gardé la faculté de bénéficier de privilèges et de préparer des modifications législatives soigneusement étudiées. Cependant la Pologne, après avoir accepté à la légère de brefs délais dans le traité de coopération économique avec les Etats-Unis, non seulement n'a pas profité d'un délai de faveur mais encore n'a pas réussi jusque-là à s'acquitter de l'obligation contractée de réformer ses lois sur la protection de la propriété intellectuelle. Au cours des négociations de Bruxelles, la délégation polonaise s'est opposée à l'obligation d'accéder aux conventions internationales non encore ratifiées par certains pays de la CEE. Le texte de l'art. 66, al. 2 ne tranche pas encore cette question.

la période quinquennale d'adaptation. Ce pays, qui dispose dans cette partie de l'Europe du plus grand nombre de solutions brevetées à l'étranger, n'a cependant pas signé jusque-là de traité bilatéral sur la protection de la propriété intellectuelle avec les Etats-Unis.

VIII. Contrairement à l'ouverture réelle des marchés de services exigeant d'importantes mises de fonds, le traité ne prévoit presque aucune libéralisation sur le marché du travail et des services prêtés directement par les personnes physiques au profit des travailleurs (clientèle) de l'autre partie. C'est le dilemme de tous les pays en voie de développement qui ne peuvent pas actuellement compenser, autant que par le passé, l'ouverture de leurs marchés aux marchandises et aux services exigeant d'importantes mises de fonds par l'exportation leur la main-d'oeuvre ou des services assurés par leurs travailleurs.

Le traité prévoit seulement l'égalisation des droits des travailleurs légalement employés sur le territoire de l'autre partie avec ceux des travailleurs locaux dans le cadre de la législation du travail, du régime de retraite et des assurances sociales largement entendues (art. 39). D'autre part, il prévoit l'étude des possibilités d'élargissement de l'accès des travailleurs polonais aux marchés du travail de la CEE, au moyen de accords avec les pays membres. Le Conseil de l'Association est tenu d'analyser le problème de la circulation de la main-d'oeuvre et d'élaborer des recommandations utiles au cours de la seconde étape de la période transitoire, donc dans le second quinquennat. Les démarches de la partie polonaise en faveur de la reconnaissance légale du statut des citoyens polonais qui travaillent dans les pays de la CEE sans autorisation requise n'ont pas réussi.

Les dispositions du traité concernant la circulation, ou, plutôt, le gel de la circulation de la main-d'oeuvre entre les CE et le pays associé, dérogent le plus au modèle du marché libre, et rendront essentiellement différente l'intégration européenne des Etats de notre région, à son étape préalable, des conditions d'intégration dont ont bénéficié jusque-là tous les pays associés à la CEE. Dans le cas de la Grèce, de la Turquie ou de l'Espagne la possibilité d'émigration économique des millions de citoyens représentait la forme la plus précieuse d'assistance pendant la période de transformation de l'économie de ces pays.

IX. Le préambule et de nombreuses dispositions du traité définissent expressément le but économique ultime de l'Etat associé à la CE. Le préambule déclare entre autres que les réformes polonaises ont pour objectif la transformation du système actuel et l'édification de l'économie de marché, garantissant les principes de la liberté économique. Citons comme éléments importants des structures juridiques d'un tel

²⁰ La Hongrie se prévaut du plus grand nombre d'inventions sur un million d'habitants, qui ont été brevetées à l'Occident. Par exemple, elle a breveté aux Etats-Unis, dans la décennie 80, presque trois fois plus d'inventions que les sujets polonais. Son nombre de brevets obtenus par million d'habitants est dix fois supérieur à l'indice des droits exclusifs obtenus par des Polonais. Voir G. R a y: "Innovation and Productivity in Eastern Europe. An International Comparison", *National Institute Economic Review* 1991, N° 4, p. 83.

modele, qui imite la legislation de la CE, les normes du droit de la libre concurrence et les limitations de l'ingérence de l'Etat dans les domaines tels que l'aide prêtée à certains sujets économiques au moyen de ressources publiques (subsidés et autres formes de public aid). En même temps le traité limite sensiblement la possibilité d'utiliser les mesures non tarifaires de protection du marché de l'importateur. Toutes ces dispositions sont presque littéralement empruntées au Traité de Rome. Parmi les règles de la concurrence largement admise dans les échanges économiques entre les ressortissants des deux parties il convient de citer les normes du droit antitrust (art. 63, al. 1 - 3), les restrictions à l'application de l'aide publique préférentielle (art. 63, al. III), la défense d'accorder de préférences aux entreprises économiques publiques (public undertakings) (art. 65), les défenses et sanctions s'opposant aux pratiques antidumping et à tous les instruments non tarifaires de discrimination des importations, ainsi qu'à la déformation de la concurrence dans les échanges commerciaux entre les parties (art. 30 et 36) et l'obligation mutuelle, fondée sur le principe du traitement national, à autoriser les sujets économiques de l'autre partie à participer aux enchères publiques (art. 67).

Les dispositions susmentionnés ne suscitent aucune réserve du point de vue de leur conformité aux objectifs de la réforme économique réalisée en Pologne. Elles constituent des normes, vérifiées par la pratique, de la compétition économique. Certaines offrent la chance de protection des sujets polonais dans le cadre des relations commerciales nouées avec des partenaires étrangers, en règle générale plus puissants (p.ex. les normes du droit antitrust). Cependant ces dispositions ne tiennent pas compte des difficultés liées à leur observation par la Pologne dans la période transitoire, avant l'édification d'une véritable économie de marché. Par exemple, compte tenant du fait qu'encore en 1991 plusieurs pays de la CEE (p.ex. la France et l'Italie) accordaient des préférences à leurs entreprises nationales, préférences interdites par le Traité de Rome, il est difficile d'imaginer que la Pologne soit en mesure de respecter l'art. 90 de ce Traité (art. 65 du traité d'association) après à peine trois ans de l'application des dispositions du traité d'association. Car presque toute intervention de l'Etat sous forme d'octroi d'un crédit préférentiel, d'une concession d'importation ou d'exportation, voire d'abandon de l'exécution d'une obligation fiscale à l'égard d'une entreprise nationale, d'une société contrôlée par le Trésor ou une collectivité locale, constituerait une violation du traité d'association. Pourtant il est impossible de restructurer le secteur public en Pologne sans mener une politique active à son égard. Le fait que certains pays de la CEE ne respectent toujours pas l'art. 90 du Traité de Rome ne saurait pas nous tranquilliser. La Pologne n'est pas Etat membre et ses chances d'entrée dans la CEE dépendent de la possibilité de démontrer qu'elle est en mesure de respecter les obligations contractées.

Il y a un plus grave problème, à savoir que la CE interprète d'une façon spécifique les dispositions du traité qui concernent les défenses du droit antitrust et l'abus des droits de propriété intellectuelle (art. 36 et 63). En dépit de leur teneur libérale, la CEE déclare que ces dispositions ne sont pas directement applicables aux accords commerciaux passés entre les sujets polonais et ceux de la CEE, et qu'ils n'entraînent

pas, par conséquent, la nullité des pratiques défendues par ces dispositions, excepté les situations où les limitations des principes de la liberté du commerce et de la concurrence provoquent des effets négatifs pour le commerce sur le territoire de la Communauté. Il suffira donc que des effets négatifs apparaissent dans le commerce entre la Pologne et la CEE que ces pratiques soient reconnues comme nulles. Devant une interprétation aussi artificieuse des art. 36 et 63 du traité, la partie polonaise avait demandé l'insertion d'une déclaration commune dont il ressortirait que les dispositions concernées seraient directement applicables aux actes de violation des normes de la concurrence et de la défense du monopole abusif de la propriété intellectuelle, lorsque de telles pratiques auraient un impact négatif sur le commerce entre la CE et la République de Pologne. Cette formule n'a été adoptée que partiellement. La déclaration commune annexée au traité prévoit qu'un comité spécial s'occupera de mettre en place des instruments juridiques ayant pour but d'éliminer les clauses restrictives imposées dans le cadre d'«anciens» contrats commerciaux, en violation des art. 85 et 86 du Traité de Rome. C'est un gros problème pour de nombreux importateurs polonais de technologies, qui dans les années 70 et 80 ont conclu des contrats avec des sociétés de la CEE, en s'engageant à ne pas exporter de produits protégés par licence sur les marchés dits de change ou à s'approvisionner exclusivement en certaines marchandises chez le donneur de licence. Une autre déclaration commune précise que le renvoi aux art. 85 et 86 du Traité de Rome par l'art. 63 du traité d'association doit être entendu de telle façon que l'impact (affectation), prévu à l'art. 85, des normes antitrust sur le commerce entre les Etats de la CEE est remplacé par la notion d'influence des pratiques défendues sur le commerce entre la Pologne et la CEE. Cette concession ne pourra revêtir une plus grande importance pratique que lorsque le Conseil d'Association aura tenu la promesse d'examiner dans un avenir indéterminé la possibilité d'application directe de certaines normes du droit antitrust de la CEE au commerce entre la Pologne et la CEE. C'est alors seulement que les sujets polonais, en règle générale plus faibles, pourront invoquer devant les tribunaux et les commissions d'arbitrage des pays de la CEE la nullité des contrats interdisant, par exemple, les exportations ou imposant d'autres limitations de la concurrence, car la majorité des accords commerciaux transnationaux conclus par des sujets polonais relèvent de la juridiction des organes judiciaires ou d'arbitrage de ces pays.

La Pologne doit évidemment incorporer le plus rapidement possible dans sa législation le droit antitrust de la CEE, tandis que l'Administration antimonopoliste (AA) doit, à l'exemple de la Commission de la CEE, poursuivre les restrictions à la libre concurrence imposées par des sujets étrangers aux entreprises polonaises. Cependant les possibilités de cette Administration sont très restreintes, étant donné que les enquêtes et le procès antitrust sont extrêmement coûteux. D'autre part, en raison de la juridiction territorialement limitée de l'AA, elle n'est pas en mesure de contraindre le sujet étranger à révéler ses documents confidentiels, à faire des dépositions, et ensuite à faire exécuter sa décision. C'est pourquoi seuls les organes antitrust de la CEE et des Etats-Unis peuvent faire exécuter effectivement leurs décisions à l'égard des sociétés étrangères présentes sur leurs marchés, par l'intermédiaire de filiales ou sociétés

contrôlées, et pour cette raison ne pouvant accepter le risque de refus d'exécution des décisions de la Commission de la CEE et du Département de la Justice des USA.

La question du refus d'application directe au commerce entre la Pologne et la CEE de la défense de l'abus des droits de propriété intellectuelle se présente sous un jour encore moins favorable. Il s'agit de l'interprétation unique de l'art. 36 du Traité de Rome, incorporé au traité d'association et de la privation des propriétaires des droits exclusifs en Pologne de la compétence d'interdiction d'importations de marchandises de la CEE, dans la situation où l'importateur avait acquis la marchandise légalement brevetée sur le territoire de l'un des pays de la Communauté. Bien que la disposition concernée du Traité de Rome ait été incorporée verbatim au traité analysé (art. 36), la partie de la CEE estime que cette disposition présuppose l'épuisement exterritorial des droits de propriété intellectuelle seulement dans les échanges entre les Etats de la Communauté. L'art. 36 du Traité de Rome est interprété au sein de la CEE de telle manière que les propriétaires des brevets et d'autres droits de propriété intellectuelle ne peuvent interdire à personne l'importation du produit protégé (p.ex. un médicament breveté ou un enregistrement protégé par le droit d'auteur), par exemple en Allemagne, si la marchandise a été légalement acquise dans un autre pays quelconque de la CEE (p.ex. en Grande Bretagne) chez ce même sujet ou une autre personne autorisée à l'introduire sur le marché (p.ex. un preneur de licence ou une maison contrôlée par le titulaire du droit exclusif). La liberté de l'«importation parallèle» est une source de la concurrence et d'importantes économies des consommateurs, car les importateurs peuvent faire venir des marchandises du marché étranger le moins cher, tandis que les titulaires des droits de propriété intellectuelle ne peuvent dicter des prix de vente uniques aux preneurs de licence ni contrôler pleinement les marchés des pays membres. Selon le régime juridique en vigueur la Pologne s'est engagée non seulement à protéger fortement les droits de propriété intellectuelle — ce qui est une importante concession en faveur des ressortissants de la CEE — mais aussi à leur concéder des monopoles plus puissants que garantissent les droits exclusifs, obtenus éventuellement par les auteurs et les inventeurs polonais dans les pays de la Communauté. Alors que les sujets étrangers contrôlent pleinement l'importation en Pologne des marchandises protégées, l'entrepreneur polonais qui obtient des droits analogues dans les pays de la CEE ne peut interdire à personne de pratiquer les importations dites parallèles et à cause des dispositions du droit antidumping de la CEE jouit des droits bien plus restreints que dans son propre pays.

Les trois pays nouvellement associés à la CEE n'ont pas découvert à temps²¹ que les monopoles de la propriété intellectuelle, accompagnés du refus d'application directe des règles antitrust européennes et des défenses d'abus de la propriété industrielle au commerce entre ces pays et la CEE, étaient incompatibles avec les principes du libre échange. Ils n'entraînent pas seulement la discrimination des Etats associés à la CEE et le danger inévitable d'instauration des barrières non tarifaires à la place des

²¹ Seul le traité d'association entre la Pologne et la CE contient la déclaration précitée sur la possibilité d'application directe des art. 85 et 86 du Traité de Rome au commerce avec la Pologne.

droits abolis de douane et des contingentements des exportations et des importations. Pour la partie plus faible ces barrières commerciales privées, dressées par les fournisseurs de technologies, sont bien plus fâcheuses que les droits de douane, car le donneur de licence est entièrement libre de dicter les coûts d'entrée sur le marché donné ou peut refuser la licence d'exportation de la marchandise protégée par un brevet ou par le droit d'auteur. Il convient de remarquer aussi que la majorité des licences acquises par les entreprises polonaises dans les années 1970 - 1985 comportaient la clause de la défense totale des exportations ou autorisaient les preneurs de licence à exporter uniquement vers la "zone rouble".²²

Journal of World Trade a attiré dernièrement l'attention des lecteurs sur ce danger qui menace le fonctionnement des traités d'association et dont on n'a pas suffisamment conscience chez nous.

"On oublie souvent — lisons-nous dans un article — que les droits de propriété intellectuelle profitent au fournisseur de technologies, qui protège son propre marché, en dressant ipso facto des barrières au commerce. A défaut de disposition appropriée dans les traités européens limitant ces pratiques, cela signifiera que là où les pays est-européens profitent des technologies occidentales dans l'intérêt de leur développement, ils ont en même temps un choix limité des marchés d'exportation, parce que les contingents quantitatifs d'importation supprimés par la CEE seront provisoirement remplacés par des mesures suscitant des effets analogues, et cela dans une période où les pays de l'Europe de l'Est doivent développer les exportations aussi bien pour pouvoir payer les technologies importées que pour poursuivre le développement de leurs économies. Si l'on présuppose que le transfert des technologies a avant tout pour but la modernisation et le développement des marchés est-européens et aussi leur intégration au système mondial de commerce, il faut absolument trouver une solution à ce problème".²³

L'aversion de la CE pour l'extension directe de ses règles de la concurrence au commerce avec les pays associés est une continuation de la politique qui permet aux sociétés des pays développés de mener des pratiques défendues sur leur territoire à l'égard des sujets étrangers. Cette politique, qui consiste entre autres à encourager ses propres sociétés à créer des cartels d'exportation, présente un grave danger pour le commerce mondial car — comme le constate judicieusement le rapport du comité spécial antitrust American Bar Association — "cela facilite aux producteurs d'un pays d'exploiter les importateurs d'un autre pays".²⁴ Malgré le soutien accordé par la CEE

²² Selon les enquêtes effectuées au début des années 80, près de trois quarts des licences prévoyaient des limitations aux exportations vers la zone de change dite deuxième, ce qui était l'une des causes de la crise des exportations et du déficit de balance entre les recettes en roubles et celles en dollars. Nombre de ces défenses d'exportation sont encore en vigueur. Cf. S. Sołtysiński, A. Kawecki: *Ograniczenie swobody działalności gospodarczej importera technologii w praktyce polskiego handlu zagranicznego* [Les limitations à la liberté d'exercer l'activité économique d'importateur dans la pratique du commerce extérieur polonais], dans: *Ochrona własności przemysłowej w obrocie zagranicznym* [La protection de la propriété industrielle dans les échanges avec l'étranger], Ossolineum 1983, p. 108.

²³ I. Goavere: "The Impact of Intellectual Property Protection on Technology Transfer between the EC and the CE European Countries", *J.W.T.* n° 5/1991, p. 75 - 76.

²⁴ Special Committee of ARA Urges Extensive Tailoring to Harmonize laws... *BNA Antitrust and Trade Report*, 1992, vol. 62, p. 156.

à l'idée d'unification des règles de la concurrence à l'échelle globale dans le cadre du GATT²⁵, nos partenaires européens ont maintenu en principe le système de traitement discriminatoire des sujets économiques des pays associés, et cela dans la zone de libre échange.

X. Le processus d'intégration dans la CEE de certains pays du bassin méditerranéen, qui s'est terminé par un succès, est l'un des arguments majeurs en faveur de l'option européenne pour les pays de notre région. Mais si l'on compare les conditions d'entrée des trois pays de l'Europe centrale dans le marché intégré de la CEE avec celles formulées dans les traités avec les pays méditerranéens, on voit que la tâche qui attend nos trois pays est incommensurablement plus difficile.

Par exemple, le processus d'abolition des droits de douane entre la CEE et la Turquie a été prévu dans le délai de 22 ans.²⁶ Pour ce même processus le traité d'association avec la Grèce prévoyait une période de 12 années pour la majorité des marchandises, mais ce pays a obtenu un délai transitoire de 22 ans pour l'abolition des droits de douane frappant les marchandises reconnues comme particulièrement névralgiques du point de vue des intérêts de l'industrie locale.²⁷ Par suite de l'admission de la Grèce à la CEE, ce processus a duré au total 24 ans (1961 -1985). L'Espagne et le Portugal, devenus membres de la CEE, ont bénéficié d'une période de sept ans (!) pour l'abolition des droits de douane sur les marchandises industrielles de la CEE, après une longue période d'association ou de coopération commerciale étroite avec la CEE.²⁸ Le processus d'abolition des tarifs douaniers entre l'Espagne et le Portugal d'un côté et la CEE de l'autre a pris fin en 1993 seulement.

Tous ces pays, sauf la Turquie qui n'a pas été admise à la CEE, ont conservé les droits de douane et nombre d'instruments non tarifaires de protection du marché pendant quelques années après l'entrée dans la CEE. L'intégration de leur économie avec la CE, après qu'ils y étaient entrés, s'est avérée incomparablement plus facile, car ils ont bénéficié non seulement d'une influence sur les décisions de la Communauté mais aussi d'une très importante assistance financière à la restructuration de l'agriculture et des régions sous — développées (fonds régional et fonds social). Ainsi le Portugal, qui compte à peine 9 millions d'habitants, a reçu entre autres un milliard d'Ecus pour le Fonds de stabilisation et 700 millions d'Ecus pour la restructuration de l'agriculture. A titre de comparaison, rappelons que l'aide de la CEE à l'agriculture polonaise en 1991 devait s'élever à 15 - 25 millions d'Ecus (programme PHARE). Les nouveaux membres de la CEE bénéficient largement des subsides du programme de politique

²⁵ Competition and the GATT, *Financial Times* du 4 février 1992.

²⁶ Les art. 10 - 11 du Traité d'association de la Turquie avec la CE. Ce traité (art. 21 - 22) prévoyait un délai de plus de 20 ans pour l'abolition des restrictions limitatives aux importations.

²⁷ Cf. les art. 14 et 15 du traité d'association CE — Grèce. *Collected Acts, EEC — Greece Association Agreement*, Gen. 14, vol. 1.

²⁸ L'Espagne a inauguré l'intégration de son économie à la CE par l'accord commercial de 1970. Les négociations ont duré 7 ans. The Accession Treaty between Spain and the EEG art. 31. *Common Markets Reports*, Item 7703 et suiv. Le Portugal avait commencé à abolir les droits de douane dans ses relations avec la CEE dans le cadre du traité d'association de 1972. Ce processus a pris fin en 1993.

agricole. L'accès au marché agricole et au marché du travail présente pour eux une importance capitale. Bien que dans ce dernier domaine certaines restrictions restent encore obligatoires, la Turquie par exemple (pays associé) a toujours plus de 3 millions de ses ressortissants employés dans les pays de la CEE.

Les pays nouvellement admis à la CEE ont obtenu, après leur adhésion à la CEE, des délais plus longs que la Pologne pour la mise en place de coûteuses réformes économiques. Cela concerne en particulier la réforme de la protection de la propriété intellectuelle. Le dernier différend entre la CE et la République de Pologne, concernant la répartition des 30 mille voitures à importer en Pologne sans droits de douane en 1992, m'a incité à chercher des concessions analogues en faveur de l'industrie automobile de la CEE dans le traité d'adhésion de l'Espagne à la CE. Il s'avère que l'Espagne aussi a réussi à obtenir des conditions plus favorables que la Pologne au début de la période d'association. Le contingent d'importation espagnol pour 1986 de 32 mille voitures a été taxé de 17,4 % de droits de douane *ad valorem*.²⁹

La Communauté accordait aux pays associés antérieurement une assistance financière pluriannuelle garantie par des protocoles spéciaux, signés dans la plupart des cas simultanément avec les traités d'association. Ces protocoles précisaient le montant des prêts consentis et leur destination.³⁰

XI. Les documents politiques préliminaires de la CE et aussi certaines formules que contient le préambule déclarent que cet acte est fondé sur le principe d'assymétrie des droits et obligations, permettant de favoriser la partie plus faible. La CEE doit fournir une assistance économique, technique et financière au processus de transformation en Pologne. Cependant ces déclarations ne trouvent pas de reflet dans le texte du traité. Le protocole financier n'a pas été signé, et n'a pas prévu non plus, en principe, la signature d'un traité pluriannuel qui préciserait le montant des crédits à accorder dans les années à venir. Contrairement à la pratique utilisée jusque-là à l'égard de nombreux pays, le traité contient seulement des déclarations d'assistance virtuelle, en provenance des sources telle que la banque EBRD, le Fonds Monétaire International et les fonds des Etats membres du Groupe G-24 (art. 95 - 100). La Pologne peut certainement compter sur une aide de l'ordre de 200 - 250 millions d'ECUS par an, dans le cadre du programme PHARE. L'importance de l'assistance technique, scientifique et professionnelle déclarée dans de nombreux points du traité n'est pas suffisamment précise.

Les principales concessions de la CE consistent en réduction anticipée des tarifs, la suppression de certains quotas d'importation, l'augmentation des contingents d'importation et l'ouverture immédiate de ses marchés aux fournisseurs de services polonais, y compris la participation de nos sociétés dans des livraisons destinées aux

²⁹ Protocol N° 6 concerning annual Spanish tariff quotas on the import of motor vehicles falling within Art. 34 of the EEC (Spain Act of Accession) (1985).

³⁰ Cf. P.ex. Financial Protocol annexed to the Agreement establishing an Association between the EEC and Turkey du 12 septembre 1963, O.J. L 293 de 1972, p. 68. Des protocoles d'assistance financière pluriannuelle ont été signés par la CEE également avec la Grèce, le Portugal et la Yougoslavie.

sujets de droit public (public procurements). La Pologne conserve aussi le droit de recourir à des mesures extraordinaires de protection de son marché. Le problème qui se pose à nous se résume en ce que notre économie bénéficiera de sérieuses facilités commerciales et du droit de recours aux instruments efficaces de protection extraterritoriale en principe pendant 4-5 ans. Mais durant cette brève période les préférences les plus avantageuses nous seront accessibles dans les domaines où notre potentiel est très limité (les produits industriels technologiquement avancés et les services exigeant des investissements très coûteux), tandis qu'il nous sera impossible de mettre à profit la supériorité actuelle ou potentielle dans les cinq branches susmentionnées, que l'on reconnaît comme exigeant une protection particulière de la part de la CEE. Signalons que le commerce de produits agricoles et des autres marchandises de la liste "sensitive products" constitue plus de la moitié des exportations polonaises vers la CEE. C'est pourquoi les premières études économiques et juridiques approfondies qui soient parues à l'Occident soulignent que les traités européens réalisent la conception d'assymétrie des pouvoirs au profit de la partie plus forte et dans l'intérêt des secteurs les plus improductifs de la CEE.³¹ A l'Occident également on se pose de plus en plus fréquemment la question comment les trois pays pourront faire face à la nécessité d'accroître leurs exportations, si la Communauté n'ouvre pas ses marchés plus largement que ne le prévoient les traités européens.

La situation concurrentielle de la Pologne sera encore plus difficile après l'achèvement de la première période transitoire. Cinq ans après l'entrée en vigueur du traité les droits de douane seront diminués de 60 % et pour la majorité des marchandises occidentales ces tarifs ne constitueront pas de sérieuses barrières à leur entrée sur notre marché. Au terme de cette période nous garderons seulement les préférences minimales en matière de la protection douanière et certains instruments extraterritoriaux, fort restreints, dont l'application exigera en règle générale le consentement de l'autre partie. Depuis 1997, si des corrections essentielles ne sont pas apportées au traité ou à notre législation avec le consentement du Conseil d'Association (art. 6, al. 3), la Pologne peut se trouver dans une situation bien moins avantageuse qu'au début de la première étape transitoire. Car dans tous les domaines que la CEE juge "névralgiques" (sensitive) pour sa position concurrentielle, elle se réserve une longue (4-6 ans) ou illimitée restriction aux principes du libre échange et de la concurrence. Il s'agit de l'agriculture, de la pêche, de la houille, de l'acier et des textiles. Pendant que l'on prévoit une libéralisation progressive sensible du commerce d'acier et de textiles, le traité ne prévoit aucun délai d'abolition des subventions à l'exportation et des quotas d'importation pour les marchandises agricoles. Il en est de même pour le commerce de poissons. Par contre, un accroissement sensible de notre offre de textiles, de produits en acier ou chimiques permet aux concurrents de la CEE de recourir aussi bien aux sanctions antidumping qu'au nouvel instrument protectionniste prévu à l'art. 30 du traité, en vertu duquel des mesures de protection du marché peuvent être uti-

³¹ Telle est p.ex. la conclusion, entre autres, du rapport du Deutsches Institut für Wirtschaftsordnung... DIW Wochenbericht, v. supra, p. 702 - 704. Cf. aussi A. Winters, supra, p. 9.

Usées, si les importations accrues entraînent par exemple un grave préjudice aux producteurs locaux. L'application de ces sanctions n'exige pas qu'il faille démontrer au préalable que l'exportateur pratique le dumping ou bénéficie des subventions. Afin d'éviter ce type de sanctions, l'économie polonaise doit élargir radicalement son offre d'exportation, en réalisant de nouvelles productions. Cependant — nous l'avons dit plus haut — l'accroissement des exportations sous licence exige l'élimination des discriminations dans le domaine du droit antitrust qui permet entre autres de limiter les exportations de nouveaux produits fabriqués sur la base des contrats de licence et ceux de coopération.

A l'heure actuelle il y a peu d'arguments qui laisseraient espérer qu'il nous soit possible de réduire sensiblement, en 4 - 5 ans, la distance qui nous sépare des pays moins développés de la Communauté, qui sont nos concurrents dans les branches aussi importantes que les textiles (Portugal et Grèce) ou les produits en acier et chimiques (p.ex. Espagne). Les trois pays méditerranéens et l'Islande bénéficieront d'une aide garantie de l'ordre de 29 milliards de dollars pendant les cinq années à venir, rien que du Fonds régional de la CEE, soit du double des moyens affectés jusque-là à ce but.

Au bout de cinq ans le traité imposera à la Pologne presque toutes les obligations propres aux membres de la CEE, liées à l'ouverture du marché, à la protection des investissements et au respect des principes du libre échange. En même temps la Pologne, tout comme la Hongrie et la Tchécoslovaquie, est traitée dans ce document comme un pays tiers dans de nombreux domaines importants, en particulier en ce qui concerne la politique agricole, la libre circulation de la main-d'oeuvre et des services, le droit antitrust et antidumping, la fermeture de l'accès du marché en cas d'accroissement rapide des exportations (art. 30), etc. Je n'ai mentionné jusqu'ici que les règles du jeu économique qui sont en contradiction avec les principes du libre échange. Il convient de citer ici l'appréciation finale des traités européens, donnée par l'économiste britannique A. Winters (v. supra, p. 9) à une conférence organisée par la Commission de la CEE: "Dans toutes les parties du traité européen on peut trouver l'empreinte des ennemis de la réforme. Malgré l'état désastreux de l'économie de la Tchécoslovaquie, de la Hongrie et de la Pologne (THP), la CEE continuera à maintenir le régime protectionniste de l'agriculture et pendant 6 ans les limitations des quotas d'importation de textiles et de vêtements; elle permettra aux fabricants de produits chimiques et d'articles en acier d'attaquer librement les fournisseurs des THP au moyen du droit antidumping; pendant 5 ans elle conservera les droits de douane frappant les marchandises "névralgiques" à grand apport du travail, et en même temps elle découragera ces pays de transformer des composants (input) provenant d'autres pays.... La CEE permettra à des habitants hautement qualifiés des THP de s'installer ne serait-ce que temporairement à l'Occident, mais prendra soin tout aussi efficacement que leur riche potentiel de travail ne puisse pas être effectivement mis à profit en faveur de la production destinée à l'exportation vers la CEE et qu'ils ne soient pas en mesure d'accroître leur productivité en s'installant sur le territoire de la CEE". L'auteur conclut que ces restrictions menacent les processus de réforme engagés dans les pays associés à la CEE.

Vu que les échanges commerciaux avec les trois pays de l'Europe centrale ne représentent qu'environ 2,5 % des échanges étrangers de la Communauté, dont la moitié revient à l'Allemagne qui se montre la plus ouverte aux produits économiques des "trois", les restrictions au libre échange maintenues par la CEE sont particulièrement injustifiées. Comme le souligne *Wall Street Journal*, qui cite les sources officielles hongroises, la libéralisation ne concerne qu'environ un pour cent de la CEE, tandis que la Pologne, la Hongrie et la Tchécoslovaquie se sont engagées à abolir les barrières à plus de la moitié de leurs importations.³² Les sociétés de la CEE participent à plus de 50 % aux exportations et importations réalisées par ces pays. Ces chiffres montrent bien les dimensions de l'aptitude des pays de la CEE à assister leurs voisins orientaux et aussi du défi qui nous attend.

XII. Du côté de nos partenaires, la ratification du traité exige non seulement l'approbation de la Commission mais aussi le consentement du Conseil de la CEE, après consultation avec le Parlement Européen (art. 113 du Traité de Rome). Dans la partie qui concerne les Communautés du Charbon et de l'Acier, le traité est ratifié par la Commission. Comme le traité a un caractère mixte, c'est-à-dire qu'il ne concerne pas seulement les questions commerciales mais aussi politiques et culturelles, sa ratification définitive du traité exige l'approbation des parlements de tous les pays membres (art. 238 du Traité de Rome). Les parties ont convenu que les dispositions commerciales du traité devraient entrer en vigueur le 1^{er} mars 1992 et que l'accord intérimaire (interim agreement) devrait être ratifié aussi par la Pologne.

La réalisation du traité exige d'importants changements dans la législation polonaise, notamment en ce qui concerne le rapprochement de notre législation économique des standards CEE (art. 68 — 70). Il convient toutefois de souligner que nous ne sommes pas condamnés à "l'esclavage" du droit de la CE, car il s'agit de l'obligation d'approximation de la législation, et cela en principe en 10 ans, bien que tous les négociateurs aient convenu que ce délai ne serait pas obligatoire d'une manière absolue. Les dispositions transitoires des nouvelles lois polonaises peuvent donc prévoir l'entrée en vigueur des solutions définitives, fondées sur des modèles de la CEE, dans quelques années seulement. D'autre part, pour des raisons importantes, on peut modifier les standards CEE, en évitant seulement l'incompatibilité totale avec la législation communautaire. Il y a lieu de souligner aussi que l'obligation d'approximation de la législation ne concerne que les domaines où sont en vigueur un droit commun ou les directives de la CEE, ou bien lorsque les parties se sont engagées à adhérer aux conventions internationales déterminées (art. 66, al. 2).

La Pologne devrait aussi apporter à sa législation interne des modifications qui permettraient de renforcer le droit antimonopoliste et de réduire les risques d'abus des droits de propriété intellectuelle par la limitation des importations dites parallèles et par l'isolement de notre marché. L'introduction de la construction d'épuisement des

³²New Trade Tier to EC Could Intensify Pain for three Eastern Nations, *The Wall Street Journal* du 2 mars 1992, p. 1.

droits de propriété intellectuelle dans chaque zone de libre échange dont la République de Pologne fait partie semble particulièrement urgente. Il existe en effet des domaines où la CEE peut ne pas être intéressée par une imitation rapide de ses propres solutions juridiques dans la législation de l'Etat associé. II. s'agit notamment de ces constructions juridiques de la concurrence qui limitent la liberté d'action ou la position dominante des sociétés étrangères sur le marché polonais.

XIII. L'inégalité des droits et obligations des parties au traité d'association ne fournit pas automatiquement d'arguments en faveur de son rejet. Le paradoxe consiste dans le fait que l'obtention du statut d'Etat européen privilégié de troisième catégorie³³ peut être considérée comme une amélioration de la situation actuelle de la Pologne. Les avantages résultant de l'adhésion à la zone de libre échange contribuent avant tout à l'affaiblissement de la discrimination et à l'ouverture progressive du marché, actuellement le plus important pour nous, à la majorité des marchandises et des services. Rester en dehors du traité d'association peut s'avérer à longue échéance une solution pire pour l'Etat, car la crise dans les pays postcommunistes exclut, pour une durée difficile à prévoir, la chance de formation d'un puissant groupement économique dans cette région. L'accès privilégié aux marchés des pays de l'AELE ou des Etats-Unis ne saurait compenser la détérioration de notre position de concurrent au sein de la CEE. Le processus de l'intégration et de la formation de plusieurs blocs économiques concurrentiels fera empirer la position du partenaire qui ne fait parti d'aucun des trois groupements économiques: la CEE, la zone nord-américaine de libre échange et la région du Pacifique en voie d'intégration.

Je vois un autre type d'avantages à tirer des liens multilatéraux noués avec le plus grand marché du monde et des modèles qui ont fait leurs preuves dans les pays de l'Europe occidentale. Le traité d'association contient nombre de garanties institutionnelles de la coopération politique, économique, scientifico-technique et culturelle, qui peuvent contribuer au processus des réformes engagées et de la mise en place d'institutions démocratiques. Dans les traités d'association précédents on ne trouve pas de formes de coopération analogues.

Le troisième argument en faveur de la ratification du traité est très subjectif. Il est fondé sur l'esprit d'ouverture au système "européen" de valeurs politiques et culturelles, ce que font valoir entre autres les sondages réalisés par le CBOS. Tout en partageant les préférences révélées par ces sondages, je présume cependant que la majorité des enquêtés ne se rendent pas compte de ce que, dans la perspective d'une génération, les avantages de la réussite du processus d'intégration ne seront ressentis que par une minorité.³⁴ Alors que les difficultés rencontrées au cours du processus d'intégration,

³³ Je classe dans la première catégorie les pays de la CEE, dans la deuxième ceux de l'AELE, qui, après avoir adhéré à la Zone économique européenne, ont obtenu des conditions bien plus avantageuses que les trois pays de l'Europe centrale, mais ont dû également approuver le droit en vigueur et futur de la CEE, sans la possibilité d'influence sur le processus de développement de la législation de la Communauté.

³⁴ C. Pirzio-Bizio: *The EEC and Central and Eastern Europe*, dans *New International Realities for the 1950*, Philadelphia 1991, p. 141 et autres.

sans parler de son échec, auront pour effet de renforcer les tendances isolationnistes et nationalistes.

Le quatrième argument en faveur de la ratification est la conviction que seule la CEE peut nous apporter une assistance notable, voire décisive au cours du passage à l'économie de marché et que, peut-être, abolira-t-elle à l'avenir la majorité des inégalités dans le domaine de la coopération commerciale, dans l'intérêt des deux parties. Tel est aussi l'intérêt politique et économique de tous les pays de la CEE. Selon des estimations faites par les économistes de la CEE à la charnière des années 1989/1990, en cas de réussite des réformes dans notre région, ce qui pourrait se traduire par un accroissement économique de 5 %, le taux d'accroissement dans la CEE augmenterait d'environ 3 - 3,5 %. Les traités d'association devaient constituer l'un des principaux instruments garantissant le succès des réformes qui feraient croître, à l'an 2000, le revenu national de la CEE jusqu'à environ 500 milliards d'ECUS.³⁵ Bien que l'assistance réelle de la CEE soit sensiblement inférieure à celle annoncée en 1989, les trois quarts des sommes destinées jusqu'à présent aux pays de l'Europe centrale et orientale, reviennent aux pays de la Communauté.

Le traité d'association contraint enfin à la poursuite des réformes entamées et offre au gouvernement un argument contre les prétentions déraisonnables des partisans du protectionnisme. Cependant cet important argument en faveur de l'intégration n'est valable que si l'on admet que les obligations contractées, tout en étant difficiles, sont réalisables, que l'objectif fixé peut être atteint, que le gouvernement et les élites politiques sont capables de réaliser leurs programmes et que la majorité de la population est prête à subir des sacrifices dont les dimensions générales doivent lui être honnêtement exposées.

Il n'est pas improbable que l'économie polonaise s'effondra par suite de l'impossibilité de faire face à la concurrence du partenaire plus fort, qui propose un modèle sélectif de libre échange. J'avoue que sans une modification significative des conditions d'intégration il me semble impossible que la Pologne puisse ouvrir son marché trois fois plus rapidement que la Grèce, l'Espagne ou le Portugal, pays qui ont traversé la majeure partie de cette distance dans des conditions tout à fait différentes, étant déjà membres de la CEE. Il ne faut pas oublier non plus qu'à l'époque d'association ces pays n'ont pas eu à réussir une transformation du système politique sans précédent, ni qu'ils n'ont pas perdu subitement presque la moitié de leurs marchés d'exportation. Il est vrai que les espoirs de renégociation du traité dans un très proche avenir sont dépourvus de fondement et que la demande prématurée en ce sens pourrait compliquer nos relations avec la CEE, mais il faut tout de même reconnaître que le plan Genscher d'accélération de l'entrée des "trois" dans la Communauté, dans le cadre d'une période transitoire qui nous serait accordée à l'exemple des traités d'adhésion de l'Espagne, du Portugal et de la Grèce, accompagnée de l'ouverture des marchés de la Commu-

³⁵ La valeur de l'assistance de la CEE aux pays postcommunistes dans les années 1989 - 1991, conjointement avec l'aide alimentaire, a atteint environ 7 milliards d'ECUS. C'est une somme modeste en comparaison avec 150 - 200 milliards de dollars (chiffre revalorisé) que l'Europe occidentale a reçus dans le cadre du plan Marshall.

nauté, notamment aux produits agricoles, semble la meilleure solution possible. On ne peut compter sur un changement d'attitude de la CE que si le début de la période transitoire confirme la nécessité d'allègement des restrictions à l'accès de nos marchandises au marché de la Communauté, ainsi qu'un progrès réel des réformes en Pologne. L'état de notre économie et des institutions d'Etat, après trois années d'une thérapie de choc, prouvent cependant que l'intégration réussie exige non seulement un changement de la politique commerciale de la part de la CEE mais aussi un changement décisif dans la mise en oeuvre des réformes en Pologne.

Le débat sur la ratification devrait servir d'occasion à l'implémentation du traité et à la garantie des intérêts minimum des groupes sociaux qui supporteront inéluctablement les coûts inévitables de la restructuration (notamment la majorité de la couche paysanne). Le gouvernement devrait élaborer des pronostics à court et à long terme des effets de la réalisation du traité pour les principales branches de l'économie, ainsi que les instruments d'une active politique industrielle et d'assistance aux exportations. Il serait souhaitable de déterminer un minimum de facteurs conditionnant la réussite de l'intégration européenne en 3 - 5 ans, soit jusqu'à la fin de la première période transitoire (art. 6, al. 1). Tant à l'usage intérieur qu'international, il faut définir les prémisses minima des programmes voulus de l'intégration (p.ex. le taux d'accroissement économique, l'étendue du chômage, le niveau d'inflation, la balance du commerce extérieur, le volume des investissements financiers et des crédits étrangers). Il convient de remarquer que s'agissant de la balance du commerce extérieur, après des réussites initiales qui ont suivi l'ouverture du marché national en 1990, plus récemment la Pologne a connu de sérieuses difficultés à cet égard (un solde des échanges négatif de 2,2 milliards de dollars en 1993). Etant donné le caractère structurel de cette tendance tant au cas de la Pologne que de la Hongrie et de la République Tchèque, sa continuation est jugée susceptible de remettre en cause la justification économique de l'intégration avec les CE.

Il importe aussi que les critiques du traité d'association ne puissent pas être facilement interprétées par l'opinion européenne comme une manifestation de la xénophobie et de l'esprit de clocher des Polonais. Je viens d'essayer de démontrer que les défauts essentiels du traité résultent du modèle sélectif de libre échange et de l'activité du lobby de certains secteurs économiques au sein de la CEE, lesquels depuis plus de 30 ans bénéficient du protectionnisme de l'Etat au détriment des consommateurs. Si la Diète se décide à prendre position sous forme d'une résolution spéciale, celle-ci devrait évoquer des arguments conformes à la théorie du libre échange et mettre accent non seulement sur les importunités que les restrictions relatives aux échanges commerciaux causent à l'économie polonaise, mais aussi sur la perte des avantages virtuels des consommateurs et des exportateurs des pays de la CEE.³⁶

³⁶ Le Traité d'Association entre le Pologne et les Communautés Européennes a été ratifié par la Pologne le 20 octobre 1992. Il est entré en vigueur le 1 février 1994.

APPROXIMATION OF THE POLISH LABOUR LAW TO EUROPEAN STANDARDS*

Maria Matey**

I. Approximation of legal provisions as a result of Poland's association with European Union

In the democratic Republic of Poland of the 1990s, the genuine role of law and its proper application has been growing significantly. The constitutional amendment of 1989 brought about, as the first systemic transformation, the proclamation of Poland as a state ruled by law. This law, in its new shape, is becoming directed at supporting the mechanisms of full transition to social market economy and, on the other hand, at Poland's full integration with the European Union — Polish state's clearly specified aim of the last decade of the 20th century.

The Treaty on Association concluded between Poland and the European Community in December 1991 (European Treaty, known as Association Treaty in common parlance) entered into force on 1 February, 1994. The Treaty sets up a most extended network of mutual obligations between the European Community and Poland, a part of them asymmetric, in the areas of economy and law. The parties have decided (Art. 68 of the Treaty) that

''the major precondition for Poland's economic integration into the Community is the approximation of that country's existing and future legislation to that of the Community. Poland shall use its best endeavours to ensure that future legislation is compatible with Community legislation''.

What should be commented upon here is the notion of ''approximation of legislations'' used in the Treaty: it is on the conception of that approximation that the very nature and extent of Poland's obligations depends. From the birth of the Rome Treaty, the Communities commented upon the vagueness of meaning of the terms used in it such as unification'', ''equalization'', ''harmonization'', ''approximation'' etc.¹ In sub-

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¹ See e.g. contemporary work by G. Lyon-Caen: ''L'harmonisation sociale dans la Communauté Européenne'', (in:) *L'harmonisation dans les Communautés*, Bruxelles 1968; in Polish literature, see M. Matey: ''O koncepcji i praktyce harmonizacji prawa pracy w krajach EWG'' [The Conception and Practice of Harmonization of Labour Law in Countries of the EEC], *Państwo i Prawo*, 1972, № 8 —9.

sequent years, as the very essence of the European Community was crystallized, the notions of "harmonization" and "approximation" became established in its official language, the latter distinctly prevailing. The Community's officious language also uses the term "adjustment". Its correctness is not unquestionable; in the very least, there are no formal grounds for with respect to Poland's Association Treaty with the Community. The very notions of "harmonization" and "approximation" are used in different meanings for that matter as there are different conceptions of such harmonization and approximation — from justifying the need for setting up and observing minimum standards (a criticized conception)² to a conception, found in Community's legal texts³, of harmonization as "approximation while the improvement is being maintained". Expressed in the "Green Paper" on European social policy till the year 2000, published by the Commission of European Community late in 1993, are fears that the present stage of European integration (the recent accession of the less wealthy countries such as Greece, Spain, and Portugal, as well as the prospects of future accession of Central Europe countries) may result in a "levelling down"⁴ of social standards and, as a consequence, in a phenomenon of social dumping in Europe. In this situation, the Commission seems to revert to the conception of setting up European minimum social standards which is even among the leading theses of the "Green Paper". Many serious European studies avoid involvement in semantic discussion in this sphere, finding such discussion futile which is aggravated by linguistic differences within the Community. In Poland, the circles of negotiators of the Association Treaty stress the following aspects: 1) the "approximation" of legislations under Art. 68 does not mean a duty "slavishly" to reproduce Community norms: merely a complete "incompatibility" of Polish legislation with Community law should be avoided⁵; 2) Poland's obligation in this area is extended over 10 years in principle during which period both transitory legislative solutions as well as those of destination can be applied. The extent of obligation under Art. 68 depends also on the range of Community's legal regulation of a given branch of the law. In the sphere of labour and social law which is the present subject, Community regulations — although developed — focus on a few fragments of that law only; in general, labour and employment remain the domain of domestic law.⁶

Under the Association Treaty, Poland has undertaken to secure compatibility of its entire legal system with Community legislation; as specified in Art. 69, what is meant here are especially the branches mentioned in that article, the sphere of "protection of workers at work" included. The scope *ratione materiae* of this formula has not been discussed so far in Polish labour law literature; it seems to be extremely broadly con-

² See R. Birkin *Europäischer Binnenmarkt und Harmonisierung des Arbeitsrechts*, Mannheim 1991, p. 16.

³ Thus in Art. 117 of the Rome Treaty (after amendments), and also in the Community's Charter of Fundamental Social Rights of Employees (1989).

⁴ Green Paper: European Social Policy — Options for the Union, Introduction of Padraig FLYNN, Brussels, November 1993, p. 9.

⁵ Thus S. Sołtyński: „Układ o stowarzyszeniu między Polską a Wspólnotami Europejskimi” [Association Treaty between Poland and European Communities], see preceding study in the present issue.

⁶ See R. Blanpain, M. Matey: *Europejskie prawo pracy w polskiej perspektywie* [European Labour Law in Polish Perspective], 1993, p. 83.

ceived, though, and to include practically the entire sphere of labour law the whole of which is designed to protect employees first and foremost at workplaces. This is the interpretation given to this obligation by the bodies that prepare draft amendments and a general reform of Polish labour law, that is in particular the National Commission for Labour Law Reform, the Social Partners involved in that process (organizations of employers and the unions), as well as the competent agencies of the Government. Parliamentary works on preparation of a general amendment to the labour code, expected to be completed soon, will probably confirm the adoption by Polish legislative authority of the broad interpretation of the discussed formula of the Treaty.

It has to be stressed that the "European standards" to which Polish labour law should be approximated include not only legal norms of the European Community but also those laid down by the Council of Europe, including in particular the European Social Charter which Poland is considering to ratify in not too distant future. Despite the differences in the systems of implementation of norms by the two European institutions, those norms together make a consistent "corps of European labour law".

Finally, one should bear it in mind that Poland ratified as many as 78 Conventions of the International Labour Organization and fulfils its resulting obligations properly.

II. Approximation of Polish law to European standards: individual labour law

1. The right to work, employment and "decent" wages

In the years 1993 - 1994, during the preparation of a new Constitution of the Republic of Poland, the problem of including in it a provision on the right to work became the subject of fierce controversies in Poland. The right to work was contained in the old communist Constitution of 1952 which reflected the situation where, for many decades, the notion of unemployment was unknown in Poland (notion and not phenomenon: in fact there was extensive hidden unemployment characteristic of centralized socialist economy). The 1952 Constitution was quashed in 1992; yet a part of its provisions, particularly those pertaining to the fundamental rights and liberties of citizens the right to work included — remain in force until a new and complete Constitution of the Republic of Poland can be adopted on which works are in progress today. At present, in the face of a 14 % unemployment rate which the state is unlikely to get under control any too soon, some groups of public opinion treat the constitutional provision on the right to work as fictitious and thus detrimental and improper. This coincides with a broadly accepted opinion that the Constitution should be "purified" of declarative norms whose implementation is obviously impossible and not qualifying to judicial protection. Widespread is also a belief that the right to work and a number of other social rights are incompatible with the principles of market economy and on the other hand, that Poland cannot "afford" those rights in the country's present situation. Thus for example a draft of the so-called Charter of Rights and Freedoms, submitted by the Chancellery of President L. Wałęsa in 1993 and designed to become a compo-

ment of the new Constitution, does not provide for the right to work and merely secures freedom of work. However, the centrist and leftist factions of opinion refuse to resign the constitutional right to work. Quite rightly, they argue that this right, found in many legal systems of market economy, is not treated as subjective right (suable before the court) and was not treated as such in communist Poland; therefore, there are hardly any reasons to fear that it might be interpreted that way if contained in the new Constitution. The European standard to which Poland should adjust its legislation in this respect is the European Social Charter of the Council of Europe. The right to work has been formulated in the title of its Art. 1 (the Charter's hardcore). Further, para 1 of that Article considers it one of the fundamental aims and tasks of states to achieve and maintain the highest possible stable level of employment, the ultimate object being full employment. As all the other known normative acts, also the European Social Charter does not treat the right to work as suable. According to an interpretation of its Art. 1 provided by implementing bodies of the Council of Europe, the discussed provision obliges states to take steps and not to achieve results: all it requires is pursuit of planned employment policy. Even in a situation of considerable growth of unemployment, a country does not run the risk of being charged with a failure to observe the Charter provided it makes serious efforts towards improvement of the labour market situation.⁷ The measures that are taken nowadays to that aim by European countries with both prosocial and liberal market economy are considered by the Council of Europe to meet the obligation that follows from Art. 1 of the Charter with which they are consistent even if governments fail, despite all efforts, to remove or at least reduce unemployment.⁸ It seems that the interpretation of the contents of "the right to work" developed on the grounds of European Social Charter should disperse the undue fears entertained by some groups of public opinion in Poland in relation to the preservation of that rights also in the new Constitution of the Republic of Poland.

The legal aspect of the decision as to preservation or resignation of the constitutional norm on the right to work is no doubt important; this decision, however, cannot solve the basic economic and social problem of the size of unemployment and means of its reduction. The European Community which has the unemployment index verging upon 12 % in 1994 developed a so-called "Community-wide framework for Employment" in which the European Union's program in the social sphere till the year 2000 has been outlined.⁹ Development of an effective program of unemployment control is also Poland's duty, one that stems not from legal norms but from Community practices. Such a draft program was prepared in Poland in 1993; it is in 1994 modified to some extent by the centrist-leftist Government. Also in preparation is a radical amendment to the 1991 act on employment and unemployment.¹⁰, with consideration to the

⁷ See conclusions from the 2nd series of control (1971) conducted by Committee of Independent Experts of the Council of Europe for application of European Social Charter, Strasbourg 1982.

⁸ See Parliamentary Assembly, Buechner's Report, Strasbourg 1977.

⁹ See "Green Paper" European Social Policy—Options for the Union, Commission of the European Communities, November 1993.

¹⁰ Act of 16 October 1991 (*Journal of Laws*, N° 106, item 457) with subsequent modifications (*Journal of Laws*, N° 21/1992, item 84, and N° 78/1992, item 394).

recommendations that follow the Community employment program. Irrespective of domestic needs in this sphere, it seems that success of the unemployment control program will matter just as much for the cause of Poland's integration with Europe as success of the process of approximation of law to European standards.

Both the European Social Charter of the Council of Europe and Community Charter of Fundamental Social Rights of Workers lay stress on the guaranty of freedom of work and free choice of work. No explicit guaranty of this kind has been contained so far in Polish legislation (whether the Constitution or the still in force labour code of 1974¹¹). Although such guaranty can be deduced from the labour code through interpretation, the fact has to be borne in mind that this very code was no obstacle in the past to the introduction of the notorious act on "social parasites" which imposed the duty to work on individuals falling under that category. Therefore, a guaranty of freedom and free choice of work should be added both to constitutional norms and labour legislation.

The two social charters — the Community's as well as the Council's of Europe — formulate as the basic requirement the workers' right to fair, equitable, or decent wage. Poland as well as other post-communist countries encounter specific difficulties trying to meet this requirement. They result from the relatively low real value of average wages as compared to the situation in wealthy countries of the Community. Discussions have already started whether wages just above so-called social minimum would meet this requirement. Can it be assumed, basing on opinions recognized by OECD and the Council of Europe many years ago with respect to West-European countries, that the "threshold of decency" of wages is about 70 % of the national average? The opinion on the Equitable Wage, issued by the European Commission on 1 September 1993 will surely contribute to making the situation clear in this respect.

2. *Bans on discrimination in employment; discrimination on account of sex and other features*

The two social charters — Council's of Europe and Community's — distinguish bans on discrimination according to the following criteria: 1) sex; 2) other criteria; 3) different treatment for nationals and foreign workers. It should be added that equal treatment for men and women in the sphere of employment is dealt with by several Community directives,¹² and equal treatment for nationals and foreign workers — by an extensive set of Community regulations and directives which will be discussed further on. Besides, in both of these spheres, there is already extensive jurisdiction of the European Court of Justice. Other criteria of discrimination in employment, such in

¹¹ With numerous subsequent modifications.

¹² See 1) Directive (1975) relating to the application of equal pay for men and women, N° 75/111, O.J. N° L 45/19, 2) Directive (1976) relating to the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training, promotion and working conditions, N° 76/207, O. J. N° 139/40, 3) Directive (1978) concerning the progressive implementation of the principle of equal treatment for men and women in matters of social security, N° 79/7, O.J. N° L 6/24; 4) Directive (1986) on the implementation of the principle of equal treatment for men and women in occupational social security schemes, N° 86/378 O J N° 1225/40.

particular as origin, race, colour, political opinions, religion, are incessantly subject of interest of the Council of Europe and its agencies, the European Court of Human Rights included.¹³

In Poland a general ban on discrimination on account of sex, birth, education, occupation, nationality, race, religion, as well as social origin and status, is contained in Art. 67 of the former Constitution of 1952; the article remains in force although the Constitution as a whole was quashed in 1992. Additionally, equal treatment for men and women in the sphere of employment is laid down by Art. 78, also left in force in 1992, which mentions as the guaranty of a women's equal rights "her right to work equal to the right of a man, right to remuneration based on the principle of equal pay for equal work, equal right to repose, to social insurance, to instruction, to honours and distinctions, and equal access to public offices". With the constitutional regulation being as extensive as that, the plan was relinquished in 1974 to add an anti-discrimination clause to the labour code as the clause was found redundant. At present, in the course of works on both a new Constitution and a radical amendment to the labour code, care should be taken to prevent an impairment of the ban on discrimination as a result of today's aversion to "declarative" norms, not to mention the impact of conservatist opinions which attach little importance to equal rights of women, equality of views and religions, or equality of nationalities. A general ban on discrimination on account of all the above criteria should be included in the new Constitution of the Republic of Poland, and the principle of equal treatment in the sphere of employment should be reflected in the new wording of the labour code. The developments on today's labour market in Poland have even prompted the Commission for Labour Law Reform to suggest supplementation of the ban on discrimination in the sphere of employment with the criteria of age (concerned here is a rather widespread practice of specifying the upper age limit — e.g. 35 — in job offers).

It has to be stressed that despite the guaranty of equal treatment for men and women contained in Art. 79 of the former Polish Constitution, the practice in this sphere was not fully consistent with this principle. The average wages of women amounted to 70 - 80 % of men's wages; moreover, certain occupations (teachers, judges of lower instances, certain fields of medicine) became "feminized" in Poland over the last decades, and wages were frozen in those professional groups at a level that was lower compared to "male" occupations. The situation in this sphere in the 1990s has not been studied so far; we do not know whether it has deteriorated or improved (this latter hypothesis being rather doubtful).

3. *Equal treatment for Polish and foreign workers*

So far, Poland does not face the need to adjust its national law to Community regulations and directives in this sphere.¹⁴ First, the norms concerned clearly apply to

¹³ See decisions in cases *Kosiek v. Federal Republic of Germany* and *Glaserapp v. Federal Republic of Germany*, discussed in the book by R. Błanpajn, M. Matey: *Europejskie prawo pracy...*, op. cit., p. 269.

¹⁴ See in particular: Regulation N° 1612/68 of 15 October, 1968 on freedom of movement for workers within the Community, O. J. 1968, N° L 257, amended by Regulation N° 312/76, O. J. 1976, N° 139; Directive N° 360/68 of 15 October, 1968 on the abolition of restrictions on movement and residence within the Community for workers

relations between member states of the Community; approximating its legislation to them long before it actually becomes member, Poland would have to apply Community norms concerning freedom of movement of workers towards nationals of member states of the Community while those states would not be obliged to apply those norms to Polish citizens. Besides, it seems that not even Poland's accession to the Community will result in its prompt inclusion in the Community's specific regime of free movement of workers. This will probably only take place after a prolonged period of transition as was the case with accession to the Community of Spain and Portugal. Second, as long as Poland has the status of associate member, the problem of movement of workers is regulated by the Association Treaty (Art. Art. 37 - 42) and it is to that Treaty that Polish provisions should be adjusted for the period of association. The Treaty lays distinct stress on regulation of this sphere by way of bilateral agreements (preservation of concluded bilateral agreements, encouragement of the remaining member states to consider and possibly accept bilateral agreements). Finally, what Poland is beginning to face is a need for dichotomous regulations: one which would relate to movement of workers between Poland and member states of the European Union, and another one pertaining to the mass legal and illegal inflow of labour force from East-European countries and even from the Far East; beside its aspects relating to employment, this latter phenomenon also gives rise to a complex of social, economic, health, and criminal problems (Eastern organized crime). Specific are also the problems of illegal immigrants from the East and South who treat Poland as a stage in the realization of their plans to get to the territory of a West-European state. However, Poland is also an attractive destination of profit-seeking migrations from the East and South, non-European countries included.

The problem of employment of Polish citizens abroad by foreign employers and employment of foreigners in Poland is regulated by a special chapter of the act of 16 October, 1991 on employment and unemployment (see Note 10 above). In its Art. 42 the act provides that employment of Polish citizens abroad by foreign employers should take place on the grounds of: 1) international agreements; 2) contracts concluded by Polish citizens with licensed employment agencies; 3) contracts concluded by Polish citizens with foreign employers. Poland is party to a number of bilateral international agreements in this sphere, including the most recent ones concluded in 1990 with the Federal Republic of Germany and France, as well as those of 1994 with the Russian Federation and Ukraine.

Art. 50 of the act of 1991 on employment and unemployment provides that to employ a foreigner, companies and individuals in Poland need a permission issued by a provincial employment authority which is guided by the situation in the labour mar-

of Member States and their families, *O.J.* 1968, N° L 257; Regulation N° 1251/70 of 29 June, 1970 on the right of a worker and the members of his family to remain in the territory of a Member State after having been employed in that state, *O.J.* 1970, N° L 142/30; Directive N° 221/64 of 25 February, 1964 on the coordination of special measures concerning the movement and residence of foreign nationals that are justified on the grounds of public policy, public security, or public health, *O.J.* 1964, N° L 56/4; three Directives of 28 June, 1990 on the right of residence of European citizens, nationals of Member States, of employees and self-employed persons who have ceased their occupational activity and of students, N° 362/90, 365/90 and 366/90, *O.J.* 1990, N° L 180/26 - 28.

ket when granting or refusing the permission. The permission is issued on motion of the employer; it pertains to a specified foreigner and a job with a specified employer. In its present wording, Art. 50 of the act is not exactly consistent with the principle of the free movement of workers. So far, Polish law has not taken into account the consequences of Poland's obligation under Art. 52 of the Association Treaty which pertains to employment in Poland of foreign key staff (managers and experts).

Generally, the discussed sphere still remains unsettled in Poland because of its recent emergence, and the principle of equal treatment for nationals and foreign workers is far from being implemented in practice. Besides, in the case of foreigners from so-called "Western" countries, the differences in treatment are much to their advantage (which is true especially with respect to wages), while illegal workers from the East and South are treated worse than Polish workers.

4. Employment law in the period of transformation

Employment law contained in the 1974 labour code which is still in force today in but a slightly modified form requires a radical reform whose framework has already been prepared by a specially appointed National Commission for Labour Law Reform, working since 1990 and headed by Prof. Tadeusz Zieliński. The Commission has been inspired in its work by norms of the International Labour Organization and by Community standards (this was so even before the conclusion of the Association Treaty). The fact considered that Community norms in this sphere are not too developed — employment law being chiefly a domain of national law — it is the Commission's aim generally to adjust Polish labour law to the requirements of market economy and to the general systemic and economic principles on which modern European democracies are based. Thus conceived, the "philosophy" of works on labour law reform requires three basic steps: 1) genuine freedom of contracts and legal equality of parties have to be secured or at least the former superior legal position of the (state) employer eliminated as a relic of the authoritarian system; 2) Polish labour law has to be reoriented from the centralized state economy to private companies; and 3) Polish labour law should be designed to heed the needs and possibilities of medium-size and small companies rather than the former "socialist industrial giants".

Apart from unemployment, the most painful problem of Polish labour law of 1993 - 1994 is a spreading tendency of both private employers and persons seeking a job to pass over to the so-called "grey zone of employment", that is unregistered employment, without social insurance and taxation, not based on any legally identifiable contract and thus completely lacking the protection that is offered by labour law. This "grey zone of employment" — most extensive already and still growing — pertains both to Polish nationals and to foreigners, especially those from Poland's eastern and southern neighbour countries. Such practices are difficult to control as in the situation of high unemployment rate and poor economic condition of many employers, the discussed solution is advantageous to both parties who tolerate it unanimously. In some cases, workers employed legitimately before switch, by mutual agreement, to the "grey zone" principles of employment with one and the same employer.

The control mechanisms existing in Poland in the shape of the State Labour Inspectorate are far from sufficient to reveal and curtail such practices. At the same time, opinion's are voiced by some publicists that however condemnable, those practices also play a specific positive role securing paid work to a number of persons who would have otherwise been unemployed. But, on the other hand, many "grey employees" do not hesitate to take abusively advantage of the unemployment allowances thus impoverishing scanty public funds.

This situation adds to the importance for Polish labour law of Community norms contained in Directives on individual employment relationship, especially Directive N° 553/91 on an employer's obligation to document employment relationship.¹⁵ The Directive requires that within two months of entering a job all employees should be provided with a written document containing the basic elements of their contract of employment. The still valid provisions of the Polish labour code fail to meet to the full the Directive's requirements with respect to the number and kind of such basic elements of a contract of employment that have to be documented; the prepared draft general amendment to the code, however, fully satisfies those requirements.

The "grey zone of employment" is also manifested in Poland in the employers' practice of using temporary contracts of employment for a definite period which are repeatedly renewed. This way, employers avoid the obligations related to the legal regime of contracts of employment for indefinite period (in the sphere e.g. of procedure of dissolution of the contract of employment). The amendment to the labour code will limit the possibility of circumventing the law through such practices. However, the problems of contracts for a definite period — which are "atypical" in the wording of Community norms — have acquired much importance in Poland in many aspects. Admittedly, even in its present wording, the labour code secures the right to safe and hygienic working conditions to all workers irrespective of the grounds of employment; yet the practice in this field no doubt leaves much to be desired, with respect to workers with "atypical" contracts in particular. The labour code amendment takes into account all suggestions that follow from Directive N° 383/91 on the conditions of health and safety at "atypical" work.¹⁶

Also the remaining two Directives relating to "atypical" employment to be passed in the future (now in the shape of proposals) will be just as useful for Polish law and practice. It has to be mentioned, though, that the form of temporary (*intérimaire*) employment in Community understanding — employment relationship between temporary employment agencies (here: employers) and their employees whom the agencies hire out to companies (users) — has not developed in Poland so far. Community protection of "atypical" employment concerns particularly this very type of employment.

¹⁵ Directive N° 553/91 on an employer's obligation to inform employees of the conditions applicable to the contract of employment relationship, O. J. 1991, N° L 288/32.

¹⁶ Directive N° 383/91 of 25 June, 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship, O. J. 1991, N° L 206/19.

5. *Employees' rights in the course of restructuring and privatization of companies*

In the years 1990 - 1994, what was the basic problem of Polish labour law were the consequences for employees' rights of the extensive restructuring and privatization of companies (most of them still state-owned). These operations resulted and still result in so-called mass layoffs of employees, unknown in Poland in the period of communist economy. Polish legislation met the needs involved in such transformations to the necessary extent, largely inspired in so doing by norms of the International Labour Organization and by Community standards: owing to this inspiration, the process of approximation of Polish law to those standards is much advanced today in this particular sphere.

Thus a labour code amendment introduced in April 1989 yielded a new provision — Art. 23 — relating to a change of employer, or to be more exact — to mergers and divisions of companies or to their taking over, fully or in part, by other companies (which approach reflects the absolute prevalence of state economy characteristic of those days). Under that article, in the case of a merger, division, or taking over of a company or a part of a company, the company or companies that emerge from such operations become party to employment relationships with the staff employed before organizational changes. Thus employment relationships continue automatically (but can be dissolved later in accordance with general principles which will be discussed further on). Under that same provision, responsibility for the obligations towards the employees that have emerged before the change of owner falls on the new owner (if the entire company has been taken over) or solidarily by the old and new owner if the transformation consisted in division or taking over of a part of the company. This regulation is fully consistent in principle with Community Directive N° 183 of 1977 relating to the safeguarding of employees' rights in the case of transfer of undertakings, businesses, or parts of businesses.¹⁷ The labour code regulation so far in force does not contain a provision included in the Directive which deals with a situation when the contract of employment is terminated (by the employee, as can be presumed) because the transfer has resulted in radical changes in the working conditions that are to that employee's detriment: in this situation, the termination is assumed to have been made by the employer. A similar provision has already been introduced by the Commission for Labour Law Reform into the draft general amendment of labour code (draft of 1993 - 1994). The draft uses the notion of "a company being taken over wholly or in part by another employer" which is tantamount to the "transfer" used in the Directive.

Parallel to restructuring operations, Polish economy aims towards mass privatization. The act of 13 July, 1990 on privatization of state enterprises¹⁸ provides in its Art. 9 para 1 that "employees of a privatized enterprise shall become employees of the new company by force of law". According to an established practice, in the event of

¹⁷ Directive N° 183/77 relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses, or parts of businesses, O.J. 1977, N° L 61.

¹⁸ *Journal of Laws*, N° 51, item 298.

involvement in privatization of so-called strategic investors, the foreign capital in particular, included in the negotiated agreements is the new owner's undertaking to preserve full composition of the staff for a definite period of time, e.g. for 18 months. A draft of a new act on so-called Pact on State Enterprise in course of Transformation, can be expected to confirm this practice.

Despite the Polish guaranty of automatic continuation of employment relationship in cases of restructuring or ownership transformations, the rules of market economy require that employers should be given the possibility reduce the staff for economic reasons against the principle of job protection formerly observed in state-owned economy. In the sphere of individual redundancies, employers's situation has already been made easier by the labour code amendment of April 1989; the possibility of mass lay-offs for economic reasons was introduced by the act of 28 December, 1989 called the "group dismissal act".¹⁹ The act was inspired by Community Directive of 1975²⁰ on collective redundancies, amended in 1992.²¹ It is consistent with that Directive and proves even more advantageous to employees in some of its aspects (for example, a broader category of redundancies in Poland fall under the legal regime of "mass lay-offs"; the required notification of labour administration agencies previously to such redundancies has to be made earlier in advance; and payment of discharge money is obligatory of which the Directive makes no mention at all).

Finally, the act on protection of employees' claims in the event of employer's insolvency was negotiated in 1993 within the Pact on State Enterprise in course of transformation and duly passed by the Parliament; it is modelled after Convention N° 173 of the International Labour Organization and on the Community Directive of 1980²². The act²³ appointed a Fund of guaranteed employees' benefits. Under the Polish act, however, the Fund itself can become insolvent as it lacks state guarantees (due to the country's weak financial condition). Thus, in spite of the doubts as to success in fully adjusting Polish legislation to Community norms, a most serious step has been taken in that direction; in the future, it should be submitted to further necessary improvement.

6. Hours of work and annual leave

Polish regulation of working time and annual leaves is contained in the labour code of 1974 and since has not been subject of major improvements. The duration of working time is maximum 8 hours per day and 48 hours per week. The annual leave is

¹⁹ Act of 28 December, 1989 on special rules of termination employment relationships with employees for reasons relating to the workplace and on amendment of selected statutes (*Journal of Laws*, 1990, N° 4, item 19, with subsequent changes).

²⁰ Directive N° 129/75 of 17 February, 1975 on the approximation of laws of the Member States relating to collective redundancies, *O.J.* 1975, N° L 48.

²¹ Directive N° 56/92 of 24 June, 1992, *O.J.* N° L 245.

²² Directive N° 987/80 of 20 October, 1980 on the protection of employees in the event of the insolvency of their employer, *O.J.* 1980 N° L 283, amended by Directive N° 164/87 of 2 March, 1987, *O.J.* 1987, N° L 66.

²³ Act of 29 December, 1993 on protection of employees' claims in the event of insolvency of their employer (*Journal of Laws*, N° 1/1994, item 1).

14 working days after 1 year of employment, 17 working days after 3 years of employment, 20 working days 6 years of employment and 26 working days after 10 years of employment. A substantial amendment to the labour code prepared by the National Commission for the Labour Law Reform in 1992 - 1994 and being in 1994 - 1995 in course of parliamentary legislative procedure, is aiming at establishing a new regulation of annual leaves, adapting its provisions to the ILO Convention No 132 concerning annual holidays with pay (1970) which Poland intends to ratify soon, that means providing for minimum three weeks annual leave. This drafted regulation is considered to be the utmost social effort in the Polish present economic situation.

The Community Directive No 104 adopted in 1993 on working time²⁴ goes further than ILO Convention No 132 and than the Polish draft of the labour code amendment: it requires at least four weeks annual leave. Also, some minor discrepancies exist between the Directive and the Polish regulation existing and drafted as well. It seems that four weeks annual leave required by the Directive will remain to be introduced in Poland at the end of the decade, by the entirely new Labour Code.

7. Protection of safety and health of workers

a) General protection of safety and health of workers

Protection of workers' health and safety is a sphere in which Community norms are much developed. Most generally, two specific "generations" of those norms can be distinguished. The first one includes over a dozen directives adopted in the years 1975 — 1989 in the course of implementation of the Community social program of 1974. The other group implemented the Community Charter of Fundamental Social Rights of Workers and a social program based on that Charter of 1989; it is a system of norms composed of the so-called Framework Directive of 12 June, 1989 N° 391 concerning the introduction of measures to encourage improvements in the safety and health of workers at work²⁵ and a complex of special directives, also called the individual or "daughter" directives. The process of their completion has not been completed yet: by 1994, 12 special directives were passed, several draft directives are processed by Community legislature. Besides, the complex of norms of the second "generation" also includes important Recommendations such as e.g. Recommendation of 22 May, 1990 on the list of occupational diseases. The abundance of Community norms relating to protection of safety and health results both from importance of this sphere for competitive value of separate European states (elimination of so-called social dumping), and from procedure: under the Treaty of Rome, required to pass norms in the spheres of safety and health is qualified majority of votes which was attainable as opposed to unanimity obligatory with respect to other spheres of labour and social law.

²⁴ Directive N° 104/93 of 23 November 1993 concerning certain aspects of the organization of working time, O.J. 1993, N° L 307.

²⁵ The Framework Directive N° 391/89 concerning the introduction of measures to encourage improvements in the safety and health of workers at work, O.J. 1989, N° L 183.

The legal regulation of safety and hygiene of work still in force in Poland is contained in Section X of labour code and the related or executory provisions. The regulation is quite extensive; its quality has not been criticised in principle so far, also from the viewpoint of consistence with international norms, those of the Community included. Nevertheless, it requires formal adjustment which step has been made in the draft of a new wording of the labour code, negotiated within the Pact on Enterprise and submitted to the legislative process in 1994. Beside the discussed need of formal adjustment, the major problems of Polish regulation of the sphere of protection of safety and health of workers consist in: 1) its qualitative "outdatedness" — inadequacy to Western technological standards (technological gap); only a specialistic extra-legal study, now in progress, of consistence of Polish technical norms in different branches especially with technical standards of "second generation" Community directives will provide a complete picture of the needs related to adjustment; 2) low culture of observance of the norms of safety of work by workplaces, especially by the new small business and also by larger companies in critical economic situation; 3) weakness and inefficiency of the Polish system of supervising the observance of those norms, b) Protection of women and young workers

Protection of women's work is dealt with by one of the most recent social regulations of the Community: the Directive of 19 October, 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.²⁶ The present wording of the Polish labour code meets the requirements of that Directive in principle. The Directive goes farther, however, e.g. in the sphere of protection of the health of a pregnant or breastfeeding employee: if her work threatens her health, the employer should transfer her to another job or grant her a leave for the whole of that period if transfer is impossible. Polish law does not provide for this kind of measure. What also needs to be verified is consistence of Polish lists of jobs prohibited to women with the lists that form an appendix to the discussed Directive.

Protection of the work of young people is subject of the quite recent regulation by the Directive No 39/94 on the protection of many people at work²⁷. After thorough examination of the Directive certain adjustment needs can be expected to arise: the Directive contains rather far-reaching norms of protection and organization while the Polish regulation of this sphere by the labour code seems to be rather outdated — especially with respect to the system and organization of young people's employment — and the recently prepared amendment to the code does not provide for any significant improvement (which is due to the present shortage of financial means and situation in the labour market). What can already be stated today is incompatibility of the Polish solutions with the European Social Charter of the Council of Europe which in

²⁶ Directive N° 85/92 of 19 October, 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, *O. J.* 1992, N° L 348/1.

²⁷ Directive N° 33/94 of 22 June 1994 on the protection of young people at work, *O.J.* 1994, N° L 216/12.

its Art. 7 para 5 recognizes the young people's and apprentices' right to decent wages or another adequate pecuniary remuneration (interpreted by the Council's competent agencies as one-third to two-thirds of the average adult wages). Polish provisions, instead,²⁸ define the amount of remuneration of young people in vocational training as 4 to 15 % of average adult wages. The discrepancy in this sphere is indeed glaring. It results from a belief which is deeply rooted in Poland that young people should work to train in a profession and not to earn money. In today's situation, this opinion needs to be verified. On the other hand, Polish law can be considered consistent with European standards with respect to definition of the minimum age limit of employment. The Directive No 33/94 prohibits the employment of "children" or — according to the Directive — persons aged under 15. A similar ban is contained in Polish labour code. Moreover, in the conditions of growing unemployment in Poland, the government program for unemployment control prepared in 1993 provided for extension of obligatory education to the age of 18 and for other measures to shift the lower age limit of employment far beyond the age of 15.

III. Approximation of legislations in the sphere of collective labour law

7. Directions and range of European standards in collective labour law

The problems of national collective labour relations is neither regulated by European Community in its acts or draft acts, nor discussed in decisions of the European Court of Justice, with the following exceptions: 1) the spheres of so-called information and consultation of workers in national enterprises which are touched upon by several Directives; 2) employee representation in enterprises on Community level which is dealt with by a most recent Directive on European Works Council;²⁹ and 3) a budding plan to establish European Collective Agreements.³⁰ In principle, however, the problems of collective labour relations is a domain of autonomous actions of so-called Social Partners. The Treaty that set up European Community (in the wording adopted in Maastricht) does mention in Art. 118 the freedom of association and collective bargaining between employers and employees among the spheres in which the Commission should support close cooperation between the Member States. Yet as opposed to the Commissions powers granted by Art. 118 a of the Treaty, to legislative actions on other social issues, its engagement in collective labour relations does not go beyond to that very support of close cooperation between the Member States. The Agreement on

²⁸ See Ordinance of the Council of Ministers of December 1 1990 on vocational training of young people at socialized enterprises and their remuneration (*Journal of Laws*, N° 56, item 332, with amendments of 1990 and 1992).

²⁹ Directive N° 45/94 of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purpose of informing and consulting employees, *O.J.* 1994, N° 254/64.

³⁰ In its wording of 1986, Art. 118B of the Treaty of European Communities speaks of a "dialogue between employers and employees at the European level which might — should both parties to it consider this desirable — lead to relations based on agreements". Similar relations based on agreements — if both Social Partners find it desirable — are mentioned in Art. 4 of the 1991 Maastricht Agreement on Social Policy.

Social Policy, concluded in December 1991 together with the Maastricht Treaty by Community's Member States, Great Britain excluded (reverting to the Protocol on Social Policy of Maastricht, also concluded by 11 Members States) states in its Art. 2 point 6 that its provisions do not apply to wages, right of association, right to strike, and right to lock-out. In the opinion of the doctrine of European social law, this is a distinct confirmation of Community's lack of competence in the above spheres. The separate Directives, however, often refer to actions of Social Partners, especially encouraging them to resolve problems by way of negotiations or co-decision. This was the case e.g. of a norm which is likely to be of fundamental importance for the future shaping of social relations within European Union — Art. 2 point 4 of the Maastricht Agreement on Social Policy which authorizes the Member States to bestow Social Partners — on their joint motion — with the competence in the sphere of implementation of Directives (normally, this competence belongs to the Member States themselves).

It has to be mentioned that both Social Charters — Community's and Council's of Europe alike — treat the freedom of association and collective bargaining as the fundamental rights of employees;³¹ while Community Charter is not normative in nature, the European Social Charter will become binding for Poland once it is ratified; this concerns also its two articles 5 and 6 which belong to the Charter's hardcore, as well as Art. 2 of the Additional Protocol on workers' rights to information and consultation. What will also become binding for Poland is the interpretation of those articles developed by implementing bodies of the Council of Europe (Independent Experts Committee for European Social Charter),³² which concerns also the right to strike and lock-out. Already binding for Poland as a result of the recent ratification of the European Convention on Human Rights is its Art. 11 on freedom of assembly and association and the right to unionize together with the jurisdiction of the European Court of Human Rights developed on the grounds of that provision.

It has to be stressed that the moderation shown so far in defining European Community's legislative competence in the national sphere of collective labour relations results largely from the general recognition in modern civilized world of the Conventions of International Labour Organization: N° 87 on freedom of association and protection of the right to organise (1948) and N° 98 on the right to organise and collective bargaining (1949); the two Conventions were ratified by Poland a long time ago.

It has to be stressed as well that — though the most recent and very important Directive No 45/94 on European Works Councils applies to European-scale enterprises only — the idea of works councils and procedures of information and consultation the employees is deemed to have direct impact on the situation of national-scale enterprises in the European Union countries and thus — to shape a new and general model of collective labour relations in Europe.

³¹ See Art. Art. 11 - 14 of the Community Charter of the Fundamental Social Rights of Workers and Art. Art. 5-6 of the European Social Charter of the Council of Europe.

³² In Polish literature, discussed in the book by R. Blanpain, M. Matey: *Europejskie prawo pracy w polskiej perspektywie*, Warszawa 1993, p. 281 ff.

2. The state of collective labour law in Poland in mid-1990s

The legal regulations of collective labour law that are in force in Poland can be divided into two groups: 1) new regulations passed in democratic Poland which fully reflect the European trends; according to some opinions, they even go too far and verge on syndicalization and anarchization of public life. This group includes the trade unions act³³, the act on settlement of collective labour disputes³⁴, the act on employers' organizations³⁵ and, eventually, the quite recent act on collective agreements³⁶; 2) regulations dating from before the systemic transformations in Poland — this concerns, for instance, the act on workers' self-management of 1981³⁷.

The new group of regulations: on trade unions, employers' organizations, settlement of collective labour disputes and on collective agreements fully corresponds with European standards. Even if the acts of 1991 require modification after three years of operation, such modification would aim not at making them more "European" but at a greater effectiveness and rationalization of the Polish system of industrial relations. Thus it is argued that legal solutions should be improved relating to the formation and registration of trade unions and employers' organizations, the shaping of criteria of "representativeness" of professional organizations, development of legal mechanisms conducive to cooperation of the pluralist structures of both Social Partners, simplification and de-formalization of procedures relating to strikes (which are often neglected in practice), solution of the problem of right to lock-out etc.

The range and form of employee participation in market economy is a separate problem. Since the 1981 act on workers's self-management has applied to state enterprises only, its scope is bound to become reduced with the progress of privatization in Poland. It is doubtful, though, whether employee participation can be preserved in its original shape (with most extended competence of the bodies of workers' self-management) also in companies that maintain the status of state enterprises. The idea of participation has most ardent followers but also opponents in Poland, especially among managers. From the beginning of the 1990s, there has been in Poland a marked trend towards replacing the conception of workers' self-management with that of employee stockholding which acquired the legal shape in the act of 1990 on privatization of state enterprises³⁸ (the staff of a privatized state enterprise are entitled to buy at preferential prices 20 % of the total stock; they also appoint one-third of the composition of the Board). In 1994, employee stockholding is criticised more and more often: the injustice of the staffs privileged position in buying stock is stressed as not only that group but also the entire society contributed in the past to the emergence and development of state industry and should therefore profit by ownership transformations which should

³³ Act of 23 May, 1991 on trade unions (*Journal of Laws*, N° 55, item 234).

³⁴ Act of 23 May, 1991 on settlement of collective labour disputes (*Journal of Laws*, N° 55, item 236).

³⁵ Act of 23 May, 1991 on organizations of employers (*Journal of Laws*, N° 55, item 235).

³⁶ Act of 29 September 1994 — the amendment to the Labour Code (Chapter on collective agreements), (*Journal of Laws*, N° 113, item 547).

³⁷ Act of 25 September, 1981 on workers' self-management of state enterprises (*Journal of Laws*, N° 24, item 123, with subsequent changes).

³⁸ Act of 13 July, 1990 on privatization of state enterprises (*Journal of Laws*, N° 51, item 298).

assume the form of so-called general privatization on equal terms. Not going into appraisal of the justness and correctness of the principles of privatization processes, it can just be supposed that development of market mechanisms in Poland may result in the future in a complete resignation of the idea of employee participation. The European standard — requirement of information and consultation of workers — may prove to be the factor to force preservation of employees' rights, even as reduced as the above.

IV. The state of research into approximation of Polish labour law to European standards

The researchers' interest in approximation of Polish labour law to European standards could be noticed as early as the beginning of 1990s, even before the conclusion by Poland of the 1991 Association Treaty with European Communities. At the initial stage, that interest was directed at a study of the system of related European standards which had been not too well-known in Central and Eastern Europe.³⁹ Next, analyses started of Polish labour law legislation from the viewpoint of its consistence with European norms. The studies had a practical aspect as well: current works of the National Commission for Labour Law Reform (at the Minister of Labour and Social Policy), and analyses conducted by the Office of Plenipotentiary of the Government for European Integration and Foreign Aid which led to the drawing up of the so-called "White Paper" of approximation of Polish legislation to Community norms. Successful coordination of those works — and also of similar undertakings in other branches of the law — should contribute to a success of Poland's striving towards full membership of the European Union, formally started on 9 April, 1994.

³⁹ See the earliest publication by M. Matey: „O koncepcji i praktyce harmonizacji prawa pracy w krajach EWG” [The Conception and Practice of Harmonization of Labour Law in Countries of the EEC], *Państwo i Prawo*, №8-9, 1972. In the 1990s, see E. Sobotka: „Europa 1992 — z problematyki integracji społecznej w ramach Wspólnoty Europejskiej” [Europe 1992 — the Problems of Social Integration within European Community], *Praca i Zabezpieczenie Społeczne*, № 7, 1991; M. Matey, H. Szurgacz: „Normy Wspólnoty Europejskiej w dziedzinie prawa pracy” [The Norms of European Community in the Sphere of Labour Law], *Praca i Zabezpieczenie Społeczne*, № 8, 1992; L. Florek: *Prawo Wspólnot Europejskich w zakresie zatrudnienia i stosunków pracy* [The Law of European Communities on Employment and Employment Relations], Friedrich Ebert Stiftung, Warszawa 1993, and the most extensive work by R. Błanpain, M. Matey: *Europejskie prawo pracy w polskiej perspektywie* [European Labour Law in Polish Perspective], Institute of Law Studies, Polish Academy of Sciences, Warszawa 1993.

LE DROIT PÉNAL POLONAIS ET LES STANDARDS EUROPÉENS

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I. La signification de la ratification de la Convention Européenne des Droits de l'Homme pour la réforme du droit pénal polonais

Vingt deux années se sont écoulées depuis la parution de la première étude de Leszek Kubicki consacrée au droit pénal européen, en particulier à ces normes de la Convention Européenne des Droits de l'Homme qui concernent le droit pénal matériel et processuel.¹ Aujourd'hui seulement, après le tournant politique amorcé par la "Table ronde" de 1989, il est devenu possible d'implanter les dispositions de cette Convention tant dans la législation que dans l'application du droit pénal.

Cependant le public, et notamment les hommes politiques, n'est pas universellement conscient de ce qu'est révolue l'époque où le droit pénal était réglé uniquement par les normes internes. Rappelons ici que la Pologne a signé la Convention en question le 26 novembre 1991, mais elle l'a ratifiée le 19 janvier 1993 seulement, après de très vifs débats à la Diète, pendant lesquels un groupe de députés s'est opposé à l'acceptation intégrale du système juridique prévu par la Convention. Par conséquent la Diète n'a pas ratifié quelques-uns des très importants protocoles additionnels, entre autres le protocole VII, prévoyant le droit à une réparation en cas de condamnation injuste ou de détention abusive, ainsi que le protocole VI qui oblige à l'abolition de la peine de mort, bien que cette peine ne soit plus appliquée depuis 1988.

A propos de ces difficultés, il convient de rappeler que le 3 février 1977 la Diète a ratifié le Pacte relatif aux Droits Civils et Politiques, mais qu'elle le fit de crainte que la Pologne ne fut critiquée à l'ONU. La ratification de la Convention Européenne par la République Populaire de Pologne, qui ne faisait pas partie de la Communauté Européenne, n'entraîne évidemment pas en ligne de compte. De plus, les autorités publiques de la République Populaire de Pologne n'avaient pas l'intention de respecter les Pactes de l'ONU. Elles n'ont pris aucune mesure visant l'adaptation du droit polonais, y compris le droit pénal, aux dispositions des Pactes, et elles ont refusé d'adhérer au protocole d'option, qui permet d'adresser des plaintes individuelles à la Commission

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¹ Kubicki: „Prawo karne europejskie — narodziny pojęcia” [Le droit pénal européen. Naissance d'une notion], *Państwo i Prawo*, 1971, N° 12, p. 922 et suiv.

des Droits de l'Homme à Genève en cas de préjudice causé par l'inobservation des Pactes.²

Les réserves que les autorités de la République Populaire de Pologne montraient à l'égard du système des garanties découlant de la Convention, en particulier sur la possibilité de soumettre au contrôle international le droit polonais et les décisions des organes de l'Etat appliquant ce droit, sont faciles à expliquer. La conception libérale des droits et libertés de l'individu était étrangère au régime en place et considérée par les élites au pouvoir comme une réelle menace.³ Après le tournant de 1989 le système politique a changé, mais la crainte du libéralisme et des droits développés de l'individu subsiste dans certains milieux politiques. Même si ces craintes sont sous-tendues aujourd'hui par une idéologie différente, l'effet reste le même: réduction des droits de l'individu et ralentissement du processus d'intégration de la Pologne au système juridico-politique et économique de la Communauté Européenne.

Quand on analyse le processus d'adaptation du droit polonais aux standards européens des droits et libertés de l'individu, on est amené à constater que dans une première période qui a suivi le renversement du socialisme réel, les changements en matière du droit en vigueur étaient envisagés et amorcés avec enthousiasme. Par la suite ce processus a été ralenti, voire freiné. Et c'est dans le domaine du droit pénal que ce phénomène est particulièrement visible. Dans les années 1989 - 1990 ont été adoptées quelques lois qui éliminaient les incompatibilités les plus frappantes du droit polonais avec les Pactes de l'ONU et la Convention Européenne. Ce sont: 1° Loi du 17 mai 1989 sur la position de l'Etat envers l'Eglise catholique, qui a supprimé dans le Code pénal les dispositions pénalisant "l'abus de la liberté de conscience et de confession", et en particulier "la provocation d'attroupements ou d'autres perturbations de l'ordre public à l'occasion des pratiques religieuses" (art. 194 et 195); 2° Loi du 29 mai 1989 qui a modifié partiellement le droit pénal et aboli les dispositions remontant à l'état de siège, pénalisant les faits "d'organiser ou de diriger une action de protestation" ou bien d'entreprendre d'autres "actes tendant à provoquer troubles publics ou émeute" (art. 282 a); 3° Loi de la même date, accordant à la personne arrêtée par la police le droit au contrôle judiciaire de la légalité de la décision sur l'arrestation, élargissant la faculté de la personne préventivement détenue de bénéficier du droit à la défense et à la libre communication avec son défenseur, limitant la durée de la détention préventive et soumettant au contrôle judiciaire toutes les décisions concernant cette mesure; 4° Loi du 23 février 1990, qui a aboli la peine, universellement critiquée, de confiscation de biens, les mesures postpénales à l'égard de récidivistes, consistant à les soumettre à une surveillance dite de protection ou à les placer pour 5 ans au maximum, après l'exécution de la peine, dans un centre de rééducation sociale, et qui

² De l'attitude des autorités publiques de la République Populaire de Pologne envers les obligations découlant d'une si importante convention internationale, témoigne le plus éloquemment le fait que le texte des Pactes relatifs aux Droits civils n'a été publié que 10 ans après sa ratification, et encore sous forme d'une brochure d'un très faible tirage, éditée par les "Editions Juridiques".

³ Voir Z. Kędzia: „Prawa człowieka w prawie międzynarodowym a prawo polskie” [Les droits de l'homme en droit international et le droit polonais], *Państwo i Prawo*, 1989, N° 9, p. 17.

a mis enfin sur un pied d'égalité la protection juridique des biens sociaux et des biens privés, en supprimant les différences choquantes entre les sanctions prévues jusque-là; 5^e Loi du 8 juin 1990, abolissant le contrôle exercé par le ministre de l'Intérieur sur les activités des tribunaux administratifs qui statuent sur les contraventions, intégrant ces organes au système judiciaire et mettant ainsi fin à l'existence d'un droit pénal "ministériel", privé de garanties d'indépendance et utilisé comme un instrument commode de répression, dans la lutte contre l'opposition politique.

Actuellement, le processus d'adaptation du droit pénal polonais aux standards européens retarde visiblement, comme en témoigne le manque de volonté de voter de nouvelles codifications pénales ou d'apporter, par de rapides et profonds amendements, des changements indispensables au système juridique en vigueur. On voit apparaître un nombre grandissant d'adversaires d'une nouvelle codification; certains d'entre eux soutiennent l'idée d'une réforme en profondeur, tout en s'opposant aux projets de codes qu'ils ne trouvent pas assez mûrs⁴. Mais quels que soient les arguments avancés par les théoriciens et praticiens qui disputent sur les solutions législatives des codes projetés, le fait même que des controverses subsistent, est exploité avec empressement par les adversaires des réformes et toutes sortes de démagogues, brandissant le slogan de la "spécificité polonaise" et de la limitation de la souveraineté nationale par suite de l'adaptation du droit polonais non seulement aux standards européens mais même aux mécanismes de contrôle admis en Europe. Il ne reste qu'à espérer que cette obstruction restera sans effet. Car on ne peut annuler la ratification du protocole d'adhésion aux Pactes de l'ONU ni l'acceptation, dans la loi ratifiant la Convention, du mécanisme de contrôle de la Commission et du Tribunal des Droits de l'Homme auprès du Conseil de l'Europe à Strasbourg.

Les standards européens en matière du droit pénal sont largement développés. De nombreuses dispositions de la Convention et des protocoles additionnels concernent directement le droit pénal. C'est que ce droit s'ingère, semble-t-il, le plus profondément dans la sphère des droits et libertés de l'individu. Les sanctions et les mesures de contrainte prévues par ce droit affectent les biens les plus précieux de l'individu, tels que la liberté personnelle, l'honneur, le droit à la propriété, l'exercice d'une profession ou d'une activité économique et même la jouissance des droits politiques, y compris les droits électoraux. Il n'est donc pas étonnant qu'on attache une telle importance aux strictes garanties juridiques relatives à la formation et au respect de ce droit.

⁴Voir J. Skupiński: „O zamiarze szybkiego uchwalenia nowego kodeksu karnego — krytycznie” [De l'intention d'une adoption rapide d'un nouveau code pénal — vue critique], *Państwo i Prawo*, 1990, N° 8; L. Gardocki: „Uszanować tradycję” [Respecter la tradition], *Palestra*, 1993, N° 3 - 4, et la réponse de K. Buchała: „W sprawie szanowania tradycji (dobrej) i rzeczowej dyskusji” [Du respect de la tradition (la bonne) et d'une discussion objective], *Palestra*, 1993, N° 11.

IL Le principe *nullum crimen et nulla poena sine lege anteriori*

Ce principe est universellement considéré comme le fondement de la légalité en droit pénal. En Pologne, le Code pénal de 1932, qui est resté en vigueur jusqu'au 31 décembre 1969, respectait nettement ce principe et celui de 1969, actuellement en vigueur, y met également accent (art. 1^{er}). La relativisation de ce principe au moyen du critère de danger social de l'acte n'implique pas une menace, car elle ne fait que motiver la renonciation à la pénalisation des actes dont la dangerosité sociale est insignifiante, et ne constitue pas un fondement autonome de la responsabilité (art. 26). Néanmoins l'application de ce principe suscite de sérieuses réserves, et les dernières années de la République Populaire de Pologne fournissent des exemples de violation des interdictions qui en découlent. Le principe *nullum crimen et nulla poena sine lege* comporte, en réalité, trois règles essentielles: 1/ la détermination légale des infractions (*nullum crimen sine lege*), 2/ la détermination légale des peines (*nulla poena sine lege*), 3/ la non-rétroactivité de la loi (*lex criminalis retro non agit*).⁵

La première de ces règles établit expressément que seule la loi peut être la source du droit pénal, en ce sens qu'elle institue défenses et impératifs ainsi que les peines frappant leur transgression, et exige en outre que non seulement l'acte défendu soit indiqué par la loi mais que celle-ci en définisse exactement les éléments constitutifs.⁶ Quant à la première de ces conditions, elle n'a pas été remplie par les décrets du 10 décembre 1981, concernant l'état de siège et prévoyant des procédures spéciales à suivre pendant cet état, car ils furent pris durant la session d'automne de la Diète, sans qu'on puisse reconnaître leur validation par une approbation ultérieure de la Diète. Bien plus nombreux sont les exemples d'inobservation de la seconde condition. L'exemple le plus flagrant est celui des dispositions pénalisant la propagation des "fausses nouvelles" (art. 271), voire la rédaction, la collecte et le transport d'écrits, d'imprimés, d'enregistrements et d'autres objets renfermant de telles nouvelles (art. 273), car l'imprécision de ce genre de formules — mise à part le bien-fondé de cette pénalisation — ouvre un vaste champ à leur application arbitraire et remet en question la fonction de garantie que remplit le principe *nullum crimen sine lege*. Il est donc choquant de voir que ces dispositions, malgré leur contradiction avec la légalité, n'ont pas été toutes abolies. C'est le résultat des retards de la réforme en profondeur du droit pénal.

Non moins importante est la question du respect de la défense de la rétroactivité des lois pénales. Là aussi, l'exemple le plus récent de violation des principes du droit est fourni par le décret sur l'état de siège, dont l'art. 61 stipulait que les dispositions du décret entraient en vigueur le jour de sa publication, mais avec force obligatoire

⁵ Pour plus de détails v. A. Marek: *Prawo karne — część ogólna* [Droit pénal. Partie générale], Bydgoszcz 1993, pp. 67-68, 82-94.

⁶ Ces conditions sont soulignées à juste titre par H.H. Jescheck: "Der Allgemeine Teil des Entwurfs eines polnischen Strafgesetzbuchs von 1990 in rechtsvergleichender Sicht", *Comparative Law Review*, 1993, vol. 4, Toruń, pp. 8-9; cf. également un abrégé de cette étude, *Państwo i Prawo*, 1992, N° 12, p. 26 et suiv.

à compter du jour de son adoption, donc rétroactive. L'arrêt de la Cour Suprême du 1^{er} mars 1982 essayant de justifier la légalité des condamnations prononcées en vertu de cette disposition, a été vivement critiqué.⁷ Dans l'arrêt en question la Cour affirmait que le principe *lex retro non agit*, énoncé à l'art. 1^{er} du Code pénal, n'était pas une norme constitutionnelle, et de ce fait — conformément à l'art. 121 du Code pénal, prévoyant la possibilité de réglementations différentes en droit pénal — que ce principe n'avait pas été violé. En même temps, la Cour déclarait qu'il n'était pas possible de se référer aux Pactes de l'ONU relatifs aux Droits civils et à la Convention européenne, lesquels établissent bien ce principe mais n'ont pas force obligatoire en droit interne. La Cour n'a abandonné cette opinion que dans son arrêt du 17 octobre 1991, en déclarant qu'en cette matière il aurait fallu appliquer l'art. 15 des Pactes de l'ONU ratifiés par la Pologne, car il contient une norme du droit international qui se laisse appliquer directement en droit interne (norme dite *self-executing*).⁸

A la lumière des faits précités, on comprend le postulat des théoriciens du droit pénal réclamant que les principes *nullum crimen sine lege*, *nulla poena sine lege* et *lex retro non agit* soient inscrits dans la Constitution.⁹ Rappelons que les constitutions de nombreux pays européens énoncent ces principes.

III. Les limitations de la répressivité du droit pénal

S'agissant de ce qu'on appelle la dogmatique juridique, le droit pénal polonais répond pleinement aux standards ouest-européens. Le Code pénal en vigueur ne suscite pas non plus de sérieuses réserves à cet égard et ne demande que des retouches. Ceci résulte du haut niveau de la science polonaise, et avant tout de la belle tradition législative qui remonte au Code de 1932. Le professeur H.H. Jescheck fait justement remarquer qu'en ce qui concerne la structure de la partie générale et la précision législative, on peut retrouver l'esprit de ce Code également dans celui de 1969.¹⁰

Cependant, il n'en est pas de même quant à l'appréciation de l'étendue de la pénalisation, des sanctions pénales et des règles d'application, où les conséquences de la politique criminelle de l'Etat du socialisme réel sont particulièrement visibles. Cela se traduit par le fait que le droit pénal est traité comme un instrument de règlement des problèmes socio-politiques et économiques, et aussi par la conviction qu'une répression sévère est un remède efficace à ces problèmes. On le voit bien en suivant le système

⁷ Voir notamment le commentaire de J. Kochanowski et T. De Virion, *Państwo i Prawo*, 1982, N° 9.

⁸ Voir l'arrêt II KRN 274/91, *Prawo i Życie*, 1992, N° 13, p. 15; cf. également L. Wiśniewski: *Stosowanie międzynarodowych konwencji o prawach człowieka* [L'application des conventions internationales sur les droits de l'homme], *Państwo i Prawo*, 1992, N° 12, p. 55.

⁹ K. Buchała, L. Kubicki: „Zasady odpowiedzialności karnej w przyszłej Konstytucji” [Les principes de la responsabilité pénale dans la future Constitution], *Państwo i Prawo*, 1987, N° 10, p. 151 ; B. Kunicka-Michalska: „Zasada nullum crimen nulla poena sine lege w projekcie K.K. w świetle norm międzynarodowych” [Le principe nullum crimen nulla poena sine lege dans le projet de code pénal à la lumière des normes internationales] dans *Mélanges en l'honneur du prof. M. Cieślak*, Kraków 1993, p. 62.

¹⁰ H.H. Jescheck, op. cit., pp. 6-7.

des sanctions extrêmement rigoureuses liées aux actes portant atteinte aux intérêts politiques du pouvoir, à l'activité de ses fonctionnaires, et avant tout aux biens sociaux, base économique du système. Les biens et les intérêts de l'individu, sa dignité, ses libertés politiques et son droit à la propriété font l'objet d'une protection incomparablement plus faible.¹¹ L'amendement précité du 23 février 1990 a liquidé, il est vrai, les disproportions les plus choquantes dans ce dernier domaine, mais ce n'est qu'une amorce de la réforme adaptant le droit polonais aux standards ouest-européens, en ce qui concerne son axiologie ainsi que l'étendue et l'intensité de la pénalisation.¹² Le projet du nouveau Code pénal prévoit des modifications adaptées pleinement à ces standards.

S'agissant des peines et des règles de leur application, le Code en vigueur obéit de façon évidente à l'idée de répression. Cela se traduit par la position dominante de la privation de liberté, associée à la peine d'amende en cas d'infractions commises en vue d'obtenir un avantage matériel ou au détriment des biens sociaux (art. 36, §§ 2, 3 et 4), et aussi par l'aggravation extraordinaire automatique des peines privatives de liberté, infligées aux récidivistes (art. 60). L'idée dite de polarisation, selon laquelle seules les infractions graves et la récidive devraient faire l'objet de la répression aggravée, tandis que les menues infractions seraient frappées de sanctions alternatives, non privatives de liberté, n'a jamais été mise en oeuvre. Dans l'application pratique du droit pénal on observait le phénomène que j'avais résumé, il y a quelque temps, par la notion de "ciseaux ouverts".¹³ Ce phénomène consistait, d'une part, en une politique criminelle axée sur la répression croissante, et d'autre part, en une impunité, pratiquée notamment sous forme du non-lieu conditionnel ou inconditionnel prononcé par le procureur dans les cas d'une dangerosité sociale jugée insignifiante (art. 27 et 26 du Code pénal), souvent motivé par des raisons politiques. Ainsi on voyait s'effacer la notion de la délinquance moyenne, et par la suite l'application décroissante de l'amende et des peines privatives de liberté ou des condamnations conditionnelles, mesures pénales typiques et dominantes selon les standards européens. La politique criminelle de la République Populaire de Pologne depuis la moitié des années soixante-dix jusqu'au tournant de 1989 fut l'une des plus rigoristes en Europe, bien que le taux de délinquance, contrairement aux opinions courantes, fut relativement modéré et en tout cas inférieur à la moyenne européenne.¹⁴ Ce qui témoigne le mieux de la répressivité du système pénal, c'est l'indice de prisonisation, soit le nombre de prisonniers (condamnés ou préventivement détenus) sur 100.000 habitants. Selon les données publiées par le Conseil

¹¹ Cf. A. Zoł1: „Prawo karne w systemie totalitarnym” [Le droit pénal dans le système totalitaire], *Znak*, 1992, N° 11, p. 111 et suiv.

¹² Il est choquant de voir que soient maintenues en vigueur les dispositions pénalisant de façon spéciale l'appropriation illégale des biens sociaux, les sanctions sévères frappant la "trahison" de la patrie, l'attentat contre le fonctionnaire politique, le sabotage, etc. (v. les articles 122, 126, 199 et 200, et d'autres dispositions semblables du Code pénal).

¹³ Voir A. Marek: „Model polityki karnej na tle projektowanych zmian ustawodawczych” [Un modèle de politique pénale et les projets de modifications législatives], *Państwo i Prawo*, 1982, N° 5 - 6.

¹⁴ Voir A. Marek, *Prawo karne...*, pp. 44 - 45.

de l'Europe, cet indice ne dépassait pas 100 dans les pays de l'Europe occidentale, malgré un taux de délinquance bien plus élevé, alors qu'en Pologne il était deux ou trois fois supérieur (250 - 300). C'est seulement avec le tournant de 1989, l'inversement des tendances politiques et l'extinction de la force obligatoire de la loi répressive du 10 mai 1985 sur la responsabilité pénale particulière, que l'indice de prisonisation en Pologne a baissé jusqu'à 120, à la fin de 1990.

Malheureusement, on observe au cours de ces dernières années un accroissement de répressivité dans la politique criminelle, ce qui de nouveau éloigne la Pologne des standards européens (le nombre de prisonniers est passé de 45.633 en 1990, à 61.289 à la fin de 1992, et l'indice de prisonisation a atteint 160). Cette tendance se justifie par un important accroissement de la délinquance, notamment de la délinquance violente, liée à l'activité des groupes organisés de délinquants.¹⁵ Il y a lieu de constater à ce propos que la délinquance s'est effectivement intensifiée, mais que — comme le confirme l'expérience polonaise et celle d'autres pays — la répression n'est pas un moyen efficace pour la combattre, car elle n'atteint pas les sources de celle-ci. Qui plus est, la répression associée à la baisse, constatée en Pologne, de la dénonciation d'infractions et de la baisse de l'efficacité des poursuites, ne peut donner de résultats souhaités.

Il y a lieu de reconnaître que le retour actuel à la réaction répressive est un reflet de la politique criminelle du socialisme réel. Il faut donc changer non seulement le droit mais aussi la mentalité de la société, en faveur de l'acceptation d'une politique criminelle rationnelle et modérée, visant l'amélioration du taux de découverte d'infractions, de manière que leur commission devienne non profitable. Ce sont là les prémisses standards du droit et de la politique criminelle dans les pays ouest-européens, proposées par le projet du nouveau code pénal. Ce projet ne suscite pas, à cet égard, de réserves de la part des théoriciens qui connaissent les systèmes européens, mais provoque des appréhensions et l'opposition de la part des praticiens, des hommes politiques et de l'opinion publique désorientée.

Pour les raisons susmentionnées, la réforme du droit pénal redevient aléatoire. L'opposition qu'a soulevée l'initiative de l'ombudsman tendant à l'abrogation des dispositions les plus répressives avant l'adoption d'une nouvelle codification, illustre de manière éloquente ce danger. Je pense que les propagateurs des standards ouest-européens en matière du droit pénal et de la politique criminelle devront déployer encore beaucoup d'efforts pour convaincre les hommes politiques, les praticiens conservateurs et l'opinion publique en faveur d'un système pénal fondé principalement sur les peines d'amende, les mesures de probation et de privation d'avantages tirés de

¹⁵Il convient toutefois de constater qu'en dépit de l'accroissement dernièrement noté de la délinquance, et notamment des infractions les plus graves (homicides, brigandage, viols, graves lésions corporelles), leur intensification reste toujours inférieure à celle observée dans la majorité des pays développés de l'Europe occidentale. Voir „Zagadnienia racjonalizacji polityki karnej” [Problèmes de rationalisation de la politique criminelle). Abrégé du rapport de l'Ombudsman à la Conférence du 29 novembre 1991, *Państwo i Prawo*, 1994, N° 6, p. 34 et suiv. Cf. également A. Marek, *Prawo karne...*, p. 45.

l'infraction, l'obligation de réparer le dommage causé à la victime, la limitation préventive des droits et les prestations au profit de la société. Dans ce système, la peine privative de liberté est une mesure extrême, appliquée aux auteurs d'infractions particulièrement graves ou dangereuses (le principe *ultima ration*).¹⁶

IV. Le problème de la peine de mort

Initié par les écrivains du Siècle des Lumières (Diderot, Filangeri, Beccaria), le mouvement en faveur de l'abolition de la peine non humanitaire de mort, a gagné en force après la Seconde Guerre mondiale. Une importance particulière revêtent à cet égard la Déclaration Universelle des Droits de l'Homme, dont l'art. 3 proclame le droit à la vie et l'activité de l'ONU en faveur de l'élimination progressive de cette peine.¹⁷

Après l'adoption, en 1966, du Pacte des Droits Politiques et Civils, par l'Assemblée Générale des Nations Unies, les pays du socialisme réel, dont la République Populaire de Pologne, se sont formellement conformés à ces Pactes. Cela s'est traduit par le fait que le Code pénal de 1969 considère la peine capitale comme une peine exceptionnelle (art. 30, § 2) et interdit, comme le veut l'art. 6 des Pactes, de l'infliger aux mineurs et aux femmes enceintes, ainsi que par la procédure obligatoire de recours en grâce lorsque cette peine est prononcée.¹⁸ En revanche, il serait difficile d'admettre que l'exigence de limiter la condamnation à la peine capitale uniquement aux crimes les plus graves soit déjà respectée. Le Code pénal menace de cette peine non seulement l'homicide (art. 148, § 1), le brigandage (art. 210, § 2) ou l'attentat à l'indépendance de l'Etat (art. 123), mais aussi l'espionnage (art. 124, § 1), la trahison de la Patrie — qui est spécifiquement conçue (art. 122), le sabotage et la subversion (art. 127), l'attentat violent contre le fonctionnaire ou le militant politique (art. 126, § 1), et même le fait d'organiser et de diriger ce que le Code qualifie de grande escroquerie économique (art. 134, § 2, actuellement abrogé). A quoi s'ajoute le cas, menacé de la peine capitale, d'inexécution d'un ordre dans les conditions de guerre (partie militaire du Code, art. 310).

Mais ce qui décide de la position réelle de la peine de mort sous le régime du Code pénal de 1969, c'est le nombre des condamnations passées en force de chose jugée et d'exécutions de cette peine. Elle ne fut prononcée et exécutée que dans une quinzaine de cas par an (notamment dans les cas d'infractions politiques ou économiques dans les années cinquante et vers la fin des années soixante). On peut donc parler d'une

¹⁶ Voir K. Buchała: „System kar, środków karnych i zabezpieczających w projekcie Kodeksu karnego” [Le système des peines, des mesures pénales et mesures de sécurité dans le projet de Code pénal], *Państwo i Prawo*, 1991, N° 6, p. 15 et suiv.

¹⁷ Voir J. Kubiak: „Działalność ONZ na rzecz zniesienia lub ograniczenia kary śmierci” [L'activité de l'ONU en faveur de l'abolition ou de la limitation de la peine de mort], *Palestra*, 1991, N° 7 - 8.

¹⁸ Pour plus de détails voir A. Grześkowiak: *Kara śmierci w polskim prawie karnym* [La peine de mort en droit pénal polonais], Toruń 1982.

limitation effective de l'application de cette peine, à quoi ont contribué les fermes critiques de la part de la majorité des représentants de la doctrine¹⁹, ainsi que les pressions internationales.

Il est vrai que les pays de l'ancien camp socialiste n'ont pas adhéré à la Convention Européenne des Droits de l'Homme, et a fortiori à son Protocole additionnel n° VI, prévoyant la renonciation à la peine de mort, mais l'entrée en vigueur de ce Protocole en 1985, après sa ratification par les Etats membres du Conseil de l'Europe (à l'exception de la Turquie), n'a pas été sans effet à cet égard. L'ancienne République Démocratique Allemande renonça à la peine de mort en 1987, ce qui eut un retentissant effet de propagande. Dans les autres pays de l'ancien camp socialiste ce processus s'est engagé à l'heure de sa désintégration. L'exemple de la Roumanie, qui a été la première à abolir la peine de mort, fut suivi par la Tchécoslovaquie et la Hongrie. En Tchécoslovaquie — par la loi du 25 mai 1990 sur la réforme du droit pénal; en Hongrie, le Tribunal Constitutionnel, dans un arrêt de septembre 1990, a déclaré cette peine contraire à l'ordre constitutionnel. En Pologne, aucun jugement de condamnation à la peine de mort n'a été exécuté depuis 1988, et les quelques condamnations pour homicide prononcées par les Cours de voïvodie ont été commuées en peines de 25 ans de privation de liberté. Nous avons donc affaire à un moratoire de fait, bien que la peine de mort ne soit pas formellement abolie.

Le projet d'abolition de la peine de mort, présenté en 1991 par un groupe de députés, était resté bloqué au parlement. Cette situation était sans doute le résultat de très importantes divergences d'opinions des parlementaires sur cette question, et par ailleurs, liée aussi à la poursuite des travaux sur le projet d'un nouveau code pénal. Le projet publié en 1990, et ses versions successives des années 1991 - 1993, ne prévoient pas la peine de mort mais, à sa place, la réclusion à vie comme peine exceptionnelle frappant les crimes les plus graves.

Cette situation fait naître un état d'incertitude quant à l'abolition formelle de la peine de mort. Les controverses sur le projet de nouveau code pénal, la réticence que montre le gouvernement à l'égard du Protocole additionnel n° VI à la Convention des Droits de l'Homme, et enfin l'intensification dans la société des tendances favorables à la répression, font craindre que cet acte n'intervienne pas de sitôt. D'un autre côté, la conscience du fait que presque tous les pays de la Communauté Européenne ont aboli la peine de mort et qu'elle n'est plus prononcée depuis 5 ans en Pologne, militent en faveur de la thèse que les conditions requises pour la prise de la décision abolissant la peine capitale sont réunies.²⁰ Il faut donc continuer à exercer pression sur les autorités compétentes et, avant tout, faire prendre conscience à l'opinion publique qu'à la lu-

¹⁹ Voir notamment M. Cieślak: „Problem kary śmierci” [Le problème de la peine de mort], *Państwo i Prawo*, 1986, N° 12; J. Jasiński: „Głos przeciwko karze śmierci” [Intervention contre la peine de mort], *Państwo i Prawo*, 1981, N°8-9; A. Grześkowiak: „Znieść karę śmierci” [Abolir la peine de mort], *Palestra*, 1982, N° 9-10; K. Poklewski-Koziełł: „W związku z propozycją zniesienia kary śmierci” [A propos de la proposition d'abolition de la peine de mort], *Państwo i Prawo*, 1988, N° 2.

²⁰ Voir A. Marek: *Prawo karne...*, pp. 248 - 250.

mière des nombreuses recherches scientifiques et de l'expérience de nombreux pays l'application ou la non-application de la peine de mort n'influe pas de manière considérable sur le degré de la délinquance et le nombre des homicides. C'est seulement la généralisation de cette vérité, accompagnée de l'argument que la peine de mort est incompatible avec les idées humanistes et le niveau culturel des sociétés européennes contemporaines, qui peut conduire à l'acceptation de la renonciation définitive à cette peine.

**THE PACT ON STATE ENTERPRISE UNDER TRANSFORMATION
(Session of the Polish Industrial Relations Committee, Warsaw, 25 May,**

The Polish Industrial Relations Committee was formed in early 1993 as a Polish branch of the International Industrial Relations Association (IIRA). The Committee is a research agency which, however, also takes an interest in the practice; its composition is similar to the structure of the Tripartite Commission for Socio-Economic Affairs, with a strong representation of the scientific circles added. The Presidium of the Committee's Board includes: President, Prof. Maria Matey, Ph.D. (Institute of Law Studies, Polish Academy of Sciences), Michał Boni, A. Bączkowski (Undersecretary of State at the Ministry of labour and Social Policy), A. Wilk (President the Confederation of Polish Employers, and professors: A. Buchner-Jezierska (Institute of Sociology, Łódź University), K. Doktor (Institute of Philosophy and Sociology, Polish Academy of Sciences), and M. Socha (Faculty of Economic Sciences, Warsaw University). The Committee has already held several sessions. Therefore, the panel discussion on the Pact on State Enterprise under Transformation, held on 25 May, 1994 at the Ministry of labour and Social Policy, was another event in a series of scientific sessions.

Opening the session, Prof. Maria Matey greeted its participants, and among them the initiators of the Pact — former Ministers Jacek Kuroń and Michał Boni, as well as lecturers: Prof. H. Lewandowski, Ph.D. from the Łódź University ("Legal Nature of the Pact"), and Prof. K. Doktor, Ph.D. from Polish Academy of Sciences ("Sociological Aspects of the Pact"). According to the President, pronouncements of the guests and lecturers were to provide a specific authentic interpretation of the Pact and the introduction to a discussion on the basic problems of its legal and sociological nature.

Pointing to the discrepancy between social expectations in Poland and the need for building market economy, J. Kuroń discussed the factors that influenced the offer of the Pact and stressed the importance of negotiations carried out with the aim to agree on the transformations of state enterprises. They constituted an attempt at correlating the different interests revealed in the process, hosted jointly by all parties to the negotiations. J. Kuroń described the social forces as a necessary condition of success of the reform (privatization in particular); he also mentioned the postulated broad Pact on labour. Such agreements have not been concluded so far; not even the Pact on State Enterprise has been implemented to the full for that matter. The speaker found this fact, together with the decline of trade unions whose existence is of importance for anticipation and thus prevention of conflicts in the economy, to be most dangerous.

Unwilling to agree with the preceding speaker's pessimistic appraisal was M. Boni who warned against the error of reduction. He perceived the Pact's importance for the future of

industrial relations in three dimensions: political (transfer of disintegrated conflicts to the sphere of arranged actions strengthened by social backing); institutional and educational (arrangement of collective agreements and the relations between social partners without the pressure of strike demands); and socio-economic (appearing in the merits of the Pact). The speaker declared for the idea of negotiating at a variety of levels of the social life as the method of decentralization of conflicts in Poland, the role of state in their resolution reduced to its appropriate dimensions. He also stressed the need for preservation of balance between the actions of the Tripartite Commission and the functions of state agencies, the Parliament in particular.

Analyzing the legal essence of the Pact, Prof. H. Lewandowski cited the example of basic agreements, found more and more often in European relations. The speaker found such agreements to evidence the growing role of trade unions at the macrosocial level, and their tendency to apply the method of participation instead of demand; he stressed the state's ever greater willingness to become party to such agreements. Examined in its many aspects, the Polish Pact on State Enterprise reveals first of all its political nature; guarantees of the obligations it contains can be seen on the moral, political-organizational or social plane. Yet considering the notion of sources of law in a sufficiently broad perspective and including in it not only the elements from which claims can be deduced but also those which provide the grounds for further creative actions, the Pact has to be seen as a legal act even if it lacks the state sanction (its specific sanction being the possibility of going on strike). The consequences of this nature of the Pact include the duty to observe its provisions, imposed on state agencies irrespective of changes of the Cabinet.

Discussing the Pact in its sociological aspects, Prof. Doktor called it an example of a rational Utopia. Aware of its various strong points, the speaker nevertheless criticized the Pact as imperfect in terms of both the way of articulation of interests (formulated authoritatively) and an insufficient representativeness of its participants. Besides, the discussed agreement called undue attention to the manufacturer, diverting it from the consumer: thus the specific "conspiracy of elites" — which is what the Pact became — failed to open new chances for market economy. Nor did it resolve the question of vertical conflicts, or draw conclusions from the fact that at the level of state enterprises there is in fact a complete uniformity of interests between partners. According to Prof. Doktor, the efficiency of negotiating will be limited in Poland as long as the level of legal culture stays low.

The pronouncements of the initiators of the Pact, together with the papers delivered, gave rise to a lively discussion which focused on two main threads. The first of them was a critical analysis of the subjective and objective scope of negotiation and the resulting adjustments. Appraising the subjective aspects of the Pact, Prof. W. Sanetra (Wrocław University) pointed to what he found insufficient differentiation in that agreement of the functions of Government which — intent to act as an arbiter in relations between employees and employers — in fact largely preserved the function of a party. This circumstance may prompt modification of the statutes making up collective labour law which have been designed to heed the needs of already privatized economy; most certainly, it should also influence the way of conducting collective negotiations in which the position of state must necessarily depend on its performance or non-performance — and extent of performance — of the role of employer. Questioning the subjective scope of the Pact, A. Machalski from the Confederation of Polish Employers stressed also defects of that agreement resulting from the absence of a social infrastructure it needs, that is a real enterprise and a real employer (representing the interests of the capital). The succession of Cabinets failed to see to the formation of such infrastructure, and so did the

Pact which hardly contributed to giving a new shape to the state employer. According to K. Rączka, Ph.D. (Warsaw University and the Confederation of Polish Employers), the Pact was not based on a sufficiently studied conception (the lack of a clear industrial and social policy contributing to this situation); its subjective scope was unnecessarily limited; and negotiations — divided in terms of organization — focused on discussion of detailed legal solutions which was a mistake from the methodological viewpoint. Worse still, such solutions were changed unilaterally in the course of the legislative process. Yet none of the above-mentioned participants in the discussion questioned the very idea of negotiating which all found to have corresponded with the social needs.

A broader reference to this latter thought was made by the other thread of the discussion which dealt with appraisal of the Pact as a tool of social and economic transformations. Prof. W. Kozek (Warsaw University) perceived the Pact's defeat to have been an unduly instrumental approach to it; she considered the proper method to be that of agreements built from the ranks up, that is starting from enterprises where the discussed idea is most vivid. According to Prof. J. Kulpińska (Łódź University), this particular model of regulation of collective labour relations is indispensable for Poland as a country where the basic dispute concerns not the wages but rather the directions of systemic transformations. Although the authoritatively developed Pact was not error-free, it nevertheless became, according to Prof. A. Buchner-Jezierska (Łódź University), an important step in transition from a conflict-based model of industrial relations to the one based on negotiation. Anyway, as stated by E. Sobótka, (Ministry of Labour), the Pact cannot be considered separately from the reality in which it emerged; on the other hand, its importance for socialization of the decision processes and consolidation of observance of the law must necessarily be noticed. At the same time, as stressed by Prof. W. Morawski (Warsaw University), democracy means also the social readiness to submit to rationally constructed programs; it is the duties of the elites to create such programs and submit them to society for consideration. Yet Prof. S. Golinowska (IPISS) was doubtful about the following question: how should the programs of transformations towards democracy and market economy be presented as to make them generally understandable. Further, the future of agreements was discussed by Prof. K. Frieske (Warsaw University) who suggested that they should concern the general principles of division, among other issues.

The questions raised during the discussion were first commented upon by the two initiators of the Pact. Stating that the Pact had not been designed as an unfeasible general social contract, M. Boni stressed the systemic importance of the decision about its conclusion which arranged the relations between social partners and helped crystallize one of the parties to the Pact, that is the employers. According to M. Boni, the Pact paved the way for the idea of collective agreements, by no means eliminating it at the level of enterprises where — admittedly — transition to the model of employer's joint action with the union is rather difficult. J. Kuroń pointed to the fact that, despite the errors and problems mentioned in the discussion, the Pact had been concluded which is of importance — admittedly not too great, so far — not only for the process of transformation of state enterprises but also for the possibility of conducting negotiations in other areas (opened by the operation of the Tripartite Commission). It is possible to negotiate towards transformation; what is of special importance here, though, is the development of programs which helps create partners in negotiation and mobilize the social forces. Even preceded by conspiracy of elites, it performs a creative function in that it leads to an intellectual turning-point. The Pact on State Enterprise, which had precisely such effect, should therefore be considered a success.

Next, the lecturers took the floor. Once again stating that the Pact on State Enterprise is a source of law in the broad sense, Prof. H. Lewandowski stressed the importance of negotiations both for development of collective labour agreements and for the possibility of concluding other agreements pertaining to important issues of collective labour relations, such as e.g. employee participation. At the same time, he pointed to what he believes to follow from the right of coalition — the possibility of conducting collective actions in connection with disputes resulting from negotiations. Doubts raised as to this thesis by Prof. W. Sanetra that involved him in polemics with the lecturer as to the scope and conditions of the right to strike in the light of provisions of the statutes on collective disputes and on trade unions of 23 May, 1991. At any rate, Prof. H. Lewandowski found collective action of participants in negotiations to be an important sanction of agreements concluded. Prof. K. Doktor, stressed in his final remarks the problems faced by a sociologist trying both to describe and to evaluate the social reality of today's Poland. Closing the session the President, Prof. Maria Matey, suggested a program of activities of the Polish Industrial Relations Committee for the next future.

Michał Bank

(University of Gdańsk)

**LE CITOYEN ET LE CONTRÔLE DE LA CONSTITUTIONNALITÉ
DU DROIT EN POLOGNE ET EN FRANCE, AU REGARD
DES SOLUTIONS EUROPÉENNES
(Conférence internationale, Wrocław, 9-10 septembre 1993)**

Cette conférence fut organisée par la Faculté de droit de l'Université des Sciences Sociales de Toulouse et l'Institut du Droit constitutionnel de l'Université de Wrocław. Elle a réuni des universitaires de Toulouse, de Wrocław et de Warszawa, des représentants du Bureau du Président de la République de Pologne ainsi que des tribunaux constitutionnels de Pologne, de Lituanie et de Slovaquie.

Quatre intervenants français et quatre polonais y ont présenté des exposés qui ont servi de base aux débats. Justifiant le choix du thème de la conférence, A. Patrzalek a constaté que la fonction essentielle du Tribunal Constitutionnel consistait à renforcer et à stabiliser l'Etat démocratique de droit. Dans les pays où l'on a sous-estimé cette question on observe maintenant — tant en France qu'en Pologne — la tendance à rendre possible la participation directe des citoyens à ce contrôle. D'où l'idée d'organiser un échange d'opinions à ce sujet et de contribuer ainsi à l'élaboration de la législation adéquate et à sa mise en pratique.

A. Cabanis a présenté l'évolution historique du Conseil Constitutionnel en France. D'un organe à position relativement faible, il est devenu à présent une institution considérée comme une des composantes essentielles de la démocratie et du système libéral. Le rapporteur a attiré l'attention des participants sur le problème de la relation s'établissant entre la souveraineté de la représentation de la nation et la position du Conseil Constitutionnel. Cette souveraineté n'est pas un obstacle doctrinal à la juridiction constitutionnelle. Mais la conviction que le droit est sûr devrait se traduire par la règle selon laquelle la loi publiée ne peut être contestée (la constitutionnalité d'un acte ne peut être soumise à l'examen qu'au cours de la période séparant l'adoption et la publication de la loi).

L'exposé de A. Patrzalek était consacré au statut du citoyen dans le système polonais du contrôle de la constitutionnalité du droit. Décrivant les moyens de la mise en oeuvre de ce contrôle, l'orateur a souligné que la forme de la participation du citoyen à l'ouverture de la procédure devant le Tribunal Constitutionnel n'est pas toujours la même — elle est différente suivant qu'il s'agit de l'ouverture de la procédure à la requête à la suite d'une question juridique ou sur l'initiative propre du Tribunal. Cette participation n'est jamais directe. Selon le rapporteur, le fonctionnement du contrôle de la constitutionnalité dans les années 1986 - 1991 démontre que sans la participation des citoyens, ne fut-ce qu'indirecte, le Tribunal n'aurait pas eu la possibilité de remplir le rôle qui lui était attribué.

J. Viguiar a présenté le projet de la réforme du contrôle de la constitutionnalité du droit en France. En particulier, il a fait remarquer que ce projet avait été repoussé à deux reprises, et que pendant les débats on avait exprimé la crainte qu'en donnant au citoyen le droit de saisir le Tribunal de plainte constitutionnelle on n'élargisse trop le champ d'activité de cette juridic-

tion. On avait indiqué aussi les obstacles pratiques à l'adoption de la réforme envisagée. Les projets de 1990 et de 1993 proposaient la participation directe et indirecte des citoyens au contrôle constitutionnel du droit. Malgré le double rejet du projet de réforme, les travaux tendant à introduire la plainte constitutionnelle se poursuivent.

J. Repel et K. Wojtowicz ont présenté dans leur exposé les solutions en matière de plainte constitutionnelle contenues dans les projets de nouvelle constitution de la République de Pologne. Cette plainte est entendue comme une procédure spéciale, initiée devant le Tribunal Constitutionnel par l'individu et tendant à protéger ses droits constitutionnels contre leur violation par l'Etat. De l'avis des rapporteurs, l'analyse des projets déposés aux Commissions Constitutionnelles de la Diète et du Sénat de la 10^e législature (1989 - 1991) et de ceux présentés à la Commission Constitutionnelle de l'Assemblée Nationale de la 1^{ère} législature (1991 - 1993) montre que la construction de la plainte dans ces textes n'est pas claire.

En particulier, le point qui s'avère problématique est celui de la définition de la personne habilitée à déposer la plainte; d'autre part il n'est pas clair s'il s'agit d'un contrôle abstrait concret, ou encore mixte.

P. Galan a décrit succinctement l'évolution du constitutionnalisme et du contrôle des actes juridiques en France. Il a indiqué les difficultés politiques et juridiques liées à l'introduction de la plainte constitutionnelle, et commenté les aspects du principe de liberté sur lesquels s'était prononcé le Conseil Constitutionnel, ainsi que la hiérarchie et le catalogue des droits fondamentaux. En concluant, il a déclaré que durant les 30 années d'activité le Conseil Constitutionnel avait rempli de façon satisfaisante sa mission consistant à garantir le respect des lois.

K. Dzialocha qui a parlé de la protection des droits acquis assurée par la jurisprudence du Tribunal Constitutionnel, a fait remarquer qu'elle consistait essentiellement à interdire le retrait ou la limitation arbitraires, des droits subjectifs (et de leurs expectatives), au moyen de modifications de la législation. La jurisprudence du Tribunal Constitutionnel connue à ce jour suscite à poser à l'ordre du jour la question de ce qu'il faut entendre par le principe de la protection des droits acquis, en particulier par son fondement constitutionnel, son champ d'application et ses limites. Par ailleurs, il convient de soulever aussi le problème du rôle que joue ce principe dans le processus de la transformation constitutionnelle du système du droit polonais, et en particulier de répondre à la question si ce principe est utile à la transformation ou bien s'il constitue un obstacle.

Le rapport de B. Banaszak a présenté les possibilités dont dispose le citoyen pour faire initier le contrôle de la constitutionnalité du droit et leur diversité dans le cas de l'Allemagne, de l'Autriche et de la Suisse.

Dans la discussion on a attiré l'attention sur la similitude des fonctions du Conseil Constitutionnel et du Tribunal Constitutionnel. Elle a porté entre autres sur les modalités de création de ces deux organismes, la prévention de leur politisation, et le contrôle préventif des normes, effectué par le Conseil. Mais le débat avait surtout pour objet la question de l'accès direct du citoyen aux juridictions constitutionnelles.

Abordant la question de l'aspect temporaire de la jurisprudence (de l'efficacité de la contestation d'un acte juridique), Z. Jarosz a porté une attention particulière au problème de savoir — qui se pose tant en France qu'en Pologne — s'il faut donner priorité au principe de la sûreté du droit ou admettre la possibilité illimitée de remettre en cause devant le Tribunal Constitutionnel des lois non conformes au nouvel ordre constitutionnel ou encore — ce qui paraît le plus juste — chercher une issue médiane.

A. Cabanis a souligné qu'en France on attachait une importance particulière à la sûreté du droit et que pour cette raison, à son avis, le Conseil Constitutionnel n'avait pas à intervenir

aussi fréquemment que les juridictions constitutionnelles dans d'autres pays. De son côté, K. Działocha a affirmé que l'idée de la stabilité des règles juridiques est différemment conçue en fonction du dynamisme des changements des conditions politiques et juridiques concrètes. Pour ce qui est de la participation des citoyens à la procédure devant le Tribunal Constitutionnel, il a fait remarquer que le législateur, en renonçant à l'institution de la plainte constitutionnelle servant directement au citoyen, avait institué un succédané de cette participation. Cela consiste en ce que le Tribunal est autorisé à contrôler l'acte normatif sur sa propre initiative, à la suite de l'analyse des plaintes et propositions des citoyens. Le Tribunal a eu recours à cette possibilité dans 15 cas précis.

P. Galan a attiré l'attention des auditeurs sur la possibilité qu'il faut offrir au citoyen de soulever le grief d'inconstitutionnalité d'une disposition juridique. A propos du champ d'application de la plainte constitutionnelle, il a indiqué le problème de doter de ce moyen également les personnes qui ne sont pas ressortissantes du pays donné. De l'avis de J. Repel il est à présent difficile d'apprécier l'influence indirecte du citoyen sur l'activité du Tribunal Constitutionnel, cependant dans les projets d'amendement de la loi sur ce Tribunal on trouve des propositions qui visent à doter le citoyen du droit de saisir le Tribunal Constitutionnel de plainte constitutionnelle. L'orateur a évoqué aussi le problème de l'étendue des droits civiques constitutionnels et de la plainte constitutionnelle, en soulignant la nécessité de créer un mécanisme qui protégerait l'activité du Tribunal Constitutionnel contre la paralysie due à l'encombrement.

Jerzy Oniszczyk

ACTES LEGISLATIFS * LEGISLATIVE ACTS

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EUROPEAN AGREEMENT

establishing an association between the Republic of Poland, of the one part, and the European Communities and their member states, of the other part

THE KINGDOM OF BELGIUM,
THE KINGDOM OF DENMARK,
THE FEDERAL REPUBLIC OF GERMANY,
THE HELLENIC REPUBLIC,
THE KINGDOM OF SPAIN,
THE FRENCH REPUBLIC,
IRELAND,
THE ITALIAN REPUBLIC,
THE GRAND DUCHY OF LUXEMBOURG,
THE KINGDOM OF THE NETHERLANDS,
THE PORTUGUESE REPUBLIC,
THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND,

Contracting Parties to the Treaty establishing the European Economic Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community,

hereinafter referred to as "Member States", and

THE REPUBLIC OF POLAND, hereinafter referred to as "Poland",

of the one part and

THE EUROPEAN ECONOMIC COMMUNITY, THE EUROPEAN COAL AND STEEL COMMUNITY, THE EUROPEAN ATOMIC ENERGY COMMUNITY, hereinafter referred to as "the Community",

of the other part,

CONSIDERING the importance of the existing traditional links between the Community, its Member States and Poland and the common values that the Contracting Parties share;

RECOGNIZING that the Community and Poland wish to strengthen these links and to establish close and lasting relations, based on reciprocity, which would allow Poland to take part

in the process of European integration, thus strengthening and widening the relations established in the past notably by the Agreement on Trade and Commercial and Economic Co-operation, signed on 19 September 1989;

CONSIDERING the commitment of the Community and its Member States and of Poland to strengthening the political and economic freedoms which constitute the very basis of the association;

RECOGNIZING the significant achievements of the Polish people in the process of fast transition to a new political and economic order based on the rule of law and human rights, including the legal and economic framework for market economy and a multiparty system with free and democratic elections;

RECALLING the firm commitment of the Community, its Member States and of Poland to the process of the Conference on Security and Co-operation in Europe (CSCE), including the full implementation of all provisions and principles therein, in particular the Helsinki Final Act, the concluding documents of the Madrid and Vienna follow-up meetings and the Charter of Paris for a new Europe;

CONSCIOUS of the importance of the association agreement to establishing in Europe a system of stability based on co-operation, with the Community as one of the cornerstones;

BELIEVING that a link should be made between full implementation of association on the one hand, and the actual accomplishment of Poland's political, economic, and legal reforms on the other hand, as well as the introduction of the factors necessary for co-operation and the rapprochement between the parties' systems, notably in the light of the conclusions of the CSCE Bonn Conference;

DESIROUS of establishing and developing regular political dialogue on bilateral and international issues of mutual interest;

TAKING ACCOUNT of the Community's willingness to provide decisive support for the implementation of reform and to help Poland cope with the economic and social consequences of structural readjustment;

TAKING ACCOUNT furthermore of the Community's willingness to set up instruments of co-operation and economic, technical and financial assistance on a global and multiannual basis;

CONSIDERING the commitment of the Community and Poland to free trade, and in particular to compliance with the rights and obligations arising out of the General Agreement on Tariffs and Trade;

BEARING IN MIND the economic and social disparities between the Community and Poland and thus recognizing that the objectives of this association should be reached through appropriate provisions of this Agreement;

CONVINCED that the Association Agreement will create a new climate for their economic relations and in particular for the development of trade and investment, instruments which are indispensable for economic restructuring and the technological modernisation;

DESIROUS of establishing cultural co-operation and developing exchanges of information;

RECOGNIZING the fact that the final objective of Poland is to become a member of the Community and that this association, in the view of the Parties, will help to achieve this objective,

HAVE AGREED AS FOLLOWS:

Article 1

1. An Association is hereby established between the Community and its Member States on the one part and Poland on the other part.
2. The aim of this agreement is:
 - to provide an appropriate framework for the political dialogue, allowing the development of close political relations between the parties;
 - to promote the expansion of trade and the harmonious economic relations between the parties and so to foster the dynamic economic development and prosperity in Poland;
 - to provide a basis for the Community's financial and technical assistance to Poland";
 - to provide an appropriate framework for Poland's gradual integration into the Community. To this end, Poland shall work towards fulfilling the necessary conditions;
 - to promote co-operation in cultural matters.

TITLE I

POLITICAL DIALOGUE

Article 2

A regular political dialogue shall be established between the parties. It shall accompany and consolidate the rapprochement between the Community and Poland, support the political and economic changes under way in that country and contribute to the establishment of new links of solidarity. The political dialogue and co-operation:

- will facilitate Poland's full integration into the community of democratic nations and progressive rapprochement with the Community. The economic rapprochement provided for in this Agreement will lead to greater political convergence;
- will bring about better mutual understanding and an increasing convergence of positions on international issues, and in particular on those issues likely to have substantial effects on one or the other party;
- will enable each party to consider the position and interests of the other in their respective decision-making processes;
- will enhance security and stability in the whole of Europe.

Article 3

1. Consultations as appropriate shall take place between the President of the European Council and the President of the Commission of the European Communities on one side and the President of Poland on the other.
2. At ministerial level, political dialogue shall take place within the Association Council. This shall have general responsibility for any matters the parties might wish to put to it.

Article 4

Other procedures and mechanisms for political dialogue shall be set up by the parties, and in particular in the following forms:

- meetings at senior official level (political directors) between Polish officials, on the one hand, and the Presidency of the Council of the European Communities and the Commission of the European Communities, on the other;
- taking full advantage of all diplomatic channels including regular briefings by Polish officials in Warsaw, consultations on the occasion of international meetings and contacts between diplomatic representatives in third countries;
- providing regular information to Poland on European Political Co-operation which shall be reciprocated as appropriate;
- any other means which would make a useful contribution to consolidating, developing and stepping up this dialogue.

Article 5

Political dialogue at parliamentary level shall take place within the framework of the Parliamentary Association Committee.

TITLE II**GENERAL PRINCIPLES****Article 6**

1. The Association includes a transition period of a maximum duration of ten years divided into two successive stages, each in principle lasting five years. The first stage shall begin when this Agreement enters into force.
2. The Association Council shall proceed regularly to examine the application of this Agreement and of Poland's accomplishments in the process leading to a market economy system.
3. During the course of the twelve months preceding the expiration of the first stage, the Association Council shall meet to decide the transition to the second stage as well as on any possible changes to be brought about as regards measures concerning the implementation of the provisions governing the second stage. In doing this, it will take into account the results of the examination mentioned in paragraph 2.
4. The two stages envisaged in paragraphs 1, 2 and 3 do not apply to Title III.

TITLE III**FREE MOVEMENT OF GOODS****Article 7**

1. The Community and Poland shall gradually establish a free trade area in a transitional period lasting a maximum of ten years starting from the entry into force of this Agreement in accor-

dance with the provisions of this Agreement and in conformity with those of the General Agreement on Tariffs and Trade (GATT).

2. The Combined Nomenclature of goods shall be applied to the classification of goods in trade between the two parties.
3. For each product the basic duty to which the successive reductions set out in this Agreement are to be applied shall be that actually applied *erga omnes* on the day preceding the date of entry into force of the Agreement.
4. If, after entry into force of this Agreement, any tariff reduction is applied on an *erga omnes* basis, in particular reductions resulting from the tariff agreement concluded as a result of the GATT Uruguay Round, such reduced duties shall replace the basic duties referred to in paragraph 3 as from the date when such reductions are applied.
5. The Community and Poland shall communicate to each other their respective basic duties.

CHAPTER I

INDUSTRIAL PRODUCTS

Article 8

1. The provisions of this Chapter shall apply to products originating in the Community and in Poland listed in Chapters 25 to 97 of the Combined Nomenclature with the exception of the products listed in Annex I.
2. The provisions of Articles 9 to 13 included do not apply to products mentioned in Articles 15 and 16.

Article 9

1. Customs duties on imports applicable in the Community to products originating in Poland other than those listed in Annexes IIa, IIb and III shall be abolished on the entry into force of this Agreement.
2. Customs duties on imports applicable in the Community to products originating in Poland which are listed in Annex IIa shall be progressively abolished in accordance with the following timetable:
 - on the date of entry into force of this Agreement each duty shall be reduced to 50% of the basic duty;
 - one year after the date of entry into force of this Agreement the remaining duties shall be eliminated.

Customs duties on imports applicable in the Community to products originating in Poland listed in Annex IIb shall be progressively reduced, from the date of entry into force of this Agreement, by annual reductions of 20% of the basic duty, so as to arrive at a total abolition by the end of the fourth year after the date of entry into force of this Agreement.

3. The products of Polish origin listed in Annex III shall benefit from a suspension of customs duties on imports within the limits of annual Community tariff quotas or ceilings increasing progressively in accordance with the conditions defined in that Annex so as to arrive at a com-

plete abolition of customs duties on imports of the products concerned at the end of the fifth year at the latest.

At the same time, customs duties on imports applicable to import quantities in excess of the quotas or ceilings provided for above shall be progressively dismantled from the entry into force of this Agreement by annual reductions of 15%. By the end of the fifth year, remaining duties shall be abolished.

4. Quantitative restrictions on imports to the Community and measures having equivalent effect shall be abolished on the date of entry into force of this Agreement with regard to the products originating in Poland.

Article 10

1. Customs duties on imports applicable in Poland to products originating in the Community listed in Annex IVa shall be abolished on the date of entry into force of this Agreement.

2. Customs duties on imports applicable in Poland to products originating in the Community which are listed in Annex IVb shall be progressively reduced as specified in that Annex.

Poland shall open duty free tariff quotas for products originating in the Community, as listed in that Annex and according to the conditions contained therein.

3. Customs duties on imports applicable in Poland to products originating in the Community other than those listed in Annexes IVa and IVb shall be progressively reduced, and abolished by the end of the seventh year at the latest from the entry into force of this Agreement according to the following timetable:

- three years after the date of entry into force of this Agreement each duty shall be reduced to 80% of the basic duty;
- four years after the date of entry into force of this Agreement each duty shall be reduced to 60% of the basic duty;
- five years after the date of entry into force of this Agreement each duty shall be reduced to 40% of the basic duty;
- six years after the date of entry into force of this Agreement each duty shall be reduced to 20% of the basic duty;
- seven years after the date of entry into force of this Agreement the remaining duties shall be eliminated.

4. Quantitative restrictions on imports into Poland of products originating in the Community and measures having equivalent effect shall be abolished on entry into force of this Agreement with the exception of those listed in Annex V which shall be abolished in accordance with the timetable provided in that Annex.

Article 11

The provisions concerning the abolition of customs duties on imports shall also apply to customs duties of a fiscal nature.

Article 12

The Community and Poland shall abolish upon entry into force of this Agreement in trade between themselves, any charges having an effect equivalent to customs duties on imports.

Article 13

1. The Community and Poland shall progressively abolish between them at the latest by the end of the fifth year after entry into force of this Agreement any customs duties on exports and charges having equivalent effect.
2. Quantitative restrictions on exports and any measures having equivalent effect shall be abolished by the Community and Poland on the entry into force of this Agreement except for those applied to products listed in Annex VI which shall be eliminated as specified therein.

Article 14

Each party declares its readiness to reduce its customs duties in trade with the other party more rapidly than is provided for in Articles 9 and 10 if its general economic situation and the situation of the economic sector concerned so permit.

The Association Council may make recommendations to this effect.

Article 15

Protocol No 1 lays down the arrangements applicable to the textile products referred to therein.

Article 16

Protocol No 2 lays down the arrangements applicable to products covered by the Treaty establishing the European Coal and Steel Community.

Article 17

The provisions of this Chapter do not preclude the retention of an agricultural component in the duties applicable to products listed in Annex VII.

CHAPTER II**AGRICULTURE****Article 18**

1. The provisions of this Chapter shall apply to agricultural products originating in the Community and in Poland.
2. The term "agricultural products" means the products listed in Chapters 1 to 24 of the Combined Nomenclature and the products listed in Annex I, but excluding fishery products as defined by Regulation (EEC) No 3687/91.

Article 19

Protocol No 3 lays down the trade arrangements for processed agricultural products which are listed in such protocol.

Article 20

1. The Community shall abolish at the date of entry into force of this Agreement the quantitative restrictions on imports of agricultural products originating in Poland maintained by virtue of Council Regulation (EEC) No 3420/83 in the form existing on the date of signature hereof.
2. The agricultural products originating in Poland listed in Annex Villa or Annex VIIIb shall benefit, upon the date of entry into force of this Agreement, from the reduction of levies within the limit of Community quotas or from the reduction of customs duties and upon the conditions provided in the same Annex.
3. Poland shall gradually abolish quantitative restrictions on imports of agricultural products originating in the Community listed in Annex IX in accordance with the conditions established in that Annex.
4. The Community and Poland shall grant each other the concessions referred to in Annexes Xa, Xb, Xc and XI, on a harmonious and reciprocal basis, in accordance with the conditions laid down therein.
5. Taking account of the volume of trade in agricultural products between them, of their particular sensitivity, of the rules of the Common Agricultural Policy of the Community, of the role of agriculture in the Polish economy, and of the consequences of the multilateral trade negotiations under the General Agreement on Tariffs and Trade, the Community and Poland shall examine on a regular basis in the Association Council, product by product and on an orderly and reciprocal basis, the possibilities of granting each other further concessions. In this context special attention will be given to agricultural production based on natural techniques.
6. Taking account of the need for an increased harmony between the agricultural policies in the Community and Poland, as well as Poland's objective of becoming a member of the Community, both Parties will have regular consultations in the Association Council on the strategy and practical modalities of their respective policies.

Article 21

Notwithstanding other provisions of this Agreement and in particular Article 30, if, given the particular sensitivity of the agricultural markets, imports of products originating in one Party, which are the subject of concessions granted in Article 20, cause serious disturbance to the markets in the other Party, both Parties shall enter into consultations immediately to find an appropriate solution. Pending such solution, the Party concerned may take the measures it deems necessary.

CHAPTER III

FISHERIES

Article 22

The provisions of this chapter shall apply to fishery products originating in the Community and in Poland, which are covered by Regulation (EEC) No 3687/91 on the common organization of the market in the sector of fishery products.

Article 23

The Parties shall conclude as soon as practicable negotiations of an agreement on fishery products.

Thereafter, the provisions of Article 20(5) shall apply mutatis mutandis to fishery products.

CHAPTER IV**COMMON PROVISIONS****Article 24**

The provisions of this Chapter shall apply to trade in all products except where otherwise provided herein or in Protocols No 1, 2 and 3.

Article 25

1. No new customs duties on imports or exports or charges having equivalent effect shall be introduced, nor shall those already applied be increased, in the trade between the Community and Poland from the date of entry into force of this Agreement.
2. No new quantitative restriction on imports or exports or measure having equivalent effect shall be introduced nor shall those existing be made more restrictive in trade between the Community and Poland from the date of entry into force of this Agreement.
3. Without prejudice to the concessions granted under Article 20, the provisions of paragraphs 1 and 2 of this Article shall not restrict in any way the pursuance of the respective agricultural policies of Poland and the Community or the taking of any measures under such policies.

Article 26

1. The two Parties shall refrain from any measure or practice of an internal fiscal nature establishing, whether directly or indirectly, discrimination between the products of one Party and like products originating in the territory of the other Party.
2. Products exported to the territory of one of the two Parties may not benefit from repayment of internal taxation in excess of the amount of direct or indirect taxation imposed on them.

Article 27

1. This Agreement shall not preclude the maintenance or establishment of customs unions, free trade areas or arrangements for frontier trade except insofar as they alter the trade arrangements provided for in this Agreement.
2. Consultations between the Parties shall take place within the Association Council concerning agreements establishing such customs unions or free trade areas and, where requested, on other major issues related to their respective trade policy with third countries. In particular in the event of a third country acceding to the Community such consultations shall take place so as to ensure that account can be taken of the mutual interests of the Community and Poland stated in this Agreement.

Article 28

Exceptional measures of limited duration which derogate from the provisions of Article 10 and Article 25(1) may be taken by Poland in the form of increased customs duties.

These measures may only concern infant industries, or certain sectors undergoing restructuring or facing serious difficulties, particularly where these difficulties produce important social problems.

Customs duties on imports applicable in Poland to products originating in the Community introduced by these measures may not exceed 25% ad valorem and shall maintain an element of preference for products originating in the Community. The total value of imports of the products which are subject to these measures may not exceed 15% of total imports of industrial products from the Community as defined in Chapter I, during the last year for which statistics are available.

These measures shall be applied for a period not exceeding five years unless a longer duration is authorized by the Association Council. They shall cease to apply at the latest at the expiration of the transitional period.

No such measures can be introduced in respect of a product if more than 3 years have elapsed since the elimination of all duties and quantitative restrictions or charges or measures having an equivalent effect concerning that product.

Poland shall inform the Association Council of any exceptional measures it intends to take and, at the request of the Community, consultations shall be held in the Association Council on such measures and the sectors to which they apply before they are applied. When taking such measures Poland shall provide the Association Council with a schedule for the elimination of the customs duties introduced under this Article. This schedule shall provide for a phasing out of these duties starting at the latest two years after their introduction at equal annual rates. The Association Council may decide on a different schedule.

Article 29

If one of the Parties finds that dumping is taking place in trade with the other Party within the meaning of Article VI of the General Agreement on Tariffs and Trade, it may take appropriate measures against this practice in accordance with the Agreement relating to the application of Article VI of the General Agreement on Tariffs and Trade, with related internal legislation and with the conditions and procedures laid down in Article 33.

Article 30

Where any product is being imported in such increased quantities and under such conditions as to cause or threaten to cause:

- serious injury to domestic producers of like or directly competitive products in the territory of one of the Contracting Parties, or
- serious disturbances in any sector of the economy or difficulties which could bring about serious deterioration in the economic situation of a region,

the community or Poland, whichever is concerned, may take appropriate measures under the conditions and in accordance with the procedures laid down in Article 33.

Article 31

Where compliance with the provisions of Articles 13 and 25 leads to

- (i) re-export towards a third country against which the exporting Party maintains, for the product concerned, quantitative export restrictions, export duties or measures having equivalent effect,

or

- (ii) a serious shortage, or threat thereof, of a product essential to the exporting Party,
- and where the situations above referred to give rise, or are likely to give rise, to major difficulties for the exporting Party, that Party may take appropriate measures under the conditions and in accordance with the procedures laid down in Article 33. The measures shall be non-discriminatory and be eliminated when conditions no longer justify their maintenance.

Article 32

The Member States and Poland shall progressively adjust any State monopolies of a commercial character so as to ensure that, by the end of the fifth year following the entry into force of this Agreement, no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of the Member States and of Poland. The Association Council will be informed about the measures adopted to implement this objective.

Article 33

1. In the event of the Community or Poland subjecting imports of products liable to give rise to the difficulties referred to in Article 30 to an administrative procedure having as its purpose the rapid provision of information on the trend of trade flows, it shall inform the other Party.
2. In the cases specified in Articles 29, 30 and 31, before taking the measures provided for therein or, in cases to which paragraph 3(d) applies, as soon as possible, the Community or Poland, as the case may be, shall supply the Association Council with all relevant information with a view to seeking a solution acceptable to the two Parties.

In the selection of measures, priority must be given to those which least disturb the functioning of this Agreement.

The safeguard measures shall be notified immediately to the Association Council and shall be the subject of periodic consultations within that body, particularly with a view to establishing a timetable for their abolition as soon as circumstances permit.

3. For the implementation of paragraph 2, the following provisions shall apply:

- (a) As regards Article 30, the difficulties arising from the situation referred to in that Article shall be referred for examination to the Association Council, which may take any decision needed to put an end to such difficulties.

If the Association Council or the exporting Party has not taken a decision putting an end to the difficulties or no other satisfactory solution has been reached within thirty days of the matter being referred, the importing Party may adopt the appropriate measures to remedy the problem. These measures must not exceed the scope of what is necessary to remedy the difficulties which have arisen.

(b) As regards Article 29, the Association Council shall be informed of the dumping case as soon as the authorities of the importing Party have initiated an investigation. When no end has been put to the dumping or no other satisfactory solution has been reached within thirty days of the matter being referred to the Association Council, the importing Party may adopt the appropriate measures.

(c) As regards Article 31, the difficulties arising from the situations referred to in that Article shall be referred for examination to the Association Council.

The Association Council may take any decision needed to put an end to the difficulties. If it has not taken such a decision within thirty days of the matter being referred to it, the exporting Party may apply appropriate measures on the exportation of the product concerned.

(d) Where exceptional circumstances requiring immediate action make prior information or examination, as the case may be, impossible, the Community or Poland whichever is concerned may, in the situations specified in Articles 29, 30 and 31, apply forthwith the precautionary measures strictly necessary to deal with the situation.

Article 34

Protocol No 4 lays down rules of origin for the application of tariff preferences provided for in this Agreement.

Article 35

The Agreement shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures of artistic, historic or archaeological value or the protection of intellectual, industrial and commercial property or rules relating to 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.

Article 36

Protocol No 5 lays down the specific provisions to apply to trade between Poland of the one part and Spain and Portugal of the other part.

TITLE IV
MOVEMENT OF WORKERS, ESTABLISHMENT,
SUPPLY OF SERVICES

CHAPTER I

MOVEMENT OF WORKERS

Article 37

1. Subject to the conditions and modalities applicable in each Member State:
 - the treatment accorded to workers of Polish nationality, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals;
 - the legally resident spouse and children of a worker legally employed in the territory of a Member State, with the exception of seasonal workers and of workers coming under bilateral agreements within the meaning of Article 41, unless otherwise provided by such agreements, shall have access to the labour market of that Member State, during the period of that worker's authorized stay of employment.
2. Poland shall, subject to the conditions and modalities applicable in that country, accord the treatment referred to in paragraph 1 to workers who are nationals of a Member State and are legally employed in its territory as well as to their spouse and children who are legally resident in the said territory.

Article 38

1. With a view to co-ordinating social security systems for workers of Polish nationality, legally employed in the territory of a Member State and for the members of their family, legally resident there, and subject to the conditions and modalities applicable in each Member State:
 - all periods of insurance, employment or residence completed by such workers in the various Member States shall be added together for the purpose of pensions and annuities in respect of old age, invalidity and death and for the purpose of medical care for such workers and such family members;
 - any pensions or annuities in respect of old age, death, industrial accident or occupational disease, or of invalidity resulting therefrom, with the exception of non-contributory benefits, shall be freely transferable at the rate applied by virtue of the law of the debtor Member State or States;
 - the workers in question shall receive family allowances for the members of their family as defined above.
2. Poland shall accord to workers who are nationals of a Member State and legally employed in its territory, and to members of their families legally resident there, treatment similar to that specified in the second and third indents of paragraph 1.

Article 39

1. The Association Council shall by decision adopt the appropriate provisions to implement the objective set out in Article 38.
2. The Association Council shall by decision adopt detailed rules for administrative co-operation providing the necessary management and control guarantees for the application of the provisions referred to in paragraph 1.

Article 40

The provisions adopted by the Association Council in accordance with Article 39 shall not affect any rights or obligations arising from bilateral agreements linking Poland and the Member States where those agreements provide for more favourable treatment of nationals of Poland or of the Member States.

Article 41

1. Taking into account the labour market situation in the Member State, subject to its legislation and to the respect of rules in force in that Member State in the area of mobility of workers:
 - the existing facilities for access to employment for Polish workers accorded by Member States under bilateral agreements ought to be preserved and if possible improved;
 - the other Member States shall consider favourably the possibility of concluding similar agreements.
2. The Association Council shall examine granting other improvements including facilities of access for professional training, in conformity with rules and procedures in force in the Member States, and taking account of the labour market situation in the Member States and in the Community.
3. The Member States will examine the possibility of granting work permits to Polish nationals already having residence permits in the Member State concerned with the exception of those Polish nationals who have been admitted as tourists or visitors.

Article 42

During the second stage referred to in Article 6, or earlier if so decided, the Association Council shall examine further ways of improving the movement of workers, taking into account *inter alia* the social and economic conditions and requirements in Poland and the employment situation in the Community. The Association Council shall make recommendations to such end.

Article 43

In the interest of facilitating the restructuring of labour resources resulting from the economic restructuring in Poland the Community shall provide technical assistance for the establishment of a suitable social security system in Poland as set out in Article 87.

CHAPTER II

ESTABLISHMENT

Article 44

1. Poland shall, during the transitional periods referred to in Article 6, facilitate the setting up of operations on its territory by Community companies and nationals. The that end, it shall

(i) grant for the establishment of Community companies and nationals as defined in Article 48 a treatment no less favourable than that accorded to its own nationals and companies in accordance with the following timetable:

- from entry into force of the Agreement for the sectors included in Annex XIIa, and for all sectors not referred to in Annexes XIIa, XIIb, XIIc, XIId and XIIf;
- gradually, and at the latest by the end of the transitional period referred to in Article 6 for the sectors included in Annex XIIb;
- gradually, and at the latest by the end of the transitional period referred to in Article 6 for the sectors included in Annexes XIIc and XIId,

and

(ii) grant, from entry into force of this Agreement, in the operation of Community companies and nationals established in Poland a treatment no less favourable than that accorded to its own companies and nationals.

Should the existing laws and regulations not grant such treatment of Community companies and nationals for certain economic activities in Poland upon entry into force of this Agreement, Poland shall amend such laws and regulations as to ensure such treatment at the latest at the end of the first stage referred to in Article 6.

2. Poland shall, during the transitional periods referred to in paragraph 1, not adopt any new regulations or measures which introduce discrimination as regards the establishment and operations of Community companies and nationals in its territory in comparison to its own companies and nationals.

3. Each Member States shall grant, from entry into force of this Agreement, a treatment no less favourable than that accorded to its own companies and nationals for the establishment of Polish companies and nationals as defined in Article 48 and shall grant in the operation of Polish companies and nationals established in its territory a treatment no less favourable than that accorded to its own companies and nationals.

4. For the purposes of this Agreement

(a) "Establishment" shall mean

(i) as regards nationals, the right to take up and pursue economic activities as self-employed persons and to set up and manage undertakings, in particular companies, which they effectively control. Self-employment and business undertakings by nationals shall not extend to seeking or taking employment in the labour market or confer a right of access to the labour market of another Party.

The provisions of this chapter do not apply to those who are not exclusively self-employed;

- (ii) as regards companies, the right to take up and pursue economic activities by means of the setting up and management of subsidiaries, branches and agencies;
- (b) "subsidiary" of a company shall mean a company which is effectively controlled by the first company;
- (c) "economic activities" shall in particular include activities of an industrial character, activities of a commercial character, activities of craftsmen and activities of the professions.

5. The Association Council shall during the transitional periods referred to in paragraph 1(i) examine regularly the possibility of accelerating the granting of national treatment in the sectors referred to in Annexes XIb, XIc, and XIId and the inclusion of areas or matters listed in Annex XIe within the scope of application of the provisions of paragraphs 1,2 and 3. Amendments may be made to these Annexes by decision of the Association Council.

Following the expiration of the transitional periods referred to in paragraph 1 (i), the Association Council may exceptionally, upon request of Poland, and if the necessity arises, decide to prolong the duration of exclusion of certain areas or matters listed in Annexes XIb, XIc and XIId for a limited period of time.

6. The provisions concerning establishment and operation of Community and Polish companies and nationals contained in paragraphs 1, 2 and 3 shall not apply to the areas or matters listed in Annex XIe.

7. Notwithstanding the provisions of this Article, Community companies established in the territory of Poland shall have, from entry into force of this Agreement, the right to acquire, use, rent and sell real property, and as regards natural resources, agricultural land and forestry, the right to lease, where these are directly necessary for the conduct of the economic activities for which they are established.

Poland shall grant these rights to branches and agencies established in Poland of Community companies at the latest by the end of the first stage referred to in Article 6.

Poland shall grant these rights to Community nationals established as self-employed persons in Poland at the latest by the end of the transitional period referred to in Article 6.

Article 45

1. Subject to the provisions of Article 44, with the exception of financial services described in Annex XIc, each Party may regulate the establishment and operation of companies and nationals on its territory, in so far as these regulations do not discriminate against companies and nationals of the other Party in comparison to its own companies and nationals.

2. In respect of financial services, described in Annex XII c, this Agreement does not prejudice the right of the Parties to adopt measures necessary for the conduct of the Party's monetary policy, or for prudential grounds in order to ensure the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed, or to ensure the integrity and stability of the financial system. These measures shall not discriminate against companies and nationals of the other Party in comparison to its own companies and nationals.

Article 46

In order to make it easier for Community nationals and Polish nationals to take up and pursue regulated professional activities in Poland and the Community respectively, the Association

Council shall examine which steps are necessary to be taken to provide for the mutual recognition of qualifications. It may take all necessary measures to that end.

Article 47

The provisions of Article 45 do not preclude the application by a Contracting Party of particular rules concerning the establishment and operation in its territory of branches and agencies of companies of another Party not incorporated in the territory of the first Party, which are justified by legal or technical differences between such branches and agencies as compared to branches and agencies of companies incorporated in its territory, or, as regards financial services, for prudential reasons. The difference in treatment shall not go beyond what is strictly necessary as a result of such legal or technical differences, or, as regards financial services, described in Annex XIIC, for prudential reasons.

Article 48

1. A "Community company" and a "Polish company" respectively shall for the purpose of this Agreement mean a company or a firm set up in accordance with the laws of a Member State or of Poland respectively and having its registered office, central administration, or principal place of business in the territory of the Community or Poland respectively. However, should the company or firm, set up in accordance with the laws of a Member State or of Poland respectively, have only its registered office in the territory of the Community or Poland respectively, its operations must possess a real and continuous link with the economy of one of the Member States or Poland respectively.

2. With regard to international maritime transport, shall also be beneficiaries of the provisions of this Chapter and Chapter III of this Title, a national or a shipping company of the Member States or of Poland respectively established outside the Community or Poland respectively and controlled by nationals of a Member State, or Polish nationals respectively, if their vessels are registered in that Member State or in Poland respectively in accordance with their respective legislations.

3. A Community and a Polish national respectively shall, for the purpose of this Agreement, mean a natural person who is a national of one of the Member States or of Poland respectively.

4. The provisions of this Agreement shall not prejudice the application by each Party of any measure necessary to prevent the circumvention of its measures concerning third country access to its market through the provisions of this Agreement.

Article 49

For the purpose of this Agreement "financial services" shall mean those activities described in Annex XIIC. The Association Council may extend or modify the scope of Annex XIIC.

Article 50

During the first stage referred to in Article 6 for the sectors included in Annexes XIIa and XIIb, or for the sectors included in Annexes XIIC and XIId during the transitional period referred to in Article 6, Poland may introduce measures which derogate from the provisions of this Chapter as regards the establishment of Community companies and nationals if certain industries:

- are undergoing restructuring, or
- are facing serious difficulties, particularly where these entail serious social problems in Poland, or
- face the elimination or a drastic reduction of the total market share held by Polish companies or nationals in a given sector or industry in Poland, or
- are newly emerging industries in Poland.

Such measures:

- shall cease to apply at the latest two years after the expiration of the first stage referred to in Article 6 for the sectors included in Annexes XIIa and XIIb, or for the sectors included in Annexes XIIc and XIId upon the expiration of the transitional period referred to in Article 6, and
- shall be reasonable and necessary in order to remedy the situation and
- shall only relate to establishments in Poland to be created after the entry into force of such measures and shall not introduce discrimination concerning the operations of Community companies or nationals already established in Poland at the time of introduction of a given measure compared to Polish companies or nationals.

While devising and applying such measures, Poland shall grant whenever possible to Community companies and nationals a preferential treatment, and in no case a treatment less favourable than that accorded to companies or nationals from any third country.

Prior to the introduction of these measures, Poland shall consult the Association Council and shall not put them into effect before a one month period following the notification to the Association Council of the concrete measures to be introduced by Poland, except where the threat of irreparable damage requires the taking of urgent measures in which case Poland shall consult the Association Council immediately after their introduction.

Upon the expiration of the first stage referred to in Article 6 for the sectors included in Annex XIIb, or for the sectors included in Annexes XIIc and XIId upon expiration of the transitional period referred to in Article 6, Poland may introduce such measures only with the authorization of the Association Council and under conditions determined by the latter.

Article 51

1. The provisions of this Chapter shall not apply to air transport services, inland-waterways transport services and maritime cabotage transport services.
2. The Association Council may make recommendations for improving establishment and operations in the areas covered by paragraph 1.

Article 52

1. Notwithstanding the provisions of Chapter I of this Title, the beneficiaries of the rights of establishment granted by Poland and the Community respectively shall be entitled to employ, or have employed by one of their subsidiaries, in accordance with the legislation in force in the host country of establishment, in the territory of Poland and the Community respectively, employees who are nationals of Community Member States and Poland respectively, provided that such employees are key personnel as defined in paragraph 2 and that they are employed

exclusively by such beneficiaries or their subsidiaries. The residence and work permits of such employees shall only cover the period of such employment.

2. Key personnel of the beneficiaries of the rights of establishment herein referred to as "organization" are;

(a) Senior employees of an organization who primarily direct the management of the organization, receiving general supervision or direction principally from the board of directors or shareholders of the business, including:

- directing the organization or a department or sub-division of the organization;
- supervising and controlling the work of other supervisory, professional or managerial employees;
- having the authority personally to engage and dismiss or recommend engaging, dismissing or other personnel actions.

(b) Persons employed by an organization who possess high or uncommon:

- qualifications referring to a type of work or trade requiring specific technical knowledge;
- knowledge essential to the organization's service, research equipment, techniques or management.

These may include, but are not limited to, members of accredited professions.

Each such employee must have been employed by the organization concerned for at least one year preceding the detachment by the organization.

Article 53

1. The provisions of this Chapter shall be applied subject to limitations justified on grounds of public policy, public security or public health.
2. The provisions of this Chapter shall not apply to activities which in the territory of each Party are connected, even occasionally, with the exercise of official authority.

Article 54

Companies which are controlled and exclusively owned jointly by Polish companies or nationals and Community companies or nationals shall also be beneficiaries of the provisions of this Chapter and Chapter III of this Title.

CHAPTER III

SUPPLY OF SERVICES BETWEEN THE COMMUNITY AND POLAND

Article 55

1. The Parties undertake in accordance with the provisions of this Chapter to take the necessary steps to allow progressively the supply of services by Community or Polish companies or nationals who are established in a Party other than that of the person for whom the services are intended taking into account the development of services sector in the Parties.

2. In step with the liberalization process mentioned in paragraph 1, and subject to the provisions of Article 58(1), the Parties shall permit the temporary movement of natural persons providing the service or who are employed by the service provider as key personnel as defined in Article 52(2), including natural persons who are representatives of a Community or Polish company or national and are seeking temporary entry for the purpose of negotiating for the sale of services or entering into agreements to sell services for that service provider, where those representatives will not be engaged in making direct sales to the general public or in supplying services themselves.

3. The Association Council shall take the measures necessary to implement progressively the provisions of paragraph 1.

Article 56

With regard to supply of transport services between the Community and Poland, the following replaces the provisions of Article 55:

1. With regard to international maritime transport the Parties undertake to apply effectively the principle of unrestricted access to the market and traffic on a commercial basis.

(a) The above provision does not prejudice the rights and obligations under the United Nations Code of Conduct for Liner Conferences, as applied by one or the other Contracting Party to this Agreement. Non-conference liners will be free to operate in competition with a conference as long as they adhere to the principle of fair competition on a commercial basis.

(b) The Parties affirm their commitment to a freely competitive environment as being an essential feature of the dry and liquid bulk trade.

2. In applying the principles of paragraph 1, the Parties shall:

(a) not introduce cargo sharing clauses in future bilateral agreements with third countries, other than in those exceptional circumstances where liner shipping companies from one or other Party to this Agreement would not otherwise have an effective opportunity to ply for trade to and from the third country concerned;

(b) prohibit cargo sharing arrangements in future bilateral agreements concerning dry and liquid bulk trade;

(c) abolish, upon entry into force of this Agreement, all unilateral measures, administrative, technical and other obstacles which could have restrictive or discriminatory effects on the free supply of services in international maritime transport.

3. With a view to assuring a co-ordinated development and progressive liberalization of transport between the Parties adapted to their reciprocal commercial needs, the conditions of mutual market access in air transport and in inland transport shall be dealt with by special transport agreements to be negotiated between the Parties after the entry into force of this Agreement.

4. Prior to the conclusion of the agreements referred to in paragraph 3, the Parties shall not take any measures or actions which are more restrictive or discriminatory as compared to the situation existing on the day preceding the day of entry into force of this Agreement.

5. During the transitional period, Poland shall progressively adapt its legislation including administrative, technical and other rules to that of the Community legislation existing at any time in the field of air and inland transport in so far as it serves liberalization purposes and

mutual access to markets of the Parties and facilitates the movement of passengers and of goods.

6. In step with the common progress in the achievement of the objectives of this Chapter, the Association Council shall examine ways of creating the conditions necessary for improving freedom to provide air and inland transport services.

Article 57

The provisions of Article 53 shall apply to the matters covered by this Chapter.

CHAPTER IV

GENERAL PROVISIONS

Article 58

1. For the purpose of Title IV of this Agreement, nothing in the Agreement shall prevent the Parties from applying their laws and regulations regarding entry and stay, work, labour conditions and establishment of natural persons, and supply of services, provided that, in so doing, they do not apply them in a manner as to nullify or impair the benefits accruing to any Party under the terms of a specific provision of this Agreement. This provision does not prejudice the application of Article 53.

2. The provisions of Chapters II, III and IV of Title IV shall be adjusted by decision of the Association Council in the light of the result of the negotiations on services taking place in the Uruguay Round and in particular to ensure that under any provision of the present Agreement a Party grants to the other Party a treatment no less favourable than that accorded under the provisions of a future GATS Agreement.

3. The exclusion of Community companies and nationals established in Poland in accordance with the provisions of Chapter II of Title IV from public aid granted by Poland in the areas of public education services, health related and social services and cultural services shall, for the duration of the transitional period referred to in paragraph 6, be deemed compatible with the provisions of Title IV and with the competition rules referred to in Title V.

TITLE V

PAYMENTS, CAPITAL, COMPETITION AND OTHER ECONOMIC PROVISIONS, APPROXIMATION OF LAWS

CHAPTER I

CURRENT PAYMENTS AND MOVEMENT OF CAPITAL

Article 59

The Contracting Parties undertake to authorize, in freely convertible currency, any payments on the current account of balance of payments to the extent that the transaction underlying the payments concern movements of goods, services or persons between the Parties which have been liberalized pursuant to this Agreement.

Article 60

1. With regard to transactions on the capital account of balance of payments, from the entry into force of this Agreement, the Member States and Poland respectively shall ensure the free movement of capital relating to direct investments made in companies formed in accordance with the laws of the host country and investments made in accordance with the provisions of Chapter II of Title IV, and the liquidation or repatriation of these investments and of any profit stemming therefrom. Notwithstanding the above provision, such free movement, liquidation and repatriation shall be ensured by the end of the first stage referred to in Article 6 for all investments linked to establishment of nationals establishing in Poland as self-employed persons pursuant to Chapter II of Title IV.
2. Without prejudice to paragraph 1, the Member States, as from the entry into force of this Agreement, and Poland as from the start of the second stage referred to in Article 6, shall not introduce any new foreign exchange restrictions on the movement of capital and current payments connected therewith between residents of the Community and Poland and shall not make the existing arrangements more restrictive.
3. The Parties shall consult each other with a view to facilitating the movement of capital between the Community and Poland in order to promote the objectives of this Agreement.

Article 61

1. During the first stage referred to in Article 6 the Contracting Parties shall take measures permitting the creation of the necessary conditions for the further gradual application of Community rules on the free movement of capital.
2. During the second stage referred to in Article 6 the Association Council shall examine ways of enabling Community rules on the movement of capital to be applied in full.

Article 62

With reference to the provisions of this Chapter, and notwithstanding the provisions of Article 64, until a full convertibility of the Polish currency in the meaning of Article VIII of the International Monetary Fund is introduced, Poland may in exceptional circumstances apply exchange restrictions connected with the granting or taking up of short and medium-term credits to the extent that such restrictions are imposed on Poland for the granting of such credits and are permitted according to Poland's status under the IMF.

Poland shall apply these restrictions in a non-discriminatory manner. They shall be applied in such a manner as to cause the least possible disruption to this Agreement. Poland shall inform the Association Council promptly of the introduction of such measures and of any changes therein.

CHAPTER II**COMPETITION AND OTHER ECONOMIC PROVISIONS****Article 63**

1. The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and Poland:

- (i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;
- (ii) abuse by one or more undertakings of a dominant position in the territories of the Community or of Poland as a whole or in a substantial part thereof;
- (iii) any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.

2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty establishing the European Economic Community.

3. The Association Council shall, within three years of the entry into force of this Agreement, adopt by decision the necessary rules for the implementation of paragraphs 1 and 2.

Until these rules are adopted, the provisions of the Agreement on interpretation and application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade shall be applied as the rules for the implementation of paragraphs 1(iii) and related parts of paragraph 2.

4. (a) For the purposes of applying the provisions of paragraph 1 (iii), the Parties recognize that during the first five years after the entry into force of this Agreement, any public aid granted by Poland shall be assessed taking into account the fact that Poland shall be regarded as an area identical to those areas of the Community described in Article 92(3)(a) of the Treaty establishing the European Economic Community. The Association Council shall, taking into account the economic situation of Poland, decide whether that period should be extended by further periods of five years.

(b) Each Party shall ensure transparency in the area of public aid, inter alia by reporting annually to the other Party on the total amount and the distribution of the aid given and by providing, upon request, information on aid schemes. Upon request by one Party, the other Party shall provide information on particular individual cases of public aid.

5. With regard to products referred to in Chapters II and III of Title III:

- the provisions of paragraph 1(iii) do not apply;
- any practices contrary to paragraph 1 (i) should be assessed according to the criteria established by the Community on the basis of Articles 42 and 43 of the Treaty establishing the European Economic Community and in particular of those established in Council Regulation No 26/1962.

6. If the Community or Poland considers that a particular practice is incompatible with the terms of paragraph 1, and:

- is not adequately dealt with under the implementing rules referred to in paragraph 3, or
- in the absence of such rules, and if such practice causes or threatens to cause serious prejudice to the interest of the other Party or material injury to its domestic industry, including its services industry,

it may take appropriate measures after consultation within the Association Council or after 30 working days following referral for such consultation.

In the case of practices incompatible with paragraph 1(iii) of this Article, such appropriate measures may, where the General Agreement on Tariffs and Trade applies thereto, only be adopted in accordance with the procedures and under the conditions laid down by the General Agreement on Tariffs and Trade and any other relevant instrument negotiated under its auspices which are applicable between the Parties.

7. Notwithstanding any provisions to the contrary adopted in accordance with paragraph 3, the Parties shall exchange information taking into account the limitations imposed by the requirements of professional and business secrecy.

8. This Article shall not apply to the products covered by the Treaty establishing the European Coal and Steel Community which are the subject of Protocol No 2.

Article 64

1. The Parties shall endeavour to avoid the imposition of restrictive measures including measures relating to imports for balance of payments purposes. In the event of their introduction, the Party having introduced the same shall present to the other Party as soon as possible, a time schedule for their removal.

2. Where one or more Member States of the Community or Poland is in serious balance of payments difficulties, or under imminent threat thereof, the Community or Poland, as the case may be, may, in accordance with the conditions established under the General Agreement on Tariffs and Trade, adopt restrictive measures, including measures relating to imports, which shall be of limited duration and may not go beyond what is necessary to remedy the balance of payments situation. The Community or Poland, as the case may be, shall inform the other Party forthwith.

3. Any restrictive measures shall not apply to transfers related to investment and in particular to the repatriation of amounts invested or reinvested and of any kind of revenues stemming therefrom.

Article 65

With regard to public undertakings, and undertakings to which special or exclusive rights have been granted, the Association Council shall ensure that as from the third year following the date of entry into force of this Agreement, the principles of the Treaty establishing the European Economic Community, in particular Article 90, and the principles of the concluding document of the April 1990 Bonn meeting of the Conference on Security and Co-operation in Europe, in particular entrepreneurs' freedom of decision, are upheld.

Article 66

1. Poland shall continue to improve the protection of intellectual, industrial and commercial property rights in order to provide, by the end of the fifth year from the entry into force of this Agreement, a level of protection similar to that existing in the Community, including comparable means of enforcing such rights.

2. By the end of the fifth year from the entry into force of this Agreement, Poland shall apply to accede to the Munich Convention on the Grant of European Patents of 5 October 1973 and shall accede to the other multilateral conventions on intellectual, industrial and commercial property rights referred to in Annex XIII paragraph 1 to which Member States are Parties, or which are de facto applied by Member States.

Article 67

1. The Contracting Parties consider the opening up of the award of public contracts on the basis of non-discrimination and reciprocity, in particular in the GATT context, to be a desirable objective.

2. Polish companies as defined in Article 48, shall be granted access to contract award procedures in the Community pursuant to Community procurement rules under a treatment no less favourable than that accorded to Community companies as of the entry into force of this Agreement.

Community companies as defined in Article 48 shall be granted access to contract award procedures in Poland under a treatment no less favourable than that accorded to Polish companies at the latest at the end of the transitional period referred to in Article 6.

Community companies established in Poland under the provisions of Chapter II of Title IV shall have, upon entry into force of the Agreement, access to contract award procedures under a treatment no less favourable than that accorded to Polish companies.

The Association Council shall periodically examine the possibility for Poland to introduce access to award procedures in Poland for all Community companies prior to the end of the transitional period.

3. As regards establishment, operations, supply of services between the Community and Poland, as well as employment and movement of labour linked to the fulfilment of public contracts, the provisions of Articles 37 to 58 are applicable.

CHAPTER III

APPROXIMATION OF LAWS

Article 68

The Contracting parties recognize that the major precondition for Poland's economic integration into the Community is the approximation of that country's existing and future legislation to that of the Community. Poland shall use its best endeavours to ensure that future legislation is compatible with Community legislation.

Article 69

The approximation of laws shall extend to the following areas in particular: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and life of humans, animals and plants, consumer protection, indirect taxation, technical rules and standards, transport and the environment.

Article 70

The Community shall provide Poland with technical assistance for the implementation of these measures which may include inter alia:

- the exchange of experts;
- the provision of information;

- organization of seminars;
- training activities;
- aid for the translation of Community legislation in the relevant sectors.

TITLE VI

ECONOMIC CO-OPERATION

Article 71

1. The Community and Poland shall establish co-operation aimed at contributing to Poland's development. Such co-operation shall back up Poland's achievements and shall strengthen existing economic links on the widest possible foundation, to the benefit of both Parties.

2. Policies designed to bring about the economic and social development of Poland, in particular policies relating to industry including the mining sector, investment, agriculture, energy, transport, regional development and tourism should be guided by the principle of sustainable development. This entails ensuring that environmental considerations are fully incorporated into such policies from the outset.

These policies shall also take into account the requirements of sustainable social development.

3. Special attention must be devoted to measures capable of fostering co-operation between the countries of Central and Eastern Europe with a view to integrated development of the region.

Article 72

INDUSTRIAL CO-OPERATION

1. Co-operation shall seek to promote the following in particular:

- industrial co-operation between economic operators in the Community and in Poland, with the particular aim of strengthening the private sector;
- Community participation in Poland's efforts in both public and private sectors to modernize and restructure its industry, which will effect the transition from a centrally planned system to a market economy under conditions which ensure that the environment is protected;
- the restructuring of individual sectors;
- the establishment of new undertakings in areas offering potential for growth.

2. Industrial co-operation initiatives take into account priorities determined by Poland. The initiatives should seek in particular to establish a suitable framework for undertakings, to improve management know-how and to promote transparency as regards markets and conditions for undertakings.

Article 73

INVESTMENT PROMOTION AND PROTECTION

1. Co-operation shall aim to establish a favourable climate for private investment, both domestic and foreign, which is so essential to economic and industrial reconstruction in Poland.

2. The particular aims of co-operation shall be;
 - for Poland to establish a legal framework which favours investment; this could be achieved where appropriate by the Member States and Poland extending agreements for the promotion and protection of investment;
 - to implement suitable arrangements for the transfer of capital;
 - to bring about better investment protection;
 - to carry through deregulation and improve economic infrastructure;
 - to exchange information on investment opportunities in the form of trade fairs, exhibitions, trade weeks and other events.

Article 74

AGRO AND INDUSTRIAL STANDARDS AND CONFORMITY ASSESSMENT

1. Co-operation shall aim in particular to reduce differences in standardization and conformity assessment.
2. To this end, co-operation shall seek:
 - to comply with Community technical regulations and European standards concerning quality of industrial and agricultural food products;
 - to promote the use of Community technical regulations and European standards and conformity assessment procedures;
 - where appropriate, to achieve the conclusion of agreements on mutual recognition in these fields;
 - to encourage Poland's participation in the work of specialized organizations (CEN, CENELEC, ETSI, EOTC).
3. The Community will provide Poland with technical assistance where appropriate.

Article 75

CO-OPERATION IN SCIENCE AND TECHNOLOGY

1. The parties shall undertake to promote co-operation in research and technological development. They shall devote special attention to the following:
 - the exchange of scientific and technological information, including information on each other's science and technology policies and activities;
 - the organization of joint scientific meetings (seminars and workshops);
 - joint R & D activities aimed at encouraging scientific progress and the transfer of technology and know-how;
 - training activities and mobility programmes for researchers and specialists from both sides;
 - the development of an environment conducive to research and the application of new technologies and adequate protection of the intellectual property of the results of research;
 - participation in the Community programmes in accordance with paragraph 3.

Technical assistance shall be provided where appropriate.

2. The Association Council shall determine the appropriate procedures for developing co-operation.
3. Co-operation under the Community's framework programme in the field of research and technological development shall be implemented according to specific arrangements to be negotiated and concluded in accordance with the procedures adopted by each Party.

Article 76

EDUCATION AND TRAINING

1. Co-operation shall endeavour to raise the level of general education and professional qualifications in Poland, taking into consideration the priorities of Poland.
2. Co-operation shall comprise the following areas:
 - reform of education and training;
 - in-service training and continuous education;
 - re-training and adaptation to the labour market;
 - training in management abilities;
 - teaching of Community languages;
 - translation;
 - provision of training equipment;
 - promoting teaching in the field of European studies within the appropriate institutions.
3. There will be established institutional frameworks and plans of co-operation (starting with the European Training Foundation, when established, and Polish participation in TEMPUS). Polish participation in other Community programmes could also be considered in this context, in accordance with Community procedures.
4. Co-operation shall foster direct collaboration between educational institutions, and between educational institutions and enterprises, mobility and exchange of teachers, students and administrators, provide professional practice and training periods abroad, assist in developing curricula, elaborating teaching materials and equipping educational institutions.

Co-operation shall also aim at mutual recognition of periods of studies and diplomas.

In order to promote integration of Poland with Community level of educational establishments and research institutions, as stated in Article 75, the Community shall take appropriate measures to facilitate Poland's co-operation with relevant European institutions. This may include Poland's participation in the activities of these institutions as well as establishment of their filials in Poland. The objectives of the abovementioned establishments should concentrate on educating scholars, professionals and public servants to be involved in the process of European integration and co-operation with the Community institutions.

5. The principal objectives of co-operation on translation shall be;
 - to train translators and develop the terminology bases (glossaries, Eurodicautom);
 - to promote the use of Community standards and terminology;

- to develop an appropriate infrastructure for translation between Polish and the Community languages.

Article 77

AGRICULTURE AND THE AGRO-INDUSTRIAL SECTOR

1. Co-operation in this area shall have as its aim the increase of effectiveness of agriculture and the agro-industrial sector. It shall endeavour in particular to:
 - develop private farms and distribution channels, methods of storage, marketing, etc.;
 - modernize the rural infrastructure (transport, water supply, telecommunications);
 - rural espace planning, including construction and urban planning;
 - improve productivity and quality by using appropriate methods and products; provide training and monitoring in the use of anti-pollution methods connected with inputs;
 - develop and modernize processing firms and their marketing techniques;
 - promote complementarity in agriculture;
 - promote industrial co-operation in agriculture and the exchange of know-how, particularly between the private sectors in the Community and Poland;
 - develop co-operation on health, animal and plant health, including veterinary legislation and inspection, vegetal and phytosanitary legislation with the aim of bringing about gradual harmonization with Community standards through assistance for training and the organization of checks.
2. To these ends, technical assistance shall be provided by the Community as appropriate.

Article 78

ENERGY

1. Co-operation shall take place within the framework of the principles of the market economy and develop against a background of progressive integration of the market of Poland and that of the Community.
2. Co-operation shall focus on the following in particular:
 - modernization of infrastructure;
 - improvement and diversification of supply;
 - formulation and planning of energy policy;
 - management and training for the energy sector;
 - the development of energy resources;
 - the promotion of energy saving and energy efficiency;
 - the environmental impact of energy production and consumption;
 - the nuclear energy sector;
 - the electricity and gas sectors, including consideration of the possibility of interconnection of supply networks;

- the formulation of framework conditions for co-operation between undertakings in this sector;
- the transfer of technology and know-how;
- opening up the energy market to a greater degree; facilitating transit of gas and electricity.

Article 79

CO-OPERATION IN THE NUCLEAR SECTOR

1. Co-operation in the nuclear field shall mainly cover the following topics:
 - upgrading the nuclear law and regulation in Poland;
 - nuclear safety, nuclear emergency preparedness and accident management;
 - radiation protection, including environmental radiation monitoring;
 - fuel cycle problems, safeguarding and physical protection of nuclear materials;
 - radioactive waste management;
 - decommissioning and dismantling of nuclear installations;
 - decontamination.
2. Co-operation will include exchange of information and experience and R & D activities in accordance with Article 75.

Article 80

ENVIRONMENT

1. The Parties shall develop and strengthen their co-operation in the vital task of combating the deterioration of the environment, which they have judged to be a priority.
2. Co-operation shall centre on:
 - effective monitoring of pollution levels;
 - combating regional and transboundary air and water pollution;
 - efficient energy production and consumption, safety of industrial plants;
 - classification and safe handling of chemicals;
 - water quality, particularly of cross-boundary waterways;
 - waste reduction, recycling and safe disposal; implementation of the Basle Convention;
 - the environmental impact of agriculture; soil erosion; the protection of forests and flora and fauna;
 - land-use planning, including construction and urban planning;
 - use of economic and fiscal instruments;
 - global climate change.
3. To these ends, the Parties plan to co-operate particularly in the following areas:
 - exchange of information and experts, including information and experts dealing with the transfer of clean technologies;

- training programmes;
- approximation of laws (Community standards);
- co-operation at regional level (including co-operation within the framework of the European Environment Agency, when established by the Community) and international level;
- development of strategies, particularly with regard to global and climatic issues.

Article 81

TRANSPORT

1. The Parties shall develop and step up co-operation in order to enable Poland to:
 - restructure and modernize transport;
 - facilitate the movement of passengers and goods and improve access to the transport market by removing administrative, technical and other obstacles;
 - achieve operating standards comparable to those in the Community.
2. Co-operation shall include the following in particular:
 - economic, legal and technical training programmes;
 - the provision of technical assistance and advice, and the exchange of information (conferences and seminars).
3. Priority areas shall be the following:
 - road transport, including the gradual easing of transit conditions;
 - the management of railways and airports, including co-operation between the appropriate national authorities;
 - the modernization, on major routes of common interest and trans-European links, of road, inland waterway, railway, port and airport infrastructure;
 - land-use planning including construction and urban planning;
 - the upgrading of technical equipment to meet Community standards, particularly in the fields of road-rail transport, multimodal transport and transshipment;
 - the setting-up of consistent transport policies compatible with the transport policies applicable in the Community.

Article 82

TELECOMMUNICATIONS

1. The Parties shall expand and strengthen co-operation in this area, and shall to this end initiate in particular the following actions:
 - exchange information on telecommunications policies;
 - exchange technical and other information and organize seminars, workshops and conferences for experts of both sides;
 - conduct training and advisory operations;
 - carry out transfers of technology;

- have the appropriate bodies from both sides carry out joint projects;
 - promote European standards, systems of certification and regulatory approaches;
 - promote new communications, services and facilities, particularly those with commercial applications.
2. These activities shall focus on the following priority areas:
- the modernization of Poland's telecommunications network and its integration into European and world networks;
 - co-operation within the structures of European standardization;
 - the integration of trans-European systems; the legal and regulatory aspects of telecommunications;
 - the management of telecommunications in the new economic environment: organizational structures, strategy and planning, purchasing principles;
 - land-use planning, including construction and urban planning.

Article 83

BANKING, INSURANCE AND OTHER FINANCIAL SERVICES

1. The Parties shall co-operate on the adoption of a common set of rules and standards inter alia for accounting and for supervisory and regulatory systems of banking, insurance and financial sectors.
2. Both sides shall establish precise methods of facilitating the process of reform, in particular by:
 - contributing to the preparation of glossaries and the translation of Community and Polish legislation;
 - holding discussions and information meetings on the laws in force or being drafted in Poland and in the Community;
 - providing training.

Article 84

MONETARY POLICY

At the request of the Polish authorities, the Community shall provide technical assistance designed to support the efforts of Poland towards the introduction of full convertibility of the Zloty and the gradual approximation of its policies to those of the European Monetary System. This will include informal exchange of information concerning the principles and the functioning of the European Monetary System.

Article 85

MONEY LAUNDERING

1. The Parties agree on the necessity of making every effort and co-operating in order to prevent the use of their financial systems for laundering of proceeds from criminal activities in general and drug offences in particular.

2. Co-operation in this area shall include administrative and technical assistance with the purpose of establishing suitable standards against money laundering equivalent to those adopted by the Community and international fora in this field, in particular the Financial Action Task Force (FATF).

Article 86

REGIONAL DEVELOPMENT

1. The Parties shall strengthen co-operation between them on regional development and land-use planning.
2. To this end, any of the following measures are planned:
 - the provision of information for national, regional or local authorities on regional and land-use planning policy, and, where appropriate, the provision of assistance for the formulation of such policy;
 - joint action by regional and local authorities in the area of economic development;
 - the study of co-ordinated approaches for the development of border areas between the Community and Poland;
 - exchange visits to explore the opportunities for co-operation and assistance;
 - the exchange of civil servants;
 - the provision of technical assistance with special attention to the development of disadvantaged areas;
 - the establishment of programmes for the exchange of information and experience, by methods including seminars.

Article 87

SOCIAL CO-OPERATION

1. With regard to health and safety, co-operation between the Parties shall aim at improving the level of protection of the health and safety of workers, taking as a reference the level of protection existing in the Community, in particular through:
 - the provision of technical assistance;
 - the exchange of experts;
 - co-operation between firms;
 - information and training operations.
2. With regard to employment, co-operation between the Parties shall focus in particular on:
 - organization of the labour market;
 - job-finding and careers advice services;
 - planning and realization of regional restructuring programmes;
 - encouragement of local employment development.

Co-operation in these fields shall be realized through actions such as the performance of studies, provision of the services of experts and information and training.

3. With regard to social security, co-operation between the Parties shall seek to adapt the social security system in Poland to the new economic and social situation, primarily by providing the services of experts and information and training.

Article 88

TOURISM

The Parties shall step up and develop co-operation between them, in particular by:

- facilitating the tourist trade;
- stepping up the flow of information through international networks, data banks, etc.;
- transferring know-how through training, exchanges, seminars;
- studying the opportunities for joint operations such as cross-frontier projects, town-twinning, etc.

Article 89

SMALL AND MEDIUM-SIZED ENTERPRISES

1. The Parties shall aim to develop and strengthen small and medium-sized enterprises and co-operation between SMEs in the Community and Poland.
2. They shall encourage the exchange of information and know-how in the following areas:
 - bringing about the legal, administrative, technical, tax and financial conditions necessary to the establishment and expansion of SMEs and for cross-border co-operation;
 - the provision of the specialized services required by SMEs (management training, accounting, marketing, quality control, etc.) and the strengthening of agencies providing such services;
 - the establishment of appropriate links with Community operators with the aim of improving the flow of information to SMEs and promoting cross-border co-operation (e.g. the Business Co-operation Network (BC-NET), Euro-Info Centres, conferences, etc.).

Article 90

INFORMATION AND THE AUDIOVISUAL MEDIA

1. The Parties shall take appropriate measures to stimulate an effective mutual exchange of information. Initial priority shall be given to programmes providing basic information about the Community for the general public, and specialized information for specific audiences in Poland; the latter shall include wherever possible access to Community computerized data bases.
2. The Parties shall co-operate to promote the audiovisual industry in Europe. In particular, the audiovisual sector in Poland may take part in the actions undertaken by the Community within the framework of the MEDIA Programme 1991-1995, under procedures to be agreed with the bodies responsible for managing each action, and in accordance with the provisions of the Decision of the Council of the European Communities of 21 December 1990, which established the programme.

The Parties shall co-ordinate and where appropriate harmonize their policies concerning the regulation of cross-border broadcasting, technical norms in the audiovisual field, and the promotion of European audiovisual technology.

Article 91

CUSTOMS

1. The aim of co-operation shall be to guarantee compliance with all the provisions scheduled for adoption in connection with trade and to achieve the approximation of Poland's customs system to that of the Community, thus helping to ease the steps towards liberalization planned under this Agreement.
2. Co-operation shall include the following in particular:
 - the exchange of information;
 - the organization of seminars and placements;
 - the development of cross-frontier infrastructure between the Parties;
 - the introduction of the single administrative document and of an interconnection between the transit systems of the Community and Poland;
 - the simplification of inspections and formalities in respect of the carriage of goods.

Technical assistance shall be provided where appropriate.

3. Without prejudice to further co-operation provided for in this Agreement, and in particular Article 94, the mutual assistance between administrative authorities of the Contracting Parties in customs matters shall take place in accordance with the provisions of Protocol No 6.

Article 92

STATISTICAL CO-OPERATION

1. Co-operation in this area shall have as its aim the development of an efficient statistical system to provide, in a rapid and timely fashion, the reliable statistics needed to plan and monitor the process of reform and to contribute to the development of private enterprise in Poland.
2. To these ends it shall in particular seek:
 - to set up a reliable and independent statistical system;
 - to bring about harmonization with international (and particularly Community) methods, standards and classifications;
 - to provide the data needed to maintain and monitor economic reform;
 - to provide private-sector economic operators with the appropriate macro-economic and micro-economic data;
 - to guarantee the confidentiality of data.
3. Technical assistance shall be provided by the Community as appropriate.

Article 93**ECONOMICS**

1. The Community and Poland will facilitate the process of economic reforms and integration by co-operating to improve understanding of the fundamentals of their respective economies and of devising and implementing economic policy in market economies.
2. To these ends the Community and Poland will:
 - exchange information on macro-economic performance and prospects and on strategies for development;
 - analyse jointly economic issues of mutual interest, including the framing of economic policy and the instruments for implementing it;
 - through the programme of Action for Co-operation in Economics in particular, encourage extensive co-operation among economists and managers in the Community and Poland, in order to speed up the transfer of know-how for the drafting of economic policies, and provide for wide dissemination of the results of policy-relevant research.

Article 94**DRUGS**

1. The co-operation is in particular aimed at increasing the efficiency of policies and measures to counter the supply and illicit traffic of narcotics and psychotropic substances and the reduction of abuse of these products.
2. The Contracting Parties shall agree on the necessary methods of co-operation to attain these objectives, including the modalities of the implementation of common actions. Their actions will be based on consultation on and close co-ordination of the objectives and the policy measures in the fields targeted in paragraph 1.
3. The co-operation between the Contracting Parties will comprise technical and administrative assistance which could deal in particular with the following areas: the drafting and implementation of national legislation; the creation of institutions and information centres and of social and health centres; the training of personnel and research; the prevention of diversion of precursors used for the purpose of illicit manufacture of narcotic drugs or psychotropic substances.

The Parties may agree to include other areas.

TITLE VII**CULTURAL CO-OPERATION****Article 95**

1. The Parties agree to promote cultural co-operation. Where appropriate, Community cultural co-operation programmes, or those of one or more Member States, may be extended to Poland and additional actions of mutual interest shall be developed.
2. The areas of co-operation may include in particular:

- translation of literary works;
- conservation and restoration of historic and cultural monuments and sites;
- training of persons working in the cultural field;
- cultural events with a European character.

TITLE VIII

FINANCIAL CO-OPERATION

Article 96

In order to achieve the objectives of this Agreement and in accordance with Articles 97, 98, 100 and 101, Poland shall benefit from temporary financial assistance from the Community in the form of grants and loans to accelerate the economic transformation of Poland and to help Poland to cope with the economic and social consequences of structural readjustment.

Article 97

This financial assistance shall be covered by:

- the Operation PIARE measures provided for in Council Regulation (EEC) No 3906/89, as amended, until the end of 1992; thereafter grants will be made available by the Community, either within the framework of the Operation PHARE on a multiannual basis, or within a new financial multiannual framework established by the Community following consultations with Poland and taking into account the considerations set out in Articles 100 and 101;
- the loan(s) provided by the European Investment Bank until the expiry date of the availability thereof. Poland shall have access to European Investment Bank loans according to the provisions of Article 18 of the Statute of the Bank for subsequent years; following consultations with Poland the Community shall fix the maximum amount and period of availability of loans from the European Investment Bank for Poland.

Article 98

The objectives and the areas of the Community's financial assistance shall be laid down in an indicative programme to be agreed between the two Parties. The Parties shall inform the Association Council.

Article 99

1. The Community shall, in case of special need, taking into account the availability of all financial resources, on request of Poland and in co-ordination with international financial institutions, in the context of the G-24, examine the possibility of granting temporary financial assistance

- to support measures with the aim of stabilizing and maintaining the convertibility of the Zloty;
- to support medium-term stabilization and economic restructuring efforts, including balance of payments support.

2. The financial assistance is subject to Poland's presentation of IMF supported programmes in the context of G-24, as appropriate, for convertibility and/or for restructuring its economy, to the Community's acceptance thereof, to Poland's continued adherence to these programmes and, as an ultimate objective, to rapid transition to reliance on finance from private sources.
3. The Association Council will be informed of the conditions under which this assistance will be provided and of the respect of the obligations undertaken by Poland concerning such assistance.

Article 100

The Community financial assistance shall be evaluated in the light of the needs which arise and of Poland's development level, and taking into account established priorities and the absorption capacity of the Polish economy, the ability to repay loans and accomplishment of a market economy system and restructuring in Poland.

Article 101

In order to permit optimum use of the resources available, the Contracting Parties shall ensure that Community contributions are made in close co-ordination with those from other sources such as the Member States, other countries including the G-24 and international financial institutions, such as the International Monetary Fund, the International Bank for Reconstruction and Development and the European Bank for Reconstruction and Development.

TITLE IX

INSTITUTIONAL, GENERAL AND FINAL PROVISIONS

Article 102

An Association Council is hereby established which shall supervise the implementation of this Agreement. It shall meet at ministerial level once a year and when circumstances require. It shall examine any major issues arising within the framework of this Agreement and any other bilateral or international issues of mutual interest.

Article 103

1. The Association Council shall consist of the members of the Council of the European Communities and members of the Commission of the European Communities, on the one hand, and of members of the Government of Poland, on the other.
2. Members of the Association Council may arrange to be represented, in accordance with the conditions to be laid down in its rules of procedure.
3. The Association Council shall establish its rules of procedure.
4. The Association Council shall be presided in turn by a member of the Council of the European Communities and a member of the Government of Poland, in accordance with the provisions to be laid down in its rules of procedure.

Article 104

The Association Council shall, for the purpose of attaining the objectives of this Agreement have the power to take decisions in the cases provided for therein. The decisions taken shall be binding on the Parties which shall take the measures necessary to implement the decisions taken. The Association Council may also make appropriate recommendations.

It shall draw up its decisions and recommendations by agreement between the two Parties.

Article 105

1. Each of the two Parties may refer to the Association Council any dispute relating to the application or interpretation of this Agreement.

2. The Association Council may settle the dispute by means of a decision.

3. Each Party shall be bound to take the measures involved in carrying out the decision referred to in paragraph 2.

4. In the event of it not being possible to settle the dispute in accordance with paragraph 2, either Party may notify the other of the appointment of an arbitrator; the other Party must then appoint a second arbitrator within two months. For the application of this procedure, the Community and the Member States shall be deemed to be one Party to the dispute.

The Association Council shall appoint a third arbitrator.

The arbitrator's decisions shall be taken by majority vote.

Each party to the dispute must take the steps required to implement the decision of the arbitra-

Article 106

1. The Association Council shall be assisted in the performance of its duties by an Association Committee composed of representatives of the members of the Council of the European Communities and of members of the Commission of the European Communities on the one hand and of representatives of the Government of Poland on the other, normally at senior civil servant level.

In its rules of procedure the Association Council shall determine the duties of the Association Committee, which shall include the preparation of meetings of the Association Council, and how the Committee shall function.

2. The Association Council may delegate to the Association Committee any of its powers. In this event the Association Committee shall take its decisions in accordance with the conditions laid down in Article 104.

Article 107

The Association Council may decide to set up any other special committee or body that can assist it in carrying out its duties.

In its rules of procedure, the Association Council shall determine the composition and duties of such committees or bodies and how they shall function.

Article 108

An Association Parliamentary Committee is hereby established. It shall be a forum for Members of the Polish Parliament and the European Parliament to meet and exchange views. It shall meet at intervals which it shall itself determine.

Article 109

1. The Association Parliamentary Committee shall consist of members of the European Parliament, on the one hand, and of members of the Polish Parliament, on the other.
2. The Association Parliamentary Committee shall establish its rules of procedure.
3. The Association Parliamentary Committee shall be presided each in turn by the European Parliament and the Polish Parliament, in accordance with the provisions to be laid down in its rules of procedure.

Article 110

The Association Parliamentary Committee may request relevant information regarding the implementation of this Agreement from the Association council, which shall then supply the Committee with the requested information.

The Association Parliamentary Committee shall be informed of the decisions of the Association Council.

The Association Parliamentary Committee may make recommendations to the Association Council.

Article 111

Within the scope of this Agreement, each Party undertakes to ensure that natural and legal persons of the other Party have access free of discrimination in relation to its own nationals to the competent courts and administrative organs of the Community and Poland to defend their individual rights and their property rights, including those concerning intellectual, industrial and commercial property.

Article 112

Nothing in the Agreement shall prevent a Contracting Party from taking any measures:

- (a) which it considers necessary to prevent the disclosure of information contrary to its essential security interests;
- (b) with relate to the production of, or trade in, arms, munitions or war materials or to research, development or production indispensable for defence purposes, provided that such measures do not impair the conditions of competition in respect of products not intended for specifically military purposes;
- (c) which it considers essential to its own security in the event of serious internal disturbances affecting the maintenance of law and order, in time of war or serious international tension constituting threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

Article 113

1. In the fields covered by this Agreement and without prejudice to any special provisions contained therein:

- the arrangements applied by Poland in respect of the Community shall not give rise to any discrimination between the Member States, their nationals, or their companies or firms;
- the arrangements applied by the Community in respect of Poland shall not give rise to any discrimination between Polish nationals or its companies or firms.

2. The provisions of paragraph 1 are without prejudice to the right of the Contracting Parties to apply the relevant provisions of their fiscal legislation to taxpayers who are not in identical situations as regards their place of residence.

Article 114

Products originating in Poland shall not enjoy more favourable treatment when imported into the Community than that applied by Member States among themselves.

The treatment granted to Poland under Title IV and Chapter I of Title V shall not be more favourable than that accorded by Member States among themselves.

Article 115

1. The Parties shall take any general or specific measures required to fulfil their obligations under this Agreement. They shall see to it that the objectives set out in this Agreement are attained.

2. If either Party considers that the other Party has failed to fulfil an obligation under this Agreement, it may take appropriate measures. Before so doing, it shall supply the Association Council with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties.

In the selection of measures, priority must be given to those which least disturb the functioning of this Agreement. These measures shall be notified immediately to the Association Council and shall be the subject of consultations within the Association Council if the other Party so requests.

Article 116

This Agreement shall not, until equivalent rights for individuals and economic operators have been achieved under this Agreement, affect rights assured to them through existing agreements binding one or more Member States, on the one hand, and Poland, on the other.

Article 117

Protocols 1, 2, 3, 4, 5, 6 and 7 and Annexes I to XIII shall form an integral part of this Agreement.

Article 118

This Agreement is concluded for an unlimited period.
Either Party may denounce this Agreement by notifying the other Party. This Agreement shall cease to apply six months after the date of such notification.

Article 119

This Agreement shall apply, on the one hand, to the territories in which the Treaties establishing the European Economic Community, the European Atomic Energy Community, and the European Coal and Steel Community are applied and under the conditions laid down in those Treaties and, on the other hand, to the territory of the Republic of Poland.

Article 120

This Agreement is drawn up in duplicate in the Polish, Danish, Dutch, English, French, German, Greek, Italian, Portuguese and Spanish languages, each of these texts being equally authentic.

Article 121

This Agreement will be approved by the Contracting Parties in accordance with their own procedures.

This Agreement shall enter into force on the first day of the second month following the date on which the Contracting Parties notify each other that the procedures referred to in the first paragraph have been completed.

Upon its entry into force, this Agreement shall replace the Agreement between the European Economic Community and the Republic of Poland on trade and economic and commercial co-operation signed in Brussels on 19 September 1989, and the Protocol between the European Coal and Steel Community and the Republic of Poland signed in Brussels on 16 October 1991.

Article 122

In the event that, pending the completion of the procedures necessary for the entry into force of this Agreement, the provisions of certain parts of this Agreement, in particular those relating to the movement of goods, are put into effect in 1992 by means of an Interim Agreement between the Community and Poland, the Contracting Parties agree that, in such circumstances for the purposes of Title III, Articles 63, 65 and 66 of this Agreement and Protocols Nos 1, 2, 3, 4, 5, 6 and 7 hereto, the terms "date of entry into force of this Agreement" shall mean:

- the date of entry into force of the Interim Agreement in relation to obligations taking effect on that date, and
- 1 January 1992 in relation to obligations taking effect after the date of entry into force by reference to the date of entry into force.

Brussels, 16 December 1991

