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REVISION OF TURKEY-EU CUSTOMS UNION WITHIN CONTEXT OF DIVERSIFIED MODELS OF EU'S EXTERNAL RELATIONS

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İÇİNDEKİLER

REVISION OF TURKEY-EU CUSTOMS UNION WITHIN CONTEXT OF THE DIVERSIFIED MODELS OF EU'S EXTERNAL RELATIONS AND DEVELOPMENTS IN TRADE AGREEMENTS

Ankara University European Union Research Centre (ATAUM) Conference Hall
4 December 2015

PROGRAMME

Opening Remarks: 10.00-10.30

Prof. Dr. Sanem Baykal (Ankara University- Director of ATAUM)
Dr. Colin Dürkop (Head of Konrad Adenauer Stiftung-Turkey)

10.30 – 10.45: Coffee Break

First Session: Various Models of EU's External Relations: 10.45 – 12.15
Chairman: Prof. Dr. Sanem Baykal (Ankara University-ATAUM)
Speakers:
Ass. Prof. Dr. Narin Tezcan (Utrecht University) "EU's External Relations Models and Turkey-EU Customs Union in that Context"
Prof. Dr. Andrea Ott (Maastricht University) "Legal Framework and Main Aspects of European Economic Area and EU-Swiss Relations Models"
Ass. Prof. Dr. Hatice Yazgan (Çankırı Karatekin University) "EU's Neighbourhood Policy from the Perspective of EU's External Relations"

12.15 – 14.00: Lunch

Second Session: Revision of the Turkey-EU Customs Union in a Wider Context" 14.00 – 15.30
Chairman: Prof. Dr. Çınar Özen (Ankara University)
Speakers:
Prof. Dr. Canan Balkır (Dokuz Eylül University) "A Reality Check: Is the Customs Union Still Fit for Purpose or Needs a Fundamental Revision?"
Prof. Dr. Gabriel Felbermayr (University of Munich) "Potentials and Impact of Transatlantic Free Trade from a Global and European Perspective"
Ass. Prof. Dr. Sait Akman (TEPAV) "The Latest Developments in Regional Trade Agreements and Revision of the Customs Union"

SUNUŞ

Bu çalışma 4 Aralık 2015 tarihinde Ankara Üniversitesi Avrupa Toplulukları Araştırma ve Uygulama Merkezi (ATAUM) ve Konrad Adenauer Stiftung Derneği Türkiye Temsilciliği tarafından ortaklaşa düzenlenen "Revision of Turkey-EU Customs Union within Context of Diversified Models of EU's External Relations" konulu uluslararası konferans kapsamında katılımcılar tarafından gerçekleştirilen sunumların bir araya getirilmesinden oluşmaktadır.

Türkiye-Avrupa Birliği ilişkilerinin, özellikle katılım sürecine yönelik olarak tarafların iradelerinin sorgulanması bakımından zorlu bir dönemden geçtiği bir sırada taraflar arasında uzun bir dönemden beri var olan ortaklık ilişkisi ve bu ilişkinin somut sonucu olan Gümrük Birliğinin güncellenmesi/derinleştirilmesi tartışmaları ile bu yönde yürütülen çalışmalar belli bir noktaya gelmiş gibi gözükmektedir. Söz konusu güncelleme çalışmalarının hangi saiklerle başladığı, içeriğinin ve kapsamının ne olabileceği ve tarafların bugünkü ortamda bu ilişkiden beklentilerine ne ölçüde cevap verebileceği gibi konuların ele alınması bu bakımdan faydalı olabilecektir. Bu çerçevede özellikle Birliğin Türkiye dışındaki ülkelerle kurmuş olduğu ekonomik ilişki biçimlerinin hukuki, ekonomik ve siyasi yönlerinin irdelenmesi de Türkiye-AB Gümrük Birliğinin içerdiği bazı yapısal unsurların ne ölçüde, hangi yöntemlerle ve hangi yönde değiştirilebileceği ya da geliştirilebileceği tartışmalarına da ışık tutabilecektir.

"AB'nın Dış Ekonomik İlişki Modelleri ve Bu Bağlamda Türkiye-AB Gümrük Birliğinin Güncellenmesi ya da Derinleştirilmesi" şeklindeki iki ana başlık, düzenlenen konferansın ve konferans çerçevesinde gerçekleştirilen sunumların temel tartışma konusunu oluşturmaktadır. Bu kapsamda hem yurtdışından ve ülkemizden değerli ve konunun uzmanı akademisyenler konuyu kendi bakış açıları ve ilgi alanları çerçevesinde değerlendirerek değerli katkılar sunmuşlardır.

Konferansa ve kitaba katkı sağlayan, hazırlanmasında emeği geçen herkese, tüm konuşmacılara teşekkür ediyor, ilgilenenler için yararlı bir başvuru kaynağı olmasını umut ediyoruz.

Prof. Dr. Sanem BAYKAL

Ankara Üniversitesi ATAUM Müdürü

EU'S EXTERNAL RELATIONS MODELS AND TURKEY-EU CUSTOMS UNION IN THAT CONTEXT

Narin TEZCAN/İDRİZ*

Introduction

This paper aims to provide a brief overview of the existing EU models of external relations with other European countries as they have developed over the years. The focus will be on the legal framework established by various Association Agreements and the trade regimes envisaged therein. That overview will demonstrate how these agreements have developed over time and will enable us to place the Customs Union established between Turkey and the EU in the context of the wider web of Association Agreements as well as enable us to understand its unique place in that context.

It should be noted that this paper focuses on a specific relationship model employed by the EU and formerly by the EEC and EC with *European* countries: that of *association*. Firstly, the paper begins with discussing that model, its legal basis and scope. Association Agreements go beyond being simple trade agreements and often include cooperation in other areas covered by the Treaties such as free movement of workers, services and establishment. Their place in the continuum of economic integration would be somewhere between a free trade area and a common market, as they go beyond being mere free trade agreements but fall short of integrating the associated states fully into the common market. Different agreements fall in

* Assistant Professor European Law at Utrecht University. This contribution is partially based on Chapter 2 of my PhD thesis titled, *Legal Constraints on EU Member States as Primary Law Makers: A Case Study of the Proposed Permanent Safeguard Clause on Free Movement of Persons in the EU Negotiating Framework for Turkey's Accession* (E.M. Meijers Instituut: 247, 2015).

different places of that continuum. While some agreements, such as the Association Agreements with Cyprus and Malta, would fall closer to the free trade area point of the continuum, others such as the Internal Market Association established by the EEA Agreement, would fall closer to the common market point of the continuum of economic integration. These agreements also provide for an institutional framework for the development of bilateral relations between the EU and the associated state. The complexity of the institutional framework is determined by how ambitious the agreement concerned is. It is also worth noting that Association Agreements have often, but not always, served as stepping-stones to EU membership. In short, this paper does not deal with mere trade agreements, or with Association Agreements signed with non-European states, which do not have even a theoretical prospect of accession by virtue of Article 49 TEU.

Secondly, the paper briefly lays down the principles governing association. They have developed over the years and remain relevant so long as the EU keeps signing new Association Agreements. Thirdly, it classifies different Association Agreements on the basis of the trade regime they envisage as Agreements providing for a "Customs Union", "Potential Customs Union", "Internal Market Association", "Free Trade Area", and a "Deep and Comprehensive Free Trade Area (DCFTA)". Since a lot has already been written on the 'older' forms of Association Agreements, this paper will devote more attention to the "new generation" Association Agreements which aim establishing ambitious DCFTAs. In addition to examining the trade regime established under different Association Agreements, this paper will also look into whether they provide a membership perspective for the associated state with a view to see whether there is a possible relationship between those two factors examined.

Association Agreements: legal basis and scope

Article 217 TFEU (ex Article 238(1) EEC and what became later ex Article 310 EC) constitutes the legal basis for signing Association Agreements. It provides that "[t]he Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure". The details of the procedure to be followed to conclude Association Agreements are laid down in Article 218 TFEU. But the gist of the procedure is that the Council concludes these Agreements by unanimity after obtaining the consent of the European Parliament (Article 218(6)(a) TFEU).

The definition of association as a relationship that involves "reciprocal rights and obligations, common action and special procedures" is quite broad and vague. The reason for such a broad formulation might have been the fact that the drafters of the founding Treaties wanted to provide the EEC with as much flexibility as possible in defining the aim, scope and content of different association agreements. This reasoning is supported by the statement of the first president of the Commission of the EEC Walter Hallstein, according to whom "association can be anything between full membership minus 1% and a trade and cooperation agreement plus 1%".[1] Moreover, the Court's ruling in *Demirel* also points to the fact that an association constitutes a relationship that goes beyond a mere trade agreement. According to the Court, an association agreement creates "*special, privileged links* with a non-member country which must, at least to a certain extent, take part in the Community system".[2]

One should not take the definition provided for association literally. For instance, the provision provides for "reciprocal rights and obligations". However, according to the Court, this should not be interpreted as "reciprocity" or "equality" in the obligations assumed by the parties.[3] In an association, depending on the level of development of the associated country, rights and obligations may be taken on over time and on an asymmetrical basis. The definition of association also provides for "common action". Even though the Court has interpreted that to mean to "take part in the Community system",[4] as Maresceau argues, the expression in the Treaty "has perhaps a less ambitious significance than the Court seems to suggest",[5] since associated countries have never taken part in the Communities' decision-making system.[6] Hence, "common action" seems to refer to the implementation of the objectives of the association through the common

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1 D. Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?* (England: Sheffield Academic Press, 1999). 23.

2 Emphasis added. *Case 12/86 Demirel*, [1987] ECR 3719, para. 9.

3 M. Maresceau, *Bilateral Agreements Concluded by the European Community* (Martinus Nijhoff Publishers, 2006). 316. See also, Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 24; and S. Peers, "EC Frameworks of International Relations: Co-operation, Partnership and Association," in *The General Law of E.C. External Relations*, ed. A. Dashwood and C. Hillion (Sweet & Maxwell, 2000), 169.

4 *Case 12/86 Demirel*, para. 9.

5 Maresceau, *Bilateral Agreements Concluded by the European Community*: 317.

6 Ibid.; and Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 31.

institutions created in the framework of the association, such as association councils and/or association committees.

As to the topics or areas of cooperation that can be covered by an Association Agreement under Article 217 TFEU, it can contain "the whole filed of objectives defined by the Treaty",[7] as well as areas in which Union institutions have legislated. According to the Court, the authority of the Union to enter into international commitments may arise "not only from express conferment by the Treaty, but may equally flow *implicitly* from other provisions of the Treaty, from the Act of Accession and from measures adopted within the framework of those provisions, by the Community institutions".[8] In other words, the envisaged common action in association agreements can cover only areas where the Union has "an explicit or implicit internal competence to act".[9] However, association agreements entailing matters beyond the Union's treaty-making powers were signed in the past,[10] and today agreements that include political cooperation or cooperation in areas that are within the competence of Member States can be signed as well. The method employed to overcome the competence constraint in signing an association agreement has been to have both the EC/EU and its Member States individually sign and approve the envisaged association agreement, which would then be classified as a "mixed agreement".[11] Phinnemore claims that the use of this method has broadened the scope of association "well beyond that already available under the flexible provisions of Article 238 (310) [Art. 217 TFEU]".[12]

"Mixed agreements" have been a common practice, however, with a Union composed of 28 Member States, signing and ratifying a mixed agreement can be tricky. Firstly, because it can take up to few years until an

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[7] *Case 22/70 Commission v Council (AETR)*, [1971] ECR 263, para. 1 of the summary.

[8] Emphasis added. *Joined Cases 3, 4 and 6/76, Kramer and Others*, [1976] ECR 1279, paras. 19-20.

[9] Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 25.

[10] Ibid., 27.

[11] Schermers defined mixed agreements as follows: "A mixed agreement is any treaty to which an international organization, some or all of its Member States and one or more third States are parties and for the execution of which neither the organization nor its Member States have full competence". H. G. Schermers, "A Typology of Mixed Agreements," in *Mixed Agreements*, ed. D. O'Keeffe and H. G. Schermers (Kluwer, 1983), 25-26. For a comprehensive and up-to date account of challenges posed by mixed agreements, see C. Hillion and P. Koutrakos, *Mixed Agreements Revisited: The EU and its Member States in the World* (Oxford: Hart Publishing, 2010).

[12] Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 28.

Agreement is ratified in line with constitutional requirements of each and every Member State. That is the reason why Article 217(5) TFEU authorises the Council to take a decision for the provisional application of an Agreement before its entry into force. However, sometimes that is also not enough to solve all the problems as demonstrated by the fate of the Association Agreement with Ukraine. The Netherlands held an advisory referendum on 6 April 2016 and Dutch people were asked whether they were for or against the Approval Act for the Agreement. The fate of the Agreement is uncertain as 61% of those who voted were against the Approval Act.[13]

Principles of Association

In the early years of the EEC there was disagreement as to whether association should be made available exclusively to those states aspiring to become members in the future or whether it should also be employed as a permanent, long-term alternative to membership. The divergence of opinion is visible in the early reports of the European Parliament. While the Birkelbach Report (1961) outlined the association possibilities with the EEC,[14] it emphasized that "the norm for European states should be EEC membership and not association".[15] However, two years later a second report by the European Parliament, the Blaisse Report (1963) was published. While acknowledging the view held by some that "an "association" agreement can be concluded only with countries which later intend to become full members of the Community",[16] in its following page the Report states that association is also possible "for countries which, though unable or disinclined to join the

[13] G. Van der Loo, "The Dutch Referendum on the EU-Ukraine Association Agreement: Legal options for navigating a tricky and awkward situation," *CEPS Commentary* (8 April 2016).

[14] The first possibility was that of an association based on a customs union leading to possible future membership; the second possibility was an association based on a free trade area; and lastly, a relationship based on a special economic cooperation agreement. See, M. Willi Birkelbach (Rapporteur), "Rapport fait au nom de la commission politique de l'Assemblée parlementaire européenne sur les aspects politiques et institutionnels de l'adhésion ou de l'association à la Communauté", 19 December 1961, pp. 25-28. Available online at: http://www.cvce.eu/content/publication/2005/6/1/2d53201e-09db-43ee-9f80-552812d39c03/publishable_fr.pdf

[15] Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 31.

[16] P. A. Blaisse, "Report prepared on behalf of the Committee on External Trade on the common trade policy of the EEC towards third countries and on the applications by European countries for membership or association", European Parliament Working Papers, No 134, 26 January 1963, p. 31.

Community, are nevertheless prepared to play their part in the integration process by harmonising their economy with that of the Community to a really appreciable extent".[17] In other words, countries, which did not wish to join the EEC, could also become associates, provided they were ready to commit to a certain degree of integration.

While the principles of association can be deduced from the practice of the early years, these principles became formal in 1987 when the Commission laid down its position on the future of EC-EFTA relations.[18] These principles, which were referred to as the Interlaken Principles, envisaged "priority for internal integration, preservation of the Community's autonomous powers of decisions and the need to achieve balanced results (a fair balance between benefits and obligations)".[19] A second set of principles came out from the Commission proposals for Europe Agreements (EAs) with the Central and East European Countries (CEECs). The conclusion of such agreements was to take place on the condition that prospective associates gave "practical evidence of their commitment to the rule of law, respect for human rights, the establishment of multi-party systems, free and fair elections and economic liberalization with a view to introducing market economies".[20] The commitment to democracy and the latter principles, (which later in 1993 were proclaimed officially as the "Copenhagen criteria"), have always been one of the unwritten prerequisites for establishing an association, however, this was made explicit only in 1990.[21]

Different models of association

The nature of association agreements signed over the decades between the EEC/EC/EU and third European countries have changed. Before going into categorizing them on the basis of the trade regime they entail, it is worth noting that "[t]he Community's [now the Union's] classification of agreements is governed by politics, not law".[22] That is especially the case with mixed agreements. Hence, scholars warn us against approaching them

[17] Ibid, p. 32.
[18] Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 38-39.
[19] Bulletin of the European Communities, Vol. 5 - 1987, p. 65.
[20] European Commission, "Association Agreements with the Countries of Central and Eastern Europe: A General Outline", COM(90) 398 final, Brussels, 27 August 1990, p. 20.
[21] C. Hillion, "The Copenhagen Criteria and their Progeny," in *EU Enlargement: A Legal Approach*, ed. C. Hillion (Oxford, Portland, Or.: Hart Publishing, 2004); Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 39.
[22] Peers, "EC Frameworks of International Relations: Co-operation, Partnership and Association," 175.

from a purely legal perspective, as they occupy the "complex grey zone where law and politics meet".[23] This partially helps us explain, why the Ankara Agreement, which is considered as "a genuine pre-accession agreement",[24] has not led to accession, while the Agreements with Malta and Cyprus, which were considered to be "nothing more than advanced trade agreements",[25] have done so. However, there are also models that were clearly designed as alternatives to membership: these are the EEA and the "new generation" Association Agreements.

While the place of an association agreement in the classification below does not automatically determine the fate of an associate state in terms of its eventual accession to the Union, it is still very important, as the scope, content, aim and degree of integration envisaged by each type of agreement is taken into account by the Court of Justice when interpreting those agreements. It will not be wrong to say that the deeper integration an agreement envisages, the more the Court is inclined to give it an interpretation in line with EU law. Thus, the first cluster of agreements, which envisaged the establishment of a Customs Union and the eventual accession of Greece and Turkey to the Community/Union, are among the agreements that have been given the widest interpretation by the Court.[26]

The following classification of association agreements has been borrowed from Phinnemore and has been updated.[27] It is chronological, as clusters of agreements signed in different periods reflect the Community's/Union's evolving association policy in those respective periods of time. The first cluster of agreements are the ambitious association agreements signed with Greece and Turkey in the 1960s, immediately followed by the more modest agreements signed with Malta and Cyprus in the 1970s. Thirdly, comes the EEA: the most advanced association regime

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[23] M. Maresceau, "A Typology of Mixed Bilateral Agreements," in *Mixed Agreements Revisited: The EU and its Member States in the World*, ed. Christophe Hillion and Panos Koutrakos (Oxford: Hart Publishing, 2010), 16.

[24] M. Maresceau, "Turkey: A Candidate State Destined to Join the European Union," in *From Single Market to Economic Union: Essays in Memory of John A Usher*, ed. N. Nic Shuibhne and L. W. Gormley (Oxford: OUP, 2012), 318. See also, A. Rizzo, "L'Accord d'Ankara: Accord d'Association ou de Véritable "Pré-adhésion"?," in *Turquie et Union européenne: État des lieux*, ed. B. Bonnet (Buxelles: Bruylant, 2012), 105-32.

[25] Maresceau, *Bilateral Agreements Concluded by the European Community*: 319.

[26] As to the EEA Agreement, which does not envisage eventual accession, but deep integration into the internal market, it should be noted that it is the EFTA Court that rules on issues of interpretation.

[27] Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 45-49.

created between the Union and a group of third countries. Though officially it is a relationship that does not envisage membership, in practice, as illustrated by the 1995 enlargement, membership is not entirely ruled out. Fourthly, come the EAs of 1990s and SAAs of the 2000s signed with the countries of Central, Eastern, and South-Eastern Europe. Last but not least, come the "new generation" Association Agreements signed with Ukraine, Georgia and Moldova.

Associations based on a Customs Union

The first two association agreements were the so-called Athens Agreement signed with Greece (1961), and Ankara Agreement signed with Turkey (1963). These were ambitious association agreements that aimed at the gradual establishment of a Customs Union and the harmonization of the economic policies of these two countries with that of the EEC in the medium-term, and preparing them for full membership in the long-term.[28]

The emphasis in these agreements was on establishing a Customs Union because that was also the EEC's priority at the time. The very first sentence of Article 9 of the EEC Treaty, which is situated in Part Two: Foundations of the Community, under title I: Free Movement of Goods, stipulates that "[t]he Community shall be based on a customs union …". Both Agreements, even though the Ankara Agreement was less detailed,[29] can be called mini-Treaties of Rome, as they covered the EEC Treaty's entire subject matter.[30] Both agreements provided for future free movement of goods, workers, services, capital, freedom of establishment, and the extension of the rules on agriculture, transport, and competition. The comprehensiveness of those agreements, particularly their economic provisions providing for the harmonization of policies between the associates, according to Feld,[31]

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[28] W. Feld, "The Association Agreements of the European Communities: A Comparative Analysis " *International Organization* 19, no. 2 (1965): 230-34.

[29] The Athens Agreement is more detailed and is composed of 77 provisions, whereas, the Ankara Agreement is composed of only 33 provisions. Thus, the latter agreement had to be complemented by an Additional Protocol providing for the details of its implementation in 1971. See, J. N. Kinnas, *The Politics of Association in Europe* (Frankfurt: Campus Verlag GmbH, 1979). 61.

[30] See, Peers, "EC Frameworks of International Relations: Co-operation, Partnership and Association," 161.

[31] He notes however, "that the provisions containing the elements of an economic union [in the Ankara Agreement] are not detailed regulations but only commitments for future action during the transition and final periods which will be spelled out in detail by the Supplementary Protocol". Feld, "The Association Agreements of the European Communities: A Comparative Analysis " 233-34.

strongly suggest that they provide for "more than the creation of a mere customs union".[32]

The conclusion that a relationship based on a Customs Union was suitable for associates, which aspired to become members in the future, but were economically not ready to do so at the relevant time, such as Greece and Turkey, can also be deduced from the report of the Political Commission of the Parliamentary Assembly, which provided as follows:

> Les avantages d'une association sous forme d'union douanière consistent notamment dans un rapprochement progressif du pays associé au marché commun, posant ainsi les jalons de son adhésion future. *C'est pourquoi cette forme se recommande tout particulièrement pour les pays désireux d'adhérer, mais qui ne remplissent pas les conditions économiques nécessaires à l'adhésion.* Si ces pays sont prêts à tirer les conséquences d'ordre politique qui résultent des liens étroits de l'association, à respecter les principes établis, à se soumettre au système de contrôle institutionnel de l'association, l'union douanière leur offrira de plus grands avantages que les autres formes d'association.[33]

Even though both countries were considered as "developing" countries at the time, Greece was better off than Turkey. That is why the Ankara Agreement provided first, for an extra "preparatory stage", in which Turkey was to strengthen its economy with the aid from the Community. While a detailed schedule for establishing a Customs Union was spelled out clearly in the Athens Agreement,[34] the Ankara Agreement provided for the drafting of such a schedule in an Additional Protocol that was to be adopted once Turkey was deemed ready to enter the next "transitional stage" of the association,[35] which was to precede the "final stage" that was to be based on the Customs Union.[36] Lastly, both Agreements contained provisions referring to the examination of the possibility of their accession to the Community once they were ready to accept the obligations their

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[32] Ibid., 233.

[33] Emphasis added. See, M. Willi Birkelbach (Rapporteur), "Rapport fait au nom de la commission politique de l'Assemblée parlementaire européenne sur les aspects politiques et institutionnels de l'adhésion ou de l'association à la Communauté", 19 December 1961, paragraph 103, p. 26.

[34] For details see, Feld, "The Association Agreements of the European Communities: A Comparative Analysis " 230-34; and Kinnas, *The Politics of Association in Europe*: 56-61.

[35] See, Articles 3 and 4 of the Ankara Agreement.

[36] See Article 5 of the Ankara Agreement.

memberships would entail.[37] Greece acceded to the EEC before the materialization of its Customs Union.

- *Institutional structure*

Like the EEC Treaty, which the Athens and Ankara Agreements were modelled after, they were of programmatic nature and most of their provisions were drafted in general terms. Just like some of the Treaty provisions requiring the promulgation of more detailed secondary law for their implementation, some of the provisions of the Association Agreements required more detailed rules, which were to be issued by the Association Council, the main-decision making body of the Association.[38] It was to be composed of members of the governments of the Member States, members of the Council, the Commission, and members of the Turkish government, and would act unanimously. Its Decisions were legally binding.[39] Association Councils could establish further committees to assist it in the fulfilment of its tasks.[40] In addition, based on the respective provisions of the Association Agreements (Article 27 of the Ankara Agreement), which called upon the Association Councils to facilitate cooperation between the European Parliament and the Turkish and Greek Parliaments, Joint Parliamentary Committees were established with the objective to deliberate on all matters relevant for bilateral relations.[41]

With the exception of the complex institutional framework of the EEA Agreement and the Civil Society Platforms established under the "new generation" agreements, all other Association Agreements follow a similar structure. They all have Association Councils as their main decision-making bodies, which can be complemented by Committees and/or Sub-committees. They all have Joint Parliamentary Committees, which come together on a regular basis to discuss important issues on the agenda.

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[37] See Article 28 of the Ankara Agreement and Article 72 of the Athens Agreement.

[38] See Article 6 and Articles 22-25 of the Ankara Agreement.

[39] *Case 181/73 Haegeman*, [1974] ECR 449; *Case C-104/81 Kupferberg*, [1982] ECR 3641; *Case 12/86 Demirel*.

[40] See Article 23 of the Ankara Agreement.

[41] See, European Parliament, Information Note on the Working of the EU-Turkey Joint Parliamentary Committee, Directorate General for External Policies of the Union (July 2009, SP/ES), p. 2. Available online at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/d-tr/dv/917_01_/917_01_en.pdf

- The Customs Union (CU)

As to the establishment and functioning of the Customs Union between Turkey and the EU, it is worth examining in more detail, so as to appreciate fully its wide scope. Establishing the CU entailed much more than adopting the EU's Common Customs Tariff (CCT). Since there are contributions in this book, which deal extensively with problems encountered in the functioning of the CU, this contribution aims merely to demonstrate the envisaged scope of the CU under Decision 1/95.

To begin with the planned adoption of the Additional Protocol, it laid down the conditions, arrangements, and timetables for the establishment of the Customs Union. It entered into force on 1 January 1973.[42] It provided for the progressive abolition of customs duties and charges having an equivalent effect over a period of twenty-two years, at the end of which the Turkish Customs Tariff had to be aligned with the CCT.[43] Quantitative restriction on imports and exports and measures having equivalent effect had to be abolished at the latest by the end of the transitional stage.[44] Last but not least, if there were to be free movement of agricultural products between the Community and Turkey, over a period of twenty-two years Turkey would have to adjust its agricultural policy to that of the Community by adopting the necessary measures.[45]

At the end of the envisaged period, the Association Council decided the final stage of the Association could begin on 1 January 1996. It adopted Decision 1/95 on the implementation of the final phase of the Customs Union to that effect.[46] The Customs Union would cover "products other than

[42] The Additional Protocol (AP) was signed at Brussels, 23 November 1973. It was a mixed agreement that formed an integral part of the Ankara Agreement. See, OJ 1973 C 113/17.

[43] See, Section I: Elimination of customs duties between the Community and Turkey (Articles 7-16 AP) and Section II: Adoption by Turkey of the Common Customs Tariff (Articles 17-20 AP) of the Additional Protocol. For a more detailed account of the establishment of the Customs Union, see H. Kabaalioğlu, "The Customs Union: A Final Step before Turkey's Accession to the European Union?," *Marmara Journal of European Studies* 6, no. 1 (1998): 113-40.

[44] See Chapter II: Elimination of Quantitative Restrictions (Articles 21-29 AP) of the Additional Protocol.

[45] See, Chapter III: Products Subject to Specific Rules on Importation into the Community as a Result of the Implementation of the Common Agricultural Policy (Article 31 AP); and Chapter IV: Agriculture (Articles 32-35 AP) of the Additional Protocol.

[46] Decision 1/95 of the EC-Turkey Association Council on implementing the final phase of the Customs Union, 96/142/EC, OJ L 35/1, 13.02.1996.

agricultural products",[47] in other words industrial products. The Council reaffirmed the objective to move towards the free movement of agricultural products, but noted that an additional period is required to achieve that aim.[48]

As argued by Kabaalioğlu, Decision 1/95 imposes on Turkey many additional requirements, which do not fall strictly within the basic Customs Union structure. These sweeping requirements together with the Customs Union make sense only when considered as being parts of a temporary or transitional regime that is designed to prepare Turkey for full membership.[49] To provide few examples in order to give an idea as to the scope of these requirements, Turkey is required to provide equivalent levels of effective protection of intellectual, industrial and commercial property rights.[50] "With a view to achieving the economic integration sought by the Customs Union", Turkey had to ensure not only that its legislation in the field of competition law was compatible with that of the Community, but also that it was applied effectively.[51] Hence, it had to establish a competition authority to enforce those rules before the entry into force of Decision 1/95.[52]

When the content of the "Competition rules of the Customs Union" included in Decision 1/95 is examined more closely (Articles 32 to 38), it is surprising to see that most articles are identical copies of the competition provisions of the EEC Treaty, in which the phrase "common market" has been replaced by the "Customs Union".[53] Hence, Article 35 provides that those provisions "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 Community and its secondary legislation".

The Decision further required Turkey to adapt all the aid it granted to the textile and clothing sector to the EC rules before the entry into force of

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[47] See Article 2 of Decision 1/95. Special rules on agricultural products were set in Chapter II of the Decision.

[48] Article 24 of Decision 1/95. Also note that "Processed agricultural products not covered by Annex II to the Treaty establishing the European Community" are dealt under Section V of Chapter I on "Free Movement of Goods and Commercial Policy" (Articles 17 to 23 of Decision 1/95).

[49] Kabaalioğlu, "The Customs Union: A Final Step before Turkey's Accession to the European Union?," 123.

[50] See Article 31 of Decision 1/95.

[51] See Article 39(1) of Decision 1/95.

[52] See Article 39(2)(b) of Decision 1/95.

[53] Article 32 of Decision 1/95 is a copy of Article 85 of the EEC Treaty; Article 33 is a copy of Article 86 EEC; and Article 34 of Article 92 EEC.

this Decision.[54] All other aid schemes had to be adapted within two years after the entry into force of Decision 1/95.[55] It is notable that Turkey is treated almost like a Member State of the Union regarding the adoption of new aid schemes. It needs to notify the Community of any individual aid to be granted to an enterprise that would be notifiable under Community rules.[56] Similarly, Turkey needs to be informed on the same basis as the Member States "[r]egarding individual aids granted by Member States and subject to the analysis of the Commission".[57] Both parties are entitled to raise objections against an aid granted by the other party, which would be deemed unlawful under EU law. If there is dispute regarding an aid granted by Turkey, which is not resolved within 30 days, either party has the right to refer the case to arbitration.[58] If the dispute concerns an aid granted by a Member State, and the Association Council is not able to resolve it within three months, it may refer it to the Court of Justice.[59]

Other far-reaching provisions are Articles 41 and 42 of Decision 1/95. The former provided that by the end of 1996, Turkey had to ensure that regarding public undertakings and undertakings enjoying special or exclusive rights, the principles of the EEC Treaty, "notably Article 90, as well as the principles contained in secondary legislation and the case-law developed on this basis, are upheld". Article 42 required Turkey to progressively adjust any State monopolies of a commercial character by the end of 1997, so that there is no discrimination regarding the conditions under which goods are procured and marketed. Moreover, Article 43 of the Decision stipulated that the Party believing its interests are negatively affected by the anti-competitive conduct carried out on the territory of the other, "may notify the other Party and may request the other Party's competition authority initiate appropriate enforcement action".[60]

The Decision also includes provisions providing for negotiations aimed at opening the Contracting Parties' respective government procurement markets,[61] provisions on direct and indirect taxation,[62] as well as provisions

[54] See Article 39(2)(c) of Decision 1/95.
[55] See Article 39(2)(d) of Decision 1/95.
[56] See Article 39(2)(e) & (f) of Decsision 1/95.
[57] See Article 39(2)(f) of Decsision 1/95.
[58] See Article 39(4) of Decsision 1/95.
[59] See Article 39(5) of Decsision 1/95.
[60] Article 43(1) of Decision 1/95.
[61] See Article 48 of Decision 1/95.
[62] See repectively Articles 49 and 50 of Decision 1/95.

on settlement of disputes by resorting to arbitration.[63] Lastly, it establishes "an EC-Turkey Customs Union Joint Committee" to oversee the proper functioning of the Customs Union.[64] The Customs Union Joint Committee is composed of representatives of the Contracting Parties, and as a rule meets at least once a month. It is entitled to establish subcommittees or working parties to assist it, if need be.[65]

Even a brief look at the provisions of Decision 1/95 suffices to conclude that it is not only about the Customs Union and Turkey's adoption of the CCT.[66] It goes way beyond that into aligning Turkey's commercial policy, competition policy, taxation and economic policy with that of the Union. Economically, it does not make sense for a state like Turkey, which is less developed, to adopt all these far-reaching policies in the absence of the prospect of EU accession. As advanced as the EEA regime might be, it should be noted that it does not go as far as adopting the CCT.[67]

Associations based on a potential Customs Union

In the following decade, "the apparent centrality of a customs union to an association was challenged",[68] mainly because of the problems experienced with Greece and Turkey.[69] Thus, the association agreements signed with Malta (1970) and Cyprus (1972) were "a very limited form of free trade agreement[s]"[70] that envisaged the possibility to establish a

[63] See Articles 61 and 62 of Decision 1/95.
[64] See Article 52 of Decision 1/95.
[65] See Article 53 of Decision 1/95.
[66] M. S. Akman, "Türkiye – Avrupa Birliği Gümrük Birliği İlişkisi ve Ortak Dış Ticaret Politikası," in *Yarım Asrın Ardından Türkiye – Avrupa Birliği İlişkileri*, ed. Belgin Akçay and Sinem Akgül Açıkmeşe (Ankara: Turhan Kitabevi, 2013), 226-35.
[67] As noted by Kuijper, in the EEA "free movement of goods remains limited to a free trade area as opposed to a customs union". See, P. J. Kuijper, "External Relations," in *Kapteyn & VerLoren van Themaat: The Law of the European Union and the European Communities*, ed. P. J. G. Kapteyn, et al. (Kluwer Law International, 2008), 1339.
[68] Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 46. See also, Peers, "EC Frameworks of International Relations: Co-operation, Partnership and Association," 161-62.
[69] There were both economic and political problems. The economies of both countries did not develop as quickly as expected to match those of their western counterparts. Moreover, the 1960s were marked by military coups and political turmoil in both.
[70] Peers, "EC Frameworks of International Relations: Co-operation, Partnership and Association," 161. See also, Maresceau, *Bilateral Agreements Concluded by the European Community*: 319.

Customs Union.[71] These agreements were not pre-accession agreements. They were not even mixed agreements, as they did not envision cooperation in any other area than free movement of goods.[72] Eventually, the Association with both countries never came as far as establishing a Customs Union.

Neither the substantively limited scope of these agreements, nor the absence of any reference to accession in them, constituted a problem or an obstacle for the Maltese and Cypriot membership applications. Once they joined the Union in 2004, these limited agreements were replaced by the Accession Treaty,[73] demonstrating clearly that when there is (political) will there is a way.

The EEA: the Internal Market Association

This section provides only a brief overview of the EEA Agreement, as the contribution by Prof. Andrea Ott provides a more detailed account of both the EEA Agreement as well as the special relationship established with Switzerland. The EEA is the most advanced economic regime created as a basis of relations between the EU and third countries. It emerged as an alternative to EU membership, and currently none of the states parties to it seem to have any active membership aspirations.[74] Iceland, Lichtenstein, Norway and Switzerland are the only remaining parties to the EFTA Convention.[75] While all of these states participated in the negotiations of the EEA Agreement, as a result of a negative referendum in December 1992,

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[71] The preamble of both agreements provide that "eighteen months before the expiry of the first stage, negotiations may be opened with a view to determine the conditions under which a customs union between the Community and [Malta/Cyprus] could be established".

[72] Maresceau, "A Typology of Mixed Bilateral Agreements," 19.

[73] Ibid.

[74] There were two negative referenda on the issue of EU membership in Norway (in 1972 and 1994). A third referendum is not very likely in the near future. As to Iceland, it lodged a membership application in 2009, which was followed by the opening of accession negotiations in 2010. However, those negotiations were short-lived as the government of Iceland dissolved its accession team, and put the negotiations on hold. See, http://eu.mfa.is/documents/

[75] The EFTA Convention was signed in Stockholm in 1960, and was updated on 21 June 2001 by the Vaduz Convention. The Vaduz Convention incorporated important rules and principles established in the EEA Agreement as well as in the Bilateral Agreements between the EU and Switzerland. As a result, all EFTA states now enjoy the same privileged relationship among themselves as they do with the EU. The EFTA Council regularly updates the Convention so as to reflect the developments under the EEA Agreement and the Bilateral Agreements with Switzerland. For more details, see EFTA, Communiqué of Ministerial Meeting of the European Free Trade Association, Vaduz, 21 June 2001, PR-E 3/2001. See also, www.efta.int

Switzerland failed to actually join the EEA. Subsequently, it established its own complex web of more than hundred bilateral agreements with the EU, which now govern their relations.[76] However, only few of these agreements are formally based on Article 217 TFEU (or its predecessor provision).[77]

The EEA Agreement constitutes the most advanced and complex economic regime, which arguably could only work with countries at a similar level of development. In terms of free movement of goods, it does not go as far as establishing a Customs Union,[78] yet, in terms of free movement of persons, services and capital it entails the adoption of the entire internal market *acquis* by the associates, i.e. Iceland, Lichtenstein and Norway (the so-called EEA/EFTA states).[79] The EFTA Court, which deals with EEA law for matters arising on the side of the EEA/EFTA states, qualifies the existing framework of relations as constituting "a fundamentally improved free trade area".[80]

The EEA has its own complex institutional arrangement, the so-called "two-pillar" structure with institutions in the first pillar, which are composed of EEA representatives only, and institutions in the second pillar composed of both EEA and EU representatives. While the existing system seems to function well, the first draft for an EEA Agreement is recalled by scholars as an example of a planned association that involved "too much integration".[81] The Court delivered a negative opinion on the first draft agreement as it considered it provided for a system of courts with competences that would damage the autonomy of the Community legal order; hence the agreement

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[76] For a detailed analysis, see C. Tobler and J. Beglinger, *Grundzüge des bilateralen (Wirtschafts-) Rechts. Systematische Darstellung in Text und Tafeln*, 2 vols. (Zurich: Dike, 2013); T. Cottier et al., eds., *Die Rechtsbeziehungen der Schweiz und der Europäischen Union* (Berne: Stämpfli, 2014).

[77] G. Bauer and C. Tobler, "«Der Binnenmarkt ist (k)ein Schweizer Käse». Zum Assoziationsstatus der Türkei, der EWR/EFTA-Staaten und der Schweiz in ausgewählten EU-Politikbereichen, insbes. dem EU-Binnenmarkt," in *Schweizerisches Jahrbuch für Europarecht 2014/2015* (Berne: Stämpfli, 2015).

[78] The free movement of goods remains limited to a free trade area. See, Kuijper, "External Relations," 1339.

[79] Ibid., 1339-41. See also, A. Lazowski, "EEA Countries (Iceland, Liechtenstein and Norway)," in *The European Union and its Neighbours*, ed. S. Blockmans and A. Lazowski (The Hague: TMC Asser Press, 2006); EFTA-Court, *The EEA and the EFTA Court: Decentred Integration* (Oxford: Hart Publishing, 2014); C. Baudenbacher and in cooperation with the University of Liechtenstein, eds., *Handbook of EEA Law* (Heidelberg: Springer, 2015).

[80] *Case E-2/97 Mag Instrument Inc v California Trading Company Norway, Ulsteen (Maglite decision)*, [1997] EFTA Court Report 127, para. 27.

[81] Peers, "EC Frameworks of International Relations: Co-operation, Partnership and Association," 170.

was found to be incompatible with "the very foundations of the Community",[82] and was accordingly revised.

Associations based on a Free Trade Area

In terms of the trade regime they create, the Europe Agreements (EAs) together with the Stabilization and Association Agreements (SAAs) appear to be the least ambitious of the agreements covered so far. They envisage(d) the incremental establishment of a free trade area in industrial goods over a period of time that could extend up to ten years, determined in line with the level of development of each associate.[83] Including rules on competition and state aids was seen as a necessary corollary to introducing the rules on free movement of goods.[84]

Free movement of workers, services, capital, freedom of establishment, approximation of laws are referred to and included only "embryonically" in the EAs.[85] However, the substantive scope of cooperation was extended considerably after those agreements were reoriented towards full membership and were complemented by the introduction of the pre-accession strategy in 1994.[86] It is interesting to note that in the preamble of the Europe Agreement signed with Poland, Poland's membership aspirations are acknowledged, but they are not phrased as common or mutual aspirations.[87] However, after the reorientation of those agreements, the Court

[82] *Opinion 1/91 EEA*, [1991] ECR I-6084. Cf. *Opinion 1/92 EEA*, [1992] ECR I-2821.

[83] The periods envisaged in the EAs and SAAs varied among themselves. While the norm was a ten-year period for the EAs, Estonia was deemed ready to pursue free trade immediately. Latvia and Slovenia negotiated a four-year transition period, and Lithuania a six-year period. The SAAs also envisage different periods. For instance, while the Agreement with Croatia envisaged a six-year year transition period, the one with FYROM envisaged a ten-year period. See, Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 48; D. Phinnemore, "Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?," *European Foreign Affairs Review* 8(2003): 89.

[84] P.-C. Müller-Graff, "East Central Europe and the European Union: From Europe Agreements to a Member State Status," in *East Central Europe and the European Union: From Europe Agreements to a Member State Status*, ed. P.-C. Müller-Graff (Baden-Baden: Nomos, 1997), 17.

[85] Ibid.

[86] Phinnemore, "Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?," 94. See also, K. Inglis, "The Europe Agreements Compared in the Light of Their Pre-accession Reorientation," *Common Market Law Review* 37(2000): 1175-90.

[87] The preamble reads as follows: "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". Other references that can be interpreted to imply future membership in the EAs are to be found under the title "Political Dialogue".

of Justice explicitly acknowledged the membership objective in the interpretation of those agreements.[88]

Scholars agree that the structure and content of the SAAs were inspired by the EAs.[89] They are very similar in terms of the trade regime they aim to establish. However, there are other differences that might be worth mentioning.[90] The first difference is the reference contained in the preambles of the SAAs to the associated countries as "potential candidates" for EU membership. While Phinnemore thinks that this reference "suggests that the SAAs enjoy a lesser status compared with the Europe Agreements",[91] Maresceau takes the contrary view and argues that by virtue of this reference, SAAs "at least conceptually, are more clearly pre-accession agreements than the Europe Agreements".[92] The author agrees with the latter

See, Article 2 of one of the earliest EAs (signed in 1991), which provides that political dialogue and cooperation "will facilitate Poland's full integration into the community of democratic nations and progressive rapprochement with the Community". See also, the latest EA (signed in 1996), Article 4 of which provides for "Slovenia's full integration into the Community of democratic nations and its progressive rapprochement with the European Union".

[88] While acknowledging the aim of the EA as "the progressive integration of the Republic of Poland into the Community" in *Pokrzeptowicz-Meyer*, the Court extended its case law on workers to the EA provisions. However, the same statement with the further addition of "with a view to its [Poland's] possible accession" in Głoszczuk, was not enough for the extension of the case law on freedom of establishment to the corresponding provisions of the EA. In short, acknowledging the aim of the EAs as accession did not mean the extension of corresponding EU Treaty rules and case law to the provisions of the EAs. For the respective citations, see, *Case C-162/00 Pokrzeptowicz-Meyer*, [2002] ECR I-1049, para. 42; and *Case C-63/99 Głoszczuk*, [2001] ECR I-6369, para. 50. For an in-depth analysis of the Court's case law on the interpretation of provisions of various EAs concerning free movement of persons, see C. Hillion, "Cases C-63/99 Secretary of State for the Home Department ex parte Wiesław Głoszczuk and Elzbieta Głoszczuk; C-235/99 Secretary of State for the Home Department ex parte Eleanora Ivanova Kondova; C-257/99 Secretary of State for the Home Department ex parte Julius Barkoci and Marcel Malik; judgments of the Full Court of 27 September 2001; Case C-268/99 Aldona Małgorzata Jany e.a v. Staatssecretaris van Justitie, judgment of the Full Court of 20 November 2001; Case C-162/00 Land Nordrhein-Westfalen v. Beata Pokrzeptowicz-Meyer, judgment of the Full Court of 29 January 2002.," *Common Market Law Review* 40, no. 2 (2003): 465-91.

[89] See, Phinnemore, "Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?," 96; and Maresceau, "A Typology of Mixed Bilateral Agreements," 18.

[90] For an extensive and in-depth comparison see, Phinnemore, "Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?," 77-103. See also, Maresceau, "A Typology of Mixed Bilateral Agreements," 18-19.

[91] Phinnemore, "Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?," 84.

[92] Maresceau, "A Typology of Mixed Bilateral Agreements," 18.

view.[93] As mentioned above, the EAs do not contain direct and explicit references to accession or membership to the EU. The prospect of membership was introduced not by the first EAs, but by the Copenhagen European Council in 1993, following which special Accession Partnerships had to be developed to assist each country in its transition to democracy and establishing a functioning market economy in preparation for accession.

The second important difference between the SAAs and EAs is the emphasis placed on regional cooperation in the former. Regional cooperation was encouraged in the EAs as well, however, their focus was rather on economic and political reform. It is not surprising that there is a special title (Title III) devoted entirely to regional cooperation in the SAAs, as the underlying rationale of the Stabilization and Association Process (SAP) is, first and foremost, to bring peace and "stability" to the Western Balkans.[94]

Last but not least, the SAAs impose a four or five-year waiting period before the respective Stabilisation and Association Councils are able to adopt measures regarding the implementation of the freedom of establishment for the self-employed.[95] There was no such waiting period in the EAs, only the application of the non-discrimination provision regarding the freedom of establishment was postponed until the end of the respective

[93] Phinnemore might have reached that conclusion because he compares only the reference in the EA with Slovenia with those in the SAAs. As can be seen in more detail in footnote 69 above, the standard reference in the earlier EA agreements ("full integration into the community of democratic nations") has become "full integration into the Community of democratic nations" in the EA with Slovenia. Obviously, capitalizing the word "community" has changed its meaning. In other words, if one judges only on the basis of the existence of an explicit reference to accession to the EU, being "a potential candidate for EU membership" seems more promising and concrete than "full integration into the community of democratic nations". However, on the whole, as Phinnemore's comparative analysis of the two types of agreements reveals, under many of the headings, the proposed scope of cooperation is bigger in the EAs. He also adds that the language employed in the two types of agreements proves the claim that the SAAs envisage a less intense form of association than the EAs. See, Phinnemore, "Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?."

[94] Ibid., 84-85.

[95] See for example, Article 50(4) of the SAA with Albania and Article 48(4) of the SAA with Macedonia, which impose a five-year waiting period after the entry into force of their respective agreements, while Article 49(4) of the SAA with Croatia and Article 53(4) of the SAA with Serbia impose a four-year waiting period. See also, S. Peers, "EU Migration Law and Association Agreements," in *Justice, Liberty, Security: New Challenges for EU External Relations*, ed. B. Martenczuk and S. Van Thiel (Brussels: Brussels University Press, 2008), 56.

transitional period defined in each agreement,[96] or exceptionally in certain sectors, excluded all together.[97]

In short, there are more similarities than differences between the two types of agreements. Another important element borrowed from the experience of the accession process of the CEECs is the so-called "European Partnerships", modelled on the Accession Partnerships designed to complement the EAs.[98] As to the change in the qualifying adjective of the partnership, the Croatian experience illustrated that once the necessary conditions for opening accession negotiations are fulfilled, it is not difficult to re-name and re-qualify the relationship.[99] Yet, as illustrated by the Turkish experience so far, neither the existence of Accession Partnership instruments,[100] nor the official opening of accession negotiations are a guarantee for a country's eventual accession to the EU.[101]

Associations based on a Deep and Comprehensive Free Trade Areas

The most recent examples of Association Agreements between the EU and third countries are the Agreements envisaging the establishment of DCFTAs with Moldova, Georgia and Ukraine. These Agreements were signed in 2014. While the ratification process of the Agreements with

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[96] For an example see, each indent of Article 44(1) of the EA with Poland.

[97] For an example see, Article 44(6) of the EA with Poland, which reads as follows: "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 XIIe."

[98] S. Blockmans, "Western Balkans (Albania, Bosnia-Herzegovina, Croatia, Macedonia and Serbia and Montenegro, including Kosovo)," in *The European Union and Its Neighbours: A Legal Appraisal of the EU's Policies of Stabilisation, Partnership and Integration*, ed. S. Blockmans and A. Lazowski (The Hague: T.M.C. Asser Press, 2006), 346.

[99] It should be noted that the re-naming took place following the opening of accession negotiations with Croatia on 3 October 2005. See, Council Decision 2006/145/EC on the principles, priorities and conditions contained in the Accession Partnership with Croatia, OJ L 55/30, 25.02.2006, and repealing Council Decision 2004/648/EC on the principles, priorities and conditions contained in the European Partnership with Croatia, OJ L 297/19, 22.09.2004. Emphasis added.

[100] For the first Accession Partnership developed for Turkey see, Council Decision 2001/235/EC on the principles, priorities and intermediate objectives and conditions contained in the Accession Partnership with the Republic of Turkey, OJ L 85/13, 24.03.2001; for the latest one see, Council Decision 2008/157/EC on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC, OJ L 51/4, 26.02.2008.

[101] Accession negotiations with Turkey were opened on 3 October 2005.

Georgia and Moldova has been completed,[102] the fate of the Agreement with Ukraine is unclear due to a negative result to the consultative referendum held in the Netherlands on 6 April 2016.[103] These three agreements provide for much deeper integration compared to other Association Agreements signed with less developed countries. In some limited fields, the Association Agreement with Ukraine goes almost as far as the EEA Agreement. Just like the EEA, these agreements lay the ground for "a new type of integration without membership".[104]

These Agreements need to be seen in the context of the wider European Neighbourhood Policy, which aims to stabilize neighbouring states and support them in becoming fully functioning democracies. The drafting of these agreements was envisaged back in May 2009 at the Prague summit,[105] which also established the Eastern Partnership between the Union and six of its eastern neighbours: Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine. While the agreement with Ukraine "served to a large extent as a template for the agreements with Moldova and Georgia",[106] the principle of differentiation was also respected, which meant the agreements were drafted so as to meet the particular needs of each associate country.

The focus in this paper will be on the most advanced agreement among the three: the EU-Ukraine Association Agreement. The DCFTAs envisaged with Moldova and Georgia are less far-reaching as they do not provide for "internal market treatment" for the companies of these countries. Moreover, these agreements also do not contain provisions similar to Articles 17 and 18 of the Association Agreement with Ukraine, which respectively provide for equal treatment and a standstill provision for the free movement of Ukrainian workers. That also explains the size of the agreements: while the

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[102] The Agreements are in force as of 1 July 2016. See, Outcome of 3466th Council Meeting: Foreign Affairs, Brussels, 23 May 2016, (9300/19, Provisional version), p. 8.

[103] For more information on the consequences of the Dutch referendum, see Van der Loo, "The Dutch Referendum on the EU-Ukraine Association Agreement: Legal options for navigating a tricky and awkward situation."; N. Idriz and L. Senden, "De 'nieuwe generatie' Associatieovereenkomst tussen de EU en Oekraïne en zijn constitutionele context," *Nederlands tijdschrift voor Europees recht*, no. 4 (2016).

[104] G. Van der Loo, P. Van Elsuwege, and R. Petrov, "The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument," *EUI Working Papers* (LAW 2014/09): 28.

[105] See Council of the European Union, "Joint Declaration of the Prague Eastern Partnership Summit Prague", 7 May 2009, 8435/09 (Presse 78). Available online at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/107589.pdf

[106] Van der Loo, Van Elsuwege, and Petrov, "The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument," 1.

Agreements with Moldova and Georgia are around 740 pages, the annexes of the Agreement with Ukraine make it almost three times longer at approximately 2140 pages.

The Agreements are comprised of seven Titles: General Principles; Political Cooperation and Foreign and Security Policy; Justice Freedom and Security; Trade and Trade related matters (DCFTA); Economic and Sector Cooperation; Financial Cooperation with Anti-Fraud Provisions, as well as Institutional, General and Final Provisions. In the case of Ukraine 43 Annexes lay down the EU legislation that has to be adopted by a specific date.

In terms of scope and thematic coverage, these agreements are among the biggest international agreements ever concluded by the EU. They provide for political association and economic integration with Georgia, Moldova and Ukraine. Economic integration is to be achieved by establishing DCFTAs. All three agreements are considered as "new generation" agreements, since they go beyond removing tariffs and establishing free movement of goods, by also removing obstacles on free movement of services, establishment and on investment. Importantly, however, the free movement of workers remains excluded from their scope. Importantly, they also provide for regulatory convergence in areas such as competition law, public procurement, protection of intellectual property rights, protection of the environment, etc. To provide an example from the Association Agreement with Ukraine, it provides extensively for Ukraine's gradual approximation with the EU *acquis* regarding Chapter 6 on Services, Establishment and Electronic Commerce. The approximation clauses included in this part go further than approximation clauses included in other parts to require Ukraine to "ensure that its existing laws and *future* legislation will be gradually made compatible with the EU *acquis*."[107] These commitments are laid down in Annex VII of the Agreement and cover more than 80 EU Directives and Regulations. Timelines for approximation in different areas vary from 2 to 10 years after the entry into force of the Agreement.[108]

Another element that is special about these Association Agreements is the strong element of conditionality embedded in them. In addition to

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[107] See Articles 114, 124 and 133 of the Association Agreement with Ukraine.

[108] Appendix XVII-2 to XVII-5 of the Association Agreement with Ukraine. See also, Van der Loo, Van Elsuwege, and Petrov, "The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument," 16.

including the standard "essential element clause" encompassing democratic principles, and respect for human rights and fundamental freedoms (Art. 2 in conjunction with Art. 478 EU-Ukraine Association Agreement (AA)), the agreements are based on a strict "market access" conditionality. The latter implies that these countries will be granted access to parts of the internal market only after the Union is convinced that they have successfully implemented their legislative approximation commitments mentioned above. In addition to the requirement to draft regular progress reports, the assessment and monitoring process under these agreements are novel and far-reaching as they "may include on-the-spot missions, with the participation of EU institutions, bodies and agencies, non-governmental bodies, supervisory authorities, independent experts and others as needed" (Art. 475(3) EU-Ukraine AA). Obviously, the aim of the latter is to ensure that the process goes beyond formal adaptation of national rules into proper implementation and enforcement, an aspect that had far less emphasis in previous Association Agreements with other states.

As far-reaching as these agreements might be, as far as free movement of goods is concerned they do not go as far as establishing a Customs Union. Article 25 of the EU-Ukraine AA and Article 143 of the EU-Moldova AA provide for the progressive establishment of "a free trade area over a transitional period of a maximum of 10 years starting from the entry into force of this Agreement", while Article 22 of the EU-Georgia AA provides that "The Parties shall establish a free trade area starting from the entry into force of this Agreement".

- *Institutional Framework*

The institutional framework under these "new generation" Association Agreements is to a large extent similar to previously signed agreements, however, it contains some novel elements as well. It allows for the establishment of many more committees and sub-committees to ensure the proper functioning of these complex agreements that cover ever wider areas of cooperation.

To provide and example from the Association Agreement with Ukraine, firstly, it provides for annual summit meetings at the highest level (Art. 460(1)). Secondly, it establishes an Association Council that can meet in different configurations at ministerial level to supervise and monitor the implementation of the agreement as well as take binding decisions and recommendations necessary to achieve the objectives of the agreement. Decisions and recommendations can be adopted by agreement between the Parties, i.e. unanimity is required (Arts. 461-463). Thirdly, an Association Committee is established to assist the Association Council in the

performance of its duties. It is composed of representatives of the parties at senior civil servant level (Art. 464). "The Association Council may delegate to the Association Committee any of its powers, including the power to take binding decisions" (Art. 465(2)). Similarly, those decisions are taken by unanimity. The Association Committee will be assisted by other sub-committees established under the agreement (Art. 466). Fourthly, a Parliamentary Association Committee, as in every other Association Agreement, is established to exchange views and make recommendations to the Association Council (Art. 467-468). Last but not least comes a novel institution introduced by the agreement: a bilateral Civil Society Platform consisting of the members of the European Economic and Social Committee (EESC) and Ukrainian representatives of civil society (Art. 469-470).

- *Membership prospects*

There is no direct reference to EU membership or future accession in any of the three Association Agreements. However, in the preambles of these agreements the associated states are acknowledged as being "European" and as sharing "European values", which theoretically makes them eligible for future membership under Article 49 TEU.

To begin with the preamble of the EU-Georgia AA, the Union and its Member States acknowledge "the European aspirations and European choice of Georgia". They recognise Georgia as "an Eastern European country" and that it "shares historical links and common values with the Member States". Moreover, "this Agreement shall not prejudice and leaves open the way for future progressive developments in EU-Georgia relations". The latter could perhaps be interpreted to mean that more ambitious future developments, such as accession negotiations, will not be prejudiced by the less ambitious objective of this Association Agreement. The Agreement with Moldova repeats the same statements, except for the recognition of Moldova as "a European country".

The preamble of the Association Agreement with Ukraine has the same statements and wording. Like Moldova, Ukraine is also recognised as "a European country". In addition to the citations mentioned above, "the importance Ukraine attaches to its European identity" is also noted, as well as "the strong public support in Ukraine for the country's European choice".

In short, while none of these agreements contains an explicit accession perspective, all three countries have been qualified as being "European" and as sharing European values, which makes them eligible for future EU membership under Article 49 TEU. Moreover, the preambles of all three agreements explicitly state that these agreements are without prejudice for more ambitious future developments.

Conclusion

This overview of Association Agreements from past to present reveals how broad and ambitious the first two Association Agreements concluded with Greece and Turkey were, and how that ambition and enthusiasm were gradually tempered to give way to more realistic goals in subsequent Association Agreements. Despite the periodic turbulence of EU-Turkey relations over the decades, the parties succeeded in establishing a Customs Union in 1996 as planned. That achievement makes Turkey the only candidate state in the history of Union enlargement to manage to establish a Customs Union with the EC/ EU prior to its actual accession.

After the Agreements with Malta and Cyprus, establishing a Customs Union with a third country was not set even as a "potential" objective. That holds true even for the EEA: the most ambitious Association regime between the Union and a group of developed countries. Similarly, that objective is absent from the texts of the more ambitious "new generation" of Association Agreements. It is not that difficult to account for that absence. When there is no membership perspective, it does not make sense either politically or economically for any state to be a part of the Customs Union, since under the existing arrangements, the associated country has officially no say in the decision-making regarding the adoption or changes in the CCT. That can be acceptable only temporarily, as part of a long-term plan that is expected to pay off in other ways in the future, such as EU membership. A functioning Customs Union without the membership perspective in the long run, is neither a desirable nor a viable option even for the most developed countries in Europe.

As to the institutional structures established under different Association Agreements, there seems to be a positive relationship between the level of integration envisaged by an agreement and the complexity of the institutional framework established under that agreement. The most complex Agreement (the EEA Agreement) also has the most complex institutional framework. Second to the complexity of the EEA is the institutional framework envisaged under the ambitious "new generation" Agreements. Third would be the institutional framework under the Ankara Agreement, which in addition to the Association Council and the Joint Parliamentary Committees also includes a Customs Union Joint Committee and subcommittees assisting the latter in its work. Lastly, come all other associations, which are endowed with Association Councils and Joint Parliamentary Committees.

As to the possible relationship between EU membership and the envisaged regime on the free movement of goods in an Association Agreement, the examination of agreements in this contribution clearly demonstrates that it is difficult to establish a clear-cut relationship. As already mentioned above, the absence of a membership perspective in the Maltese and Cypriot cases, and the fact that they never managed to materialize the full potential (that of establishing a Customs Union with the EC) envisaged in their Association Agreements did not prevent them from becoming EU Member States. Similarly, the EAs signed with CEECs were reoriented as pre-accession Agreements after the Copenhagen Summit in 1993. The fact that they aimed at establishing mere free trade areas with the EU was not considered an issue. However, what we can say is that no matter how developed the states with which Association is established are, or how far reaching such an agreement is, in the absence of a membership perspective becoming part of the CU does not make sense.

The CU places Turkey in a very unique place. As argued above, with a genuine membership perspective a CU might be worth the price to pay. However, the question is whether it still worth the price to pay when the initial membership perspective seems to be getting further away and more illusory by the day.

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LEGAL FRAMEWORK AND MAIN ASPECTS OF EUROPEAN ECONOMIC AREA AND EU-SWISS RELATIONS MODELS

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Introduction: EEA, Switzerland and the micro-states

The European Economic Area and the EU-Swiss relations stand out in the landscape of the EU's external relations bilateral relations characterised by `Byzantine complexity`.[1] The reason is not that these relations would be simpler in their institutional set-up than other bilateral relations. The more than 120 sectoral bilateral agreements between the EU and Switzerland demonstrate the contrary. However, these contractual relations stand out because they are with the EU's closest neighbours Iceland, Liechtenstein, Norway and Switzerland which have with the Union and some of the EU member states special ties. This is symbolised by the wavering opinion in Norway and Switzerland on joining the EU.[2] It is demonstrated by the Nordic countries in their Nordic cooperation and passport union[3] or in the special relations among each other such as in the case of Switzerland and Liechtenstein through their customs and monetary union. Even more important, all these third countries are members of the free trade area EFTA.

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1 M. Maresceau, EU-Switzerland: Quo vadis?, 49GaJIntLCompl 2011, p.729.

2 Over the years, Switzerland, Iceland and Norway applied for accession. But due to referenda either the application was withdrawn (in case of Switzerland and Iceland) or an accession treaty not ratified (in the case of Norway). See on this A.Tatham, Enlargement of the European Union, , Kluwer Law International, Alphen aan de Rhijn, 2009, pp.175 -192; and on Iceland: G. Avery, The European Economic Area revisited, European Policy Centre Policy brief, 19 March 2012, http://www.epc.eu/documents/uploads/pub_1428_the_european_economic_area_revisited.pdf.

3 Cooperation between Denmark, Finland, Iceland, Sweden and Norway since the Helsinki Treaty of 1962.

And finally and primarily, the EEA and the Swiss bilaterals stand out as the most successful models of the export of the EU acquis, granting the EFTA countries a functioning alternative to accession since 1994. These integration models are not the only form of cooperation in the European legal space, the European micro-states and Turkey have also special relations with the Union but these cooperations are less comprehensive and in need of modernisation.[4] The micro-states Andorra, San Marino and Monaco, which are not part of this EEA, might be linked with the EU through customs union and monetary agreements but do not include free movement of persons,[5] services and social security coordination. The European Commission contemplated different options, possibly Framework Association Agreements, accession to the EU[6] or participation in the EEA.[7] It, however, considered that the first option is the most viable which was probably also due to reluctance of the current EEA members to accept the micro-states into the EEA.[8] At the end, the EU launched negotiations in December 2014 with the micro-states on association agreements providing for the participation of these countries in the EU's internal market and cooperation in other policy areas.[9]

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[4] See further the contribution by N. Tezcan.

[5] See, however, for the special status in regard to Schengen Monaco, which particpates in Schengen, and San Marino which is not part of Schengen but no border control between Italy and San Marino are implemented: Communication from the Commission to the EP, the Council, ECOSOC and the Committee of the Regions, EU relations with the Principality of Andorra, the Principality of Monaco and the Republic of San Marino, COM (2012) 680final/2, Brussels 11.1.2013, pp.9-10. See also M. Maresceau, The relations between the EU and Andorra, San Marino and Monaco, pp.270, in A.Dashwood and M.Maresceau (eds.), Law and Practice of EU External Relations – Salient Features of a Changing Landscape, Cambridge University Press, 2008.

[6] San Marino held in October 2013 a referendum on whether to begin EU accession talks with the EU and this was rejected due to a low turnout of voters, D.Keating, European Voice, San Marino rejects EU accession, 21.10.2013, http://www.politico.eu/article/san-marino-rejects-eu-accession/ .

[7] See on this: Communication from the Commission to the EP, the Council, ECOSOC and the Committee of the Regions, EU relations with the Principality of Andorra, the Principality of Monaco and the Republic of San Marino, COM (2012) 680final/2, Brussels, 11.1.2013.

[8] See on this and especially Norway opposes accession to the EEA: N.Forster and F.Mallin, The Association of European Microstates with the EU, SWP Comments 27, June 2014, http://www.swp-berlin.org/fileadmin/contents/products/comments/2014C27_frr_mln.pdf.

[9] Council adopts mandate to negotiate association agreements with Andorra, Monaco and San Marino, Brussels 16 December 2014, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/146317.pdf .

EEA: From free trade to internal market association

The EFTA free trade agreement which was founded in 1960 on the basis of the Stockholm Convention was from its beginning a counter-model to the EEC but ties were close between the members of EFTA and the European Community. At the time of the completion of the internal market in 1992, both sides updated the contractual relations between the EC and the EFTA countries with the EEA agreement to enable the participation in the internal market. This was seen as an alternative to accession, especially by the European Community being preoccupied in the early 1990s with the completion of the internal market and the set-up of the economic and monetary union. The preamble of the EEA Agreement defined the ambitious aim of the "establishment of a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition, and provide for adequate means of enforcement, *inter alia* at the judicial level." This advanced cooperation resulted in two EEA opinions by the Court of Justice on its compatibility with the EC Treaty.[10] Especially the originally foreseen joint EEA court raised the suspicion of the EU judges and was considered undermining the autonomy of EU law.[11] Only after this was remedied by creating a separate EFTA court for the EEA area under the Surveillance and Court Agreement (SCA), did the ECJ approve of the amended EEA agreement. After the Swiss population rejected the EEA agreement in a referendum in December 1992, the agreement entered in 1994 into force for the EU and Liechtenstein, Iceland and Norway. One year later, in 1995, the original signatory parties Sweden, Finland and Austria joined the European Union. Norway also signed an accession treaty with the European Union but after a negative referendum on accession in November 1994, remained in the EEA.[12]

Legal framework and main features

As above highlighted EEA and Swiss bilaterals stand out among the other 'integration-oriented' agreements with neighbouring third countries.[13]

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[10] EEA opinion 1/91 ECR 1991 I-06079 and Opinion 1/92, ECR 1992 I-02821.

[11] Among its eight judges five would have come from the Court of Justice and within this system all courts, the EEA court and ECJ, would have taken due account to the principles laid down in the decision delivered by the other courts.

[12] This was the second negative referendum after 1972 when the Norwegian population rejected accession in the accession round with UK and Denmark.

[13] See on this: M. Maresceau, Turkey: A Candidate State Destined to Join the Union, pp.315-340 (at p. 319) in N. Nic Shuibhne and L.W.Gormley, *From Single market to Economic*

They feature the unique characteristics of extending the internal market and the four freedoms on these countries and achieving the alignment to other relevant EU policies. To accomplish these objectives, the legal systems created between the EU and these countries include mechanism and tools which are unique but also comparable to other parallel legal orders such as the Ukrainian or Turkish association.[14] These parameters include, apart from directly enforceable norms in the EU legal order,[15] provisions on sincere cooperation, homogeneous interpretation, unique institutional features and enforcement mechanisms, which set them apart from other bilateral international agreements the EU has concluded with third countries. In addition, through separate international agreements all EFTA states participate in Schengen to lift border controls and the Dublin II Regulation on a common European asylum regime. And the EEA countries and Switzerland participate in certain EU agencies, programmes and CFSP missions.[16] They consequently create a partial parallel legal order to the EU legal order and participate in the wider European legal space.[17]

Union, Essays in Memory of John A. Usher, Oxford University Press, 2012 and M. Maresceau, Les accords d'intégration dans les relations deproximité de l'Union européenne, pp. 151 (at p. 153), (who also includes the contractual relations with the micro-states Andorra and Monaco) in C. Blumann (ed.) *Les frontieres de l'Union européenne,* Brussels, Bruylant, 2013.

[14] See on a comparison in detail: A.Ott, The EU-Turkey Association and other EU parallel legal orders in the European Legal Space, Legal Issues of Economic Integration 2015, pp.5.

[15] Such enforcability is now excluded for the novel Association Agreement with Ukraine through specific clauses precluding direct effect, see G. van der Loo, P. Van Elsuwege and R.Petrov, *The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument*
http://cadmus.eui.eu/bitstream/handle/1814/32031/LAW%20_WP_2014_9%20.pdf .

[16] EEA and Switzerland participates (with certain limitation in voting rights) in the following organisations: EEA, EASA, EDA (Norway) and Frontex. An agreement between the EU and Switzerland concluded to organise the participaton of Switzerland in the Aceh Monitoring Mission in Indonesia in 2005 and the Rule of Law mission in Kosovo, EULEX, in 2008.

[17] See on this term: C. Harding, The Identity of European Law: Mapping out the European Legal Space*, European Law Journal* 2000, pp. 128–147.

Overview on legal characteristics of parallel legal orders[18]

International Treaty	*Sincere Cooperation*	*Analogous Provisions*	*Homogeneity Clause*	*Enforcement Mechanism*
EEA	Art. 3	+	Art. 6 Art. 105 + 106 EEA Article 3 Court ESA/Court agreement	EFTA Court EEA Joint Committee CJEU reference
Swiss bilateral on persons	Art. 16(1)	+	Art. 16(2)	Joint Committee
Ukrainian association	Art. 2(5) of Annex XVII regulatory approximation	+	Art. 6 of Annex XVII	Art. 322 CJEU binding reference for certain areas of regulatory approximation
Turkish association	Art. 7 AA	+ Art. 9 AA, Art. 10 AA	Art. 66 Decision 1/95 CU	Association Council CJEU reference

The EEA Agreement

The EEA is the most successful parallel legal order and this success can be attributed to its mix of effective legal norms in the EEA rules, dynamic interpretation tools and parallel institutions. A dynamic adoption of the relevant EU acquis is established[19] and extensive homogeneity principles guide the interpretation of EEA law by especially established institutions.[20]

[18] See for the complete overview at: Ott, supra n.14, p.11.

[19] Article 102 EEA Agreement 1. In order to guarantee the legal security and the homogeneity of the EEA, the EEA Joint Committee shall take a decision concerning an amendment of an Annex to this Agreement as closely as possible to the adoption by the Community of the corresponding new Community legislation with a view to permitting a simultaneous application of the latter as well as of the amendments of the Annexes to the Agreement. To this end, the Community shall, whenever adopting a legislative act on an issue which is governed by this Agreement, as soon as possible inform the other Contracting Parties in the EEA Joint Committee.

[20] See A. Lazowski, EEA Countries, p. 95 in S. Blockmans & A. Lazowski (eds.), *The European Union and its Neighbours*, TMC Asser Press 2006; D. Chalmers, G. Davies & G.Monti, Chapter 5A The Authority of EU law beyond the Union, p. 10, http://www.cambridge.org/us/academic/subjects/law/european-law/european-union-law-text-and-materials-3rd-edition .

Depending on the position on EU integration, the estimate varies, how much EU acquis has to be taken over by the EEA states. In 2003 the Icelandic Minister for Foreign Affairs, Halldór Ásgrimsson, said that Iceland had to adopt 80 % of EU legislation via its agreements. Two years later the new Minister for Foreign Affairs, Davíd Oddsson, indicated that the percentage was just 6.5 %.[21] The same diverging figures are given in the case of Norway.[22]

The EEA is equipped with a unique twin-pillar system which synchronizes the legal orders of the EU and EEA with the EEA having its own EFTA Surveillance Authority and an EFTA Court[23] but also through the joint bodies, especially in form of the EEA Joint Committee. In this EEA Committee, composed of representatives of EU and EEA states, new internal market acquis is examined and decided which EU act is incorporated into EEA law. The transposition and application is then monitored by the EEA bodies, the EFTA Surveillance Authority and the EFTA court in line with the homogeneity principles of Articles 6 EEA, 105 EEA and Article 3 ESA/court agreement. These homogeneity clauses require a consistent interpretation in line with EU case law prior and after 1992. Whether this includes consistency to the principles such as direct effect and state liability in these rulings is still up to debate and has fuelled a divergence between the CJEU and EFTA court in evaluating the characteristics of the two special legal orders.[24] To effectively apply EU law and overcome the deficiencies of EU directives, the CJEU developed the principles of direct effect of non-implemented directives, indirect effect and state liability of Member States by relying on a more teleological reading of the aims and purpose of the supranational organization.[25] Such relevant rulings were seen in the past as part of the *acquis communautaire* acceding EU Member States have to

[21] Outside and Inside: Norway's agreements with the European Union', report presented to Norway's Foreign Minister by a committee, chaired by Fredrik Sejersted, Oslo, January 2012, 012, http://www.eu-norway.org/Global/SiteFolders/webeu/Nou2012_2_Chapter%2013.pdf

[22] They range from three-quarters to a much lower figure, See on this issue: http://eureferendum.com/blogview.aspx?blogno=85798 .

[23] C. Baudenbacher, The Goal of Homogeneous Interpretation of the Law in the European Economic Area, *The European Legal Forum*, 1-2008, p. 22; T. Burri & B. Pirker, Constitutionalization by Association? The Doubtful Case of the European Economic Area, *Yearbook of European Law*, 2013, pp. 207–229.

[24] See on this further A. Ott, Die anerkannte Rechtsfortbildung des EuGH als Teil des gemeinschaftsrechtlichen Besitzstandes, *EuZW* 2000, p. 293.

[25] G. de Búrca and P. Craig, *EU law*, 5th edn. 2011 Oxford University Press, pp. 180–215.

recognize.[26] As far as the CJEU ruled on the EEA, the judges either denied a comparison at all[27] or the Advocate General of EU stated, that 'primacy and direct effect are exclusive to the Community and do not extend to the legal structure created by the EEA Agreement'.[28] The EFTA Court in its landmark case *Sveinbjörnsdóttir* decided contrary to this Opinion of the Advocate General one month earlier that state liability could be applied in the EEA system.[29] The EFTA judges rank in their autonomous reading the EEA agreement close to the EU legal order:

> "The Court concludes from the foregoing considerations that the EEA Agreement is an international treaty sui generis which contains a distinct legal order of its own. The EEA Agreement does not establish a customs union but an enhanced free trade area, see the judgment in Case E-2/97 Maglite [1997] EFTA Court Report 127. The depth of integration of the EEA Agreement is less far-reaching than under the EC Treaty, but the scope and the objective of the EEA Agreement goes beyond what is usual for an agreement under public international law. The Court finds that the homogeneity objective and the objective of establishing the right of individuals and economic operators to equal treatment and equal opportunities are so strongly expressed in the EEA Agreement that the EFTA States must be obliged to provide for compensation for loss and damage caused to an individual by incorrect implementation of a directive. In the court decisions of *Restamark* and *Einarsson* the EFTA court asserted a quasi-direct effect and supremacy for the EEA agreement in the EEA Member States. [30]

At the end, the EFTA system has developed the state liability principle without direct effect which appears to surprise EU lawyers but can be rooted in the strict dualist approach of the Nordic countries to international and national law."[31]

In the area of free movement of goods, the EEA is interestingly - on paper - not the closest form of cooperation. In place of a customs union which is established between the EU and Turkey, previous associated countries Malta and Cyprus and the micro-states, the EFTA states are only joined to the Union through a free trade area and enabling only a progressive

[26] See Ott, supra.n. 25, p. 295.
[27] CJEU, Opinion 1/91 para. 20.
[28] Opinion of the Advocate General Cosmas in case *Andersson*, paras 45–49.
[29] E-9/97 – *Erla María Sveinbjörnsdóttir v. Iceland*, [1998] Report EFTA Court, p. 95.
[30] *Sveinbjörnsdóttir*, paras 59 and 60.
[31] H.H. Frederiksen, One Market, Two Courts: Legal Pluralism vs. Homogeneity in the European Economic Area, Nordic Journal of International Law 2010, p.490.

liberalisation in agricultural products.[32] However, it is only a gradual difference between a customs union and this 'enhanced free trade area' (according to the words of the EFTA court). It abolishes, in an identical wording to the free movement of goods of EU primary law, customs duties, any charges having equivalent effect and quantitative restrictions between the contracting parties. The exact wording of the fundamental freedoms in EU primary law is also used in the EEA Agreement for the free movement of persons, services, and capital. The extension of the internal market is combined with the enhanced cooperation in flanking, horizontal and other policies. Flanking policies are the cooperation in the economic and monetary policy, transport and competition/state aid and horizontal policies are social policy, consumer protection, environment, statistics and company law, and finally cooperation in other EU policies such as research and technological development, information services, the environment, education, training and youth, social policy, consumer protection, small and medium-sized enterprises, tourism, the audiovisual sector, and civil protection covered. The substantial annexes to the agreement cover the EU legislation and due its dynamic adaptation process, this respective legislation is continuously updated and amended.

Consequently, the EEA is the most successful parallel legal order and this success can be attributed to its mix of identical legal norms, interpretation tools and parallel institutions but also due to homogeneity of its 3 EFTA members. It, however, comes at the price that the EFTA court succumbs to the CJEU lead role and grants the CJEU the last say on the interpretation of the EEA.[33] In addition, the EEA countries have to adapt consistently a high percentage of EU acquis but have no say in the decision-making process. The influence is reduced to EEA decision-shaping in which the Commission can seek advice from the EEA in the process of drafting new legislative proposals and input can be given through the EEA Joint Committee. This has raised, especially in Norway, issues on democracy and accountability.[34] In addition, the EEA system has dynamic features but the

[32] In addition, the EEA Agreement determines preferential trade arrangements for certain processed agricultural products, see http://www.efta.int/eea/policy-areas/goods/agriculture-fish-food/agricultural-products .

[33] See on this, H.H. Frederiksen, Nordic Journal of International Law 2010, pp.481-499 (at p.483) with examples from the EFTA court, p.495.

[34] See on this Outside and Inside: Norway's agreements with the European Union, Report by the EEA Review Committee, appointed on 7 January 2010 Submitted to the Ministry of Foreign Affairs on 17 January 2012, https://www.regjeringen.no/contentassets/5d3982d042a2472eb1b20639cd8b2341/en-gb/pdfs/nou201220120002000en_pdfs.pdf .

main EEA agreement from 1992 cannot be amended in light of Lisbon Treaty changes without a revision and the ratification of new amendments to the EEA Agreement by 28 EU and three EFTA signatory parties. In addition, while the EU citizenship directive 2000/38 is extended on the EEA area,[35] the EEA has no citizenship concept deriving from the norms of this international agreement or participates in the application of the EU Charter of Fundamental Rights.[36] Observers are worried that both legal orders could further drift apart in the future and a necessary update is eminent.

The Swiss bilateral agreements

After Switzerland decided not to participate in the EEA in 1992,[37] more than 120 bilateral agreements updated the flexible integration of Switzerland.[38] The current relations are framed by the Free Trade Agreement of 1972,[39] the Insurance Agreement of 1989, Bilateral Agreements I of 1999, Bilateral Agreements II of 2004.[40] The first set of seven sectoral agreements entered into force in 2002 (known as 'Bilaterals I') including free movement of persons, technical barriers to trade, air transport and trade in agricultural products.[41] In 2004, the Bilaterals II were signed, covering, *inter alia*, Switzerland's participation in Schengen and Dublin,[42] and agreements on taxation of savings, processed agricultural products, statistics, combating

[35] Further on this: M. Maresceau, On the External dimension of Directive 2004/38/EC, pp.761 (at p.769), in I.Govaere and D. Hanf (eds.) Scrutinizing Internal and External dimensions of European Law, Liber Amicorum Paul Demaret, Peter Lang Publisher, Brussels 2013.

[36] See on this H. H.Frederiksen and Ch. Franklin, 'Of pragmatism and principles: The EEA Agreement 20 years on', EEA Agreement, CMLREv 2015, pp. pp. 629–684 (at p.639).

[37] It is interesting that before the negative referendum, Switzerland applied such as the other EFTA members – except Liechtenstein and Iceland – for membership but froze ist application , see Maresceau, p.732.

[38] See C. Baudenbacher, The Judicial Dimension of the European Neighbourhood Policy, *EU Diplomacy Paper 8/2013*, College of Europe, p. 15.

[39] OJ 1972 L 257/5.

[40] See the complete list at https://www.eda.admin.ch/content/dam/dea/de/ documents/ publikationen_dea/accords-liste_de.pdf.

[41] Trade in agricultural products was excluded by the FTA from 1972.

[42] Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis; Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, *OJ L 160, 18.6.2011, p. 39–49*

fraud, participation in the EU Media Programme, the Environment Agency, and Swiss financial contributions to economic and social cohesion in the new EU Member States.[43]

This cooperation aims to align Switzerland to EU policies but it is characterized in comparison with the EEA by more flexibility on behalf of the Swiss side. It is characterised by weaker and complex institutional structures with 27 joint committees,[44] a more static approximation process and less comprehensive sectoral homogeneity clauses. So are homogeneity clauses included in Article 16(2) Swiss bilateral on persons, Articles 8 and 9 of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis and Article 1 of the Bilateral Agreement on Air Transport. Article 16(2) of the Swiss bilateral on the free movement of persons differs between relevant rulings before and after the signature of agreement. Case law needs to be taken into account before the signature, later case law will be brought to the attention of Switzerland and the Joint Committee determines the implications of this case law. If there is a dispute about the interpretation and application of this agreement, Article 19 stipulates that the Joint Committee will try to resolve this dispute. Concerning Articles 8 and 9 of the Schengen association of Switzerland,[45] the most uniform possible application and

[43] The conclusion of the seven agreements from 2002 is based on Art. 217 TFEU, see OJ 2002 L 114/1-5. See also in general: D. Chalmers, G. Davies & G. Monti, Chapter 5A, The Authority of EU Law beyond the Border, 2014, p. 5 and p. 25,
http://www.cambridge.org/us/academic/subjects/law/european-law/european-union-law-text-and-materials-3rd-edition (last accessed 4 Nov. 2014).

[44] Almost every sectoral agreement is administered by a separate joint committee.

[45] Article 8: 1. In order to achieve the Contracting Parties' objective of ensuring the most uniform possible application and interpretation of the provisions referred to in Article 2, the Mixed Committee shall keep under constant review developments in the case-law of the Court of Justice of the European Communities, hereinafter referred to as the "Court of Justice", and in the case-law relating to such provisions of the competent Swiss courts. To that end a mechanism shall be set up to ensure regular mutual transmission of such case-law.
2. Switzerland shall have the right to submit statements of case or written observations to the Court of Justice in cases where a court in a Member State has applied to the Court of Justice for a preliminary ruling concerning the interpretation of the provisions referred to in Article 2.
Article 9: 1. Each year Switzerland shall report to the Mixed Committee on the way in which its administrative authorities and courts have applied and interpreted the provisions referred to in Article 2, as interpreted, where relevant, by the Court of Justice.
2. If, within two months of being notified of a substantial divergence between Court of Justice case-law and that of Switzerland's courts or of a substantial divergence between the

interpretation shall be established. In such, the mixed committee keeps under constant review the development of the case of the European courts and Swiss courts. If a substantial divergence between the CJEU case law and Swiss case law or between Member States and Swiss authorities is reported, the procedure under Article 10 is initiated. The mixed committee has 90 days to settle the dispute and if after another 30 days no final settlement is reached, the agreement is terminated in six months. Article 1 of the Air Transport agreement implies that case law interpretation on identical worded provisions needs to be taken into account but only applies before the signature of the agreement. After the signature, the implications of CJEU rulings are communicated to Switzerland. In case of disputes, the Joint Committee has to resolve the issue and if no conclusion can be reached, appropriate and temporary safeguard measures can be taken. These examples demonstrate the static aspects according to which the important case law after the signing of the respective agreement is not automatically taken into account. In combination with its individual dispute resolutions, this result in a less effective system. This diplomatic dispute settlement is no match to the EEA judicial system. In a similar situation, the EEA Joint Committee has also the task to ensure the homogeneous interpretation and prevent divergences. But EU and EEA can bring the case before the CJEU which will give a binding ruling on the interpretation of the relevant rules. In addition, the EFTA court and Surveillance Authority have a stronger and supervised obligation to follow relevant case law after the signature of the EEA Agreement according to Article 3 of the Surveillance and Court Agreement.

The packaging of the agreements was necessary due to the Swiss referendum approving these agreements and facilitating the negotiation process. However, this packaging also triggered the guillotine clause. According to this clause all the Bilaterals I had to enter at the same time into force but also the failure of one agreement in this package would terminate the other agreements.[46] From their integration level, the agreement on person and the Agreement on Air transport are worth highlighting. The Air Transport agreement gives reciprocal freedom of establishment in the field of civil aviation and includes a homogeneity clause in Article 1 of the Agreement.[47] So are the decisions on distortion of competition taken by

authorities of the Member States concerned and the Swiss authorities in their application of the provisions referred to in Article 2, the Mixed Committee is unable to ensure a uniform application and interpretation, the procedure provided for in Article 10 shall be initiated.

[46] The Bilaterals II did not include such a clause, see Maresceau, op. cit.n.1, p.735.

[47] Art.1 (2) of the Agreement.

Union institutions (Art.11) It grants, in difference to the other bilaterals, EU institutions the supervision over the application of the agreement. The Swiss bilateral on persons is limited in its scope and asymmetrical in its rights. The CJEU stressed in its case law that the Swiss choose not to have a complete integration into the internal market and consequently free movement of services and establishment are currently excluded.[48] The agreement does not mutually grant the same rights, the free movement of persons bilateral gives citizens of both countries an asymmetrical access. The EU gives since 1 June 2004 Swiss nationals access to the EU labour market, while the Swiss labour market only opens gradually over twelve years since the ratification of the agreement and differentiates between new and existing EU citizens. In principle, two different legal regimes in three different country groups of the EU twenty-eight Member States currently apply. These country groups are the EU-17 (old Member States + Cyprus and Malta), the new EU Member States in 2004 (EU-8), and the recent accession countries Romania, Bulgaria and Croatia. For the first and second group, restrictions have been phased out or phase out over a twelve-year period and in different timelines since 2007 – depending on the ratification of the agreement or the date of accession. In the third country group, Croatia is currently treated *de jure* as a non-EU Member State, which does not fall under the EU-Swiss bilateral agreements due to the latest political developments following the Swiss referendum against migration in February 2014. After the conservative Swiss People's Party launched an initiative to restrict immigration and a narrow majority of the electorate accepted this in a referendum in February 2014, Switzerland decided not to sign the Croatian protocol (Protocol III to take account of the Croatian accession). Between July 2013 and July 2014 Croatian citizens were treated like third-country nationals by the Swiss authorities.[49] The Swiss Federal Council subsequently followed a two-track approach, primarily seeking the renegotiation of the Swiss-EU bilateral agreement on persons but also trying to accommodate the urgent adaptation to the Swiss-EU bilateral agreement on persons with the Croatian accession. In June 2014 the Swiss government requested that the Union, in light of the amended Swiss constitution, revise the bilateral agreement on persons.[50]

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[48] Case C-351/08 *Grimme v. Deutsche Angestellten-Krankenkasse* ECR [2009], para. 27 but also see the case C-656/11 *UK v. Council,* ECLI:EU:C:2014:97 'In the light of those provisions of the EC-Switzerland Agreement on the Free Movement of Persons, the Court has already held, in Case C-247/09 *Xhymshiti* [2010] ECR I-11845, paragraph 31, that for the purposes of the application of those regulations the Swiss Confederation is to be equated with a Member State of the European Union'.

[49] Proposal for a Council Decision, 1.10.2013, COM (2013) 673 final.

[50] According to Art. 197 Ziff. 9 Abs. 1 of the Swiss constitution are international agreements which contravene Art. 121a of the amendment to be renegotiated and amended within three

However, the EU High Representative denied this request in July 2014 as unacceptable[51] and this stance was confirmed by the Council in December 2014, which considered the free movement of persons as a fundamental pillar of EU policy.[52] Under the second track, the Swiss Federal Council decided to apply Protocol III *de facto* from 1 July 2014, which would result, according to the Swiss government, in the same quotas as Croatia would have received if Protocol III would have been signed.[53] The EU Council rebutted at the end of 2014 that these unilateral measures fall short of the provisions of the Protocol III and hinder Croatian nationals from relying on the bilateral international agreement between the EU and Switzerland.[54]

Both parallel legal orders have been described as enhanced multilateralism and bilateralism with its counterpart a more static bilateralism achieved by other association agreements.[55] However, a more static and diplomatic dispute-settlement system, with the exemption of the Swiss-EU air transport agreement in which the EU Commission and the CJEU execute surveillance or interpretation tasks,[56] can be already detected in the Swiss bilaterals. In addition, the Swiss-EU surveillance of adoption and homogeneous interpretation and dispute-settlement mechanisms applicable on the over 100 agreements are no match to the effective twin-

years. However, it has been disputed that this applies for the adaptation of the existing bilateral agreements, see A. Epiney, Zur rechtlichen Tragweite der Art. 121 a, Art. 197 Ziff. 9 BV, April 2014, www.vd.ch/..._/avis_de_droit_Epiney_art._121a_général_Deutsch.pdf .

[51] See exchange of letters between Switzerland and the High Representative Ashton, http://www.europa.admin.ch/themen/00500/00506/00519/index.html?lang=en&.

[52] Council conclusions on a homogeneous extended single market and EU relations with Non-EU Western European countries, Brussels, 16 December 2014, para.45, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/146315.pdf.

[53] Bundesrat der Schweizerischen Eidgenossenschaft, Declaration of the Federal Council pertaining to non-discrimination of Croatian citizens, http://www.news.admin.ch/NSBSubscriber/message/attachments/34637.pdf. This *de facto* application would not violate *de jure* the February 2014 referendum, S. Schürer, Eine Sonderlösung für Kroatien, 24.2.2014, Berner Zeitung, http://www.bernerzeitung.ch/schweiz/standard/Eine-Sonderloesung-fuer-Kroatien/story/31097079 .

[54] Council conclusions on a homogeneous extended single market and EU relations with non-EU Western European countries, Brussels, 16 December 2014, para.47.

[55] A. Lazowski, Box of Chocolates Integration: The European Economic Area and the Swiss Model Revisited, pp. 88 (at p. 89) in S.Blockmans and S.Prechal (eds.), *Reconciling the Deepening and Widening of the European Union,* T.M.C. Asser Press, the Hague, 2007.

[56] See case involving Switzerland where Switzerland could not be claim to be treated – comparable as a Member State – in regard to the bilateral on transport as a privileged applicant in the Art. 263 procedure: Case T-319/05 *Switzerland v. Commission* [2010] ECR II-4265.

pillar, judicialized structure of the EEA.[57] This qualitative difference to the EEA is also reflected in the jurisdiction of the CJEU as above highlighted.[58]

Hence, the EU is more and more frustrated by this unmatched complexity and bureaucracy and has promoted Swiss EEA membership or a comprehensive associations agreement with Switzerland.[59] This has been clearly voiced by European Commission,[60] Council[61] and European Parliament.[62] As a compromise, both sides have started talks to reform the existing path but the EU wants to make further access to the internal market for Switzerland conditional on institutional reforms.[63] The EU envisions an automatic adoption of the acquis by Switzerland, independent surveillance and dispute resolution mechanisms. And the future of this complex system of bilaterals will come under further pressure with the pending Swiss constitutional amendments which could possibly even trigger the guillotine clause.

Conclusions: role models for EU-Turkey cooperation?

Literature has given a good summary of the two forms: on the one hand a multilateral, dynamic and two-pillar model with the EEA while the Swiss bilaterals is broad, bilateral, static and sectoral model.[64] A valid question is whether experiences with these two integration forms constitute role models

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[57] See in this regard also C.Tobler, A Look at the EEA from Switzerland, pp.542 (at p.553) in EFTA Court (ed.) The EEA and the EFTA Court, Decentred Integration, Hart Publishing, Oxford, 2014.

who does not agree with Schwok and Levrat assessment of a substitute for the EEA, see on this R.Schwok and N.Levrat, Switzerland's relations with the EU after the adoption of the seven bilateral agreements EFARev 2001, pp.335-354 (at. P.335).

[58] See also Ott, supra.n. 14, pp.5 , at p.24.

[59] Tobler, op.cit.57, p.542.

[60] See for instance, European Commission memo on EU-Swiss relations, Brussels 10 February 2014, http://europa.eu/rapid/press-release_MEMO-14-100_en.htm.

[61] Council conclusions on EU relations with EFTA countries, Brussels 20 December 2012, pp.5 -6, http://eeas.europa.eu/norway/docs/2012_final_conclusions_en.pdf. .

[62] EP Report, 29.6.2010 A7-0216/2010 on EEA-Switzerland: Obstacles with regard to the full implementation of the internal market (2009/2176(INI).

[63] See further Baudenbacher, supra n.39, p. 22 with further references to the rejected Swiss proposal of a Swiss pillar with a Swiss surveillance authority overseen by the Swiss Federal Supreme Court. See also 'Negotiating mandate for an EU-Switzerland institutional framework agreement', Council, Brussels 6 May 2014, 9525/14.

[64] S.Gstöhl, The EU's different neighboughhood models, in E. O. Eriksen and J.E. Fossum (eds.)
The European Union's Non-Members: Independence Under Hegemony?, Routledge, Abingdon, 2015.

for Turkey's relationship with the European Union or possibly Britain's relations with the Union if the population votes in favour of leaving the Union.[65] In any case, the European Union is very reluctant and will avoid copying the Swiss bilaterals to any other country relations which has received negative labelling from "cherry-picking"[66] to "chocolate-box integration".[67] The preferred choice is, if a country is not able for different reasons to join the EEA, that a tailor-made and comprehensive association agreement is sought. It would also be advisable if both sides can depart from the Swiss model and from the patchwork of bilateral relations which currently plague EU-Turkey relations. These relations are diversified by three layers.[68] The first and oldest layer is the outdated Association agreement from 1963, the Additional Protocol from 1970 and the Association Decision 2/76, 1/80, 3/80 and 1/95 which have to be seen through the lens of the CJEU case law over the last thirty years to comprehend its full impact and scope. In association law, movement of persons issues and customs union matters developed further apart: to guide the implementation of the customs union between the EU and Turkey, an Additional Protocol was added in 1970; the final phase was reached with the adoption of the Association Council Decision 1/95. The ECJ has declared limits on the application of integration principles on this association, setting the Turkish association apart from the internal market established with the EEA countries and the gradual participation therein by Switzerland.[69] Both sides aim to reform and update these customs union arrangements as it has updated relations with other important trading partners.[70]

The second layer is the accession process which was never been a parallel process despite the preamble of the Ankara Agreement which aims to improve the standard of living of Turkish citizens together with

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[65] See on this written evidence by Professor René Schwok and Cenni Najy, University of Geneva, UK returning to EFTA: Divorce at 40 and going back to mom and dad?, http://www.publications.parliament.uk/pa/cm201213/cmselect/cmfaff/writev/futunion/m21.pdf .

[66] Maresceau, op.cit n.1, p.733.

[67] Lazowski, op.cit.n.55, pp. 88,

[68] See on this A.Ott, EU-Turkey cooperation in migration matters: The stepping or stumpling stone in a multi-layered relationship? in F.Ippolito et al, Bilateral relations in the Mediterranean: Prospects for migration issues, Edgar Elgar Publishing, 2016 forthcoming.

[69] See on this Case C-371/08 *Ziebell* [2011] ECR I-12735 and Case C-221/11 *Demirkan*, ECLI:EU:C:2013:583.

[70] EU and Turkey announce modernisation of customs union, Statement 12 May 2015, see also Report of the senior official working group (SOWG) on the update of the EU-Turkey customs union and trade relations, 27 April 2015, http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154367.pdf , last accessed 1 April 2016.

facilitating the accession of Turkey at a later stage. The first application was denied in 1989 on economic and political grounds and Turkey was side-lined in the third and fourth enlargement process between 1995 and 2004. It gained new momentum in 1999 but negotiations were only officially started in 2005 under very ambivalent circumstances. A Council negotiating framework stressed an open-ended process, referring to the Copenhagen criteria and the revalued absorption capacity and contemplating alternatives to accession.[71] The third, and most recent, layer, results from the compartmentalisation of policy fields such as migration, common aviation policy, energy security and fight against terrorism where the Union wants to establish a deepened bilateral cooperation with Turkey. It is also in the direct comparison with the Swiss bilaterals even more complex due to the different layers of cooperation created over the last 50 years which are neither dynamic nor flexible. The only more dynamic but most fragile cooperation takes currently place in migration matter. This, however, occurs outside the framework of formal international agreements.[72]

[71] Council EU opening statement, negotiating framework, 12 October 2005.

[72] EU-Turkey Joint Action Plan, 15 October 2015 and meetings of the heads of state or government with Turkey – EU-Turkey statement 29 November 2015. See Steve Peers, The final EU/Turkey refugee deal: a legal assessment, http://eulawanalysis.blogspot.nl/2016/03/the-final-euturkey-refugee-deal-legal.html, last accessed 30 March 2016; C. Mortera-Martinez, Doomed: Five reasons why the EU-Turkeish refugee deal will not work, 24 March 2016, http://www.cer.org.uk/insights/doomed-five-reasons-why-eu-turkish-refugee-deal-will-not-work, last accessed 30 March 2016, Sergio Carerra and Elspeth Guild, EU-Turkey plan for handling refugees is fraught with legal and procedural challenges, 10 March 2016, last accessed 30 March 2016, https://www.ceps.eu/publications/eu-turkey-plan-handling-refugees-fraught-legal-and-procedural-challenges; J. A. Emmanouilidis, Elements of a complex but still incomplete puzzle: an assessment of the EU(-Turkey) summit, European Policy Centre, 21 March 2016, http://www.epc.eu/documents/uploads/pub_6417_post-summit_analysis_-_21_march_2016.pdf .

EUROPEAN NEIGHBORHOOD POLICY THROUGH THE LENS OF EUROPEAN UNION'S EXTERNAL RELATIONS

Hatice YAZGAN*

Introduction

European Neighbourhood policy (ENP) is one of the initiatives that the European Union (EU) has formulated for engagement with third countries. This policy has come to the agenda of the EU intensely during the Eastern Enlargement of the EU and has some specific features from the perspective of EU external relations. As a matter of fact, the EU applies the enlargement method and procedure to the Neighbourhood policy countries, in the sense that it applies the conditionality principle to an extent[1] and establishes an economic and political ground for the approximation of the countries with the EU. However the EU has not foreseen a membership perspective for these countries and this has become an issue of importance for their progress towards the EU.

This presentation aims to provide a brief analysis of the ENP structure in context of EU external relations and evaluate an eastern neighbour – Ukraine's, recent economic and related political developments including the Association Agreement (AA) and Deep and Comprehensive Free Trade Area (DCFTA) concluded with the EU. In the presentation, firstly the features of ENP mainly focusing on the institutional structure it builds on will be evaluated. Then, the policy will be examined through the case of Ukraine.

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1 Gwendolyn Sasse, "The European Neighbourhood Policy: Conditionality Revisited for the EU's Eastern Neighbours," *Europe-Asia Studies*, Vol.60, No.2, (2008): 295.

Main Features of ENP

ENP is regarded as an ambitious foreign policy instrument of the EU at the beginning. In former President of European Commission Romano Prodi's words, ENP is about "everything but institutions"[2] which refers mostly to the extensive economic and –to an extent- political advantages offered to these countries.

ENP idea appeared on the EU agenda mainly during the Eastern enlargement in 2004 when eight of Central and Eastern European countries became members of the EU. This enlargement wave paved the way for the EU to forge closer links with the new neighbours, placed on the external borders of the EU, including Russia, "Western Newly Independent States" and "Southern Mediterranean" countries.[3] As mentioned in the first Strategy document of ENP, the EU has an "interest" in close cooperation with these countries and economic and trade benefits and combatting with "transboundary threats" have been counted as the main motivations of launching ENP.[4]

Thus, enhancing security and stability in the EU's neighbourhood could be considered as the main aspect of ENP given the threat perceptions identified basically in the EU's security strategy and some other documents. From this point of view, the reasons for formulation of ENP are similar to the enlargement policy of the EU which also likely to produce similar results in terms of enhancing stability and security.

ENP has been currently formulated for 16 countries[5], including the EU's closest southern and eastern neighbours. The policy mainly comprises bilateral relations with these countries in the name of action plans,

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[2] Romano Prodi, "A Wider Europe - A Proximity Policy as the key to stability, "Peace, Security And Stability International Dialogue and the Role of the EU," *Sixth ECSA-World Conference. Jean Monnet Project*, Brussels, 2002, accessed November 12, 2015, http://europa.eu/rapid/press-release_SPEECH-02-619_en.htm.

[3] Commission of the European Communities, "Wider Europe- Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours," *Communication from the Commission to the Council and the European Parliament,* accessed November 14,.2015, http://eeas.europa.eu/enp/pdf/pdf/com03_104_en.pdf, 3.

[4] Ibid., 3.

[5] ENP countries are (in alphabetical order): Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Palestine, Syria, Tunisia and Ukraine. These countries are in different levels of relationship with the EU. An eastern neighbour, Belarus and two of the southern neighbours- Libya and Syria currently do not actively engage in ENP structures mainly due to their unfavourable domestic circumstances.

association agreements and some other related arrangements explained below. In addition to the bilateral relations, ENP has been supported by some regional initiatives, respectively:

- **"Eastern Partnership"** comprises six countries in the eastern neighbourhood, namely Armenia, Azerbaijan, Georgia, Moldova, Ukraine and Belarus.
- **"the Union for the Mediterranean"**, an initiative known as **"Euro-Mediterranean Partnership"** before, includes the Middle Eastern and Mediterranean partners. (Egypt, Israel, Jordan, Lebanon, Morocco, Palestine, Tunisia, Algeria, Libya and Syria)
- **"Black Sea Synergy"** comprises Eastern Partnership countries except Belarus. This initiative has been extended to include Russia, Turkey as well as the EU member countries, Romania and Bulgaria.

Institutional Structure of ENP

Institutional structure of ENP resembles to the enlargement policy instruments despite the lack of membership perspective for ENP countries[6]. Although the policy gives the impression of a homogenous content, it is obvious that there is a distinction between the eastern and southern neighbours. As indicated below, current relations with eastern neighbours have a higher level of progress compared to the southern neighbours.

In this framework, bilateral relations are conducted through a number of arrangements within ENP. **Action Plans** (these plans are named as "Association agendas" for eastern neighbours) are one of the basic instruments and they lay down the short and medium term priorities to be implemented in order to comply with the reforms. Although these plans have commonalities, they include country specific provisions, referring to some internal conflicts of the countries as an example. Regarding the commonalities, measures in order to strengthen the democratic governance structures and importance attributed to enhance respect for human rights, fundamental freedoms and the rule of law in these countries should be underlined. EU's effort to establish close links with the civil society in these countries is another significant feature of the action plans. [7]

These action plans build on the legal arrangements namely Partnership and Cooperation Agreements and later, Association Agreements which aim

[6] Sasse, "The European Neighbourhood Policy".

[7] ENP Action Plans, accessed November 14, 2015, http://eeas.europa.eu/enp/documents/action-plans/index_en.htm.

to fulfil the relevant economic and political provisions. European Commission follows the whole process through progress reports. Similar to the enlargement policy, EU provides financial aid (European Neighbourhood Instrument) and technical support to the neighbourhood countries. These countries can also participate in some EU programmes and agencies as well as "cross border programme(s)" which aim to promote cooperation and economic development of border areas in the ENP countries.

Partnership and Cooperation Agreements (PCA) are the prior legal instruments for neighbourhood countries which comprise trade related issues as well as political dialogue and cultural cooperation issues.

Association Agreements including a "Deep and Comprehensive Free Trade Area" (AA/DCFTA) replaced the PCAs and they aim to deepen economic and political relations with the EU and related ENP country through gradually integrating the country in the EU's internal market. The country should be member for WTO for the conclusion of DCFTA.

Current Situation of Eastern Partnership Countries

	"Partnership and Cooperation Agreement" (PCA)	Action Plan (Association Agendas for Eastern Neighbours since 2014)	"Association Agreement " including a "Deep and Comprehensive Free Trade Area" (AA/DCFTA)	Visa Facilitation /Liberalisation
Armenia	1999	2006	No progress due to Armenia's joining to Eurasian Economic Union	Visa Facilitation since 2014
Azerbaijan	1999	2006	Negotiating since 2010	Visa Facilitation since 2013
Georgia	1999	2006	2014	Visa Liberalisation Dialogue since 2012
Ukraine	1998	updated 2009	2014	Visa Liberalisation Dialogue since 2012
Moldova	1994	updated 2014	2014	Visa Liberalisation since 2014
Belarus	Ratification process frozen since 1997	-	-	Visa facilitation negotiations started in 2014.

Source: Dates and other information gathered from: European Neighbourhood Policy (ENP), accessed November 14, 2015, http://eeas.europa.eu/enp/about-us/index_en.htm. (Dates refer to the ratification of the Agreements.)

Association Agreements (AA) comprise political provisions ranging from visa dialogue to combatting terrorism, while DCFTAs include trade and economic related issues with mutual obligations for both parties. DCFTA is mainly about trade liberalization through progressive removal of customs tariffs which will facilitate market access and adoption of EU trade Acquis. DCFTAs aim to integrate the country to the EU single market, however this integration is not free from problems. (e.g., these agreements provide limited access to agricultural and service sectors with insufficient funding.[8]

Eastern neighbours- except Belarus have advanced level of partnerships with the EU in terms of concluding comprehensive economic and trade agreements and having visa facilitation & liberalisation process compared to the southern neighbours. EU and the Eastern Partnership countries hold annual summits which attract a wide range of interest from policy makers and media.[9] Multilateral cooperation between the Eastern Partnership countries and the EU envisages mainly four priority areas: enhancing good governance, enhancing mobility and people-to-people contacts between the partners, providing market opportunities and improving interconnections mainly the energy security.[10]

History of EU's relations with **southern neighbours** goes back to Barcelona Declaration of 1995 which envisaged the establishment of a free trade area. Barcelona Declaration led to the launch of Euro-Mediterranean Partnership, then later, the launch of the "Union for Mediterranean" in 2008.

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[8] For an analysis, Wolfgang Koeth, "The Deep and Comprehensive Free Trade Agreements: an Appropriate Response by the EU to the Challenges in its Neighbourhood?," *eipascope,* European Institute of Public Administration, Bulletin (2014): 25.

[9] For the declaration of the latest Riga summit, 2015, http://eeas.europa.eu/eastern/docs/riga-declaration-220515-final_en.pdf.

[10] "What is Eastern Partnership?" accessed November 14, 2015 http://eeas.europa.eu/eastern/about/index_en.htm.

Current Situation of Southern Neighbours

	(Euro-Mediterranean) Association Agreement	Action Plan
Egypt	2004	2007
Israel	2000	2006
Jordan (advanced status)	2002	2007
Lebanon	2006	2005
Morocco (advanced status)	2000	2006
Palestine	Interim association agreement since 1997	2005
Tunisia	1998	2005
Algeria	2005	-
Syria	-	-
Libya	-	-

Source: Dates and other information gathered from European Neighbourhood Policy (ENP), accessed November 14,.2015, http://eeas.europa.eu/enp/about-us/index_en.htm. (Dates refer to the ratification of the Agreements.)

In fact, Cooperation Agreements were in place before the conclusion of Association Agreements with southern neighbours. Syria and Libya do not participate in ENP structure due to their internal political situations. After the Arab uprisings, EU revised ENP and offered "more for more" principle. This principle envisages offering more incentives to the countries that make (more) progress in terms of democratic and economic standards. EU continued to emphasize the democratic progress of the neighbours and in the Council conclusions of 2015; it is underlined that "a democratic, stable and prosperous neighbourhood is a strategic priority and fundamental interest for the EU".[11]

Recently signed Association Agreements with Georgia, Moldova and Ukraine together with **"Deep and Comprehensive Free Trade Area(s)" (DCFTA)** indicate an advanced model of agreements. Since 2011, the EU has also started to the preparations for signing DCFTAs with Jordan, Egypt, Tunisia and Morocco.

[11] Council Conclusions on the Review of the European Neighbourhood Policy, accessed February 1, 2016, http://www.consilium.europa.eu/en/press/press-releases/2015/12/14-conclusions-european-neighbourhood/.

Main motivation of the EU through these agreements was to offer "more concrete measures" to Eastern Partnership countries and some Southern neighbours due to "lack of interest from most partner countries in engaging meaningful reforms, the Arab uprisings and assertiveness of Russia".[12] It is obvious that lack of EU membership perspective may affect these countries to initiate costly economic and political reforms. The reason why the EU offered AA/DCFTA's only to "some" countries is that these countries are the most advanced in implementing previous obligations and ready to take new ones and the EU was regarded as a "role-model" especially for some Eastern neighbours.[13]

Application of **"conditionality"** (in the sense that relationship with the EU depends on the fulfilment of the conditions) of the enlargement policy is a common principle for the ENP as well. In Association agreements and action plans, various provisions exist concerning the political standards, democracy, human rights and rule of law standards of ENP countries. However, in practice, the EU is criticized for not applying the (political) conditionality principle properly in some cases[14] when the EU member states' economic and energy interests are at stake.

Ukraine: A challenging case of ENP

Ukraine is a unique case concerning the application of AA and DCFTA, since these agreements have a clear political meaning for this country. On December 2, 2015, in his speech, Ukraine President Petro Poroshenko expressed that Ukrainian business had been waiting for the agreement to be signed. Referring to the events in 2013, President said that "Millions of people came to the streets when they found out that the Agreement wouldn't be signed. They did not demand higher salaries or lower taxes. People demanded Europe."[15] Obviously the President refers to the process that Ukraine has witnessed since Orange revolution in 2004. As a country where Russian and Western interests have explicitly clashed, Ukraine could be a meaningful test case for the implementation of ENP in general and Eastern Partnership in particular.

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[12] Koeth, "The Deep and Comprehensive Free Trade Agreements' an Appropriate Response by the EU to the Challenges in its Neighbourhood?," 23.

[13] Ibid., 24-25.

[14] For Azerbaijani case: Jana Kobzova & Leila Aliyeva, "The EU and Azerbaijan: Beyond Oil", *Policy Memo*, European Council on Foreign Relations (ECFR), No.57, (2012):1-7.

[15] "FTA with the EU creates unique opportunities for Ukraine"- President at the Ukraine-Lithuania economic forum, December 2, 2015, accessed December 3, 2015, http://www.president.gov.ua/en/news/zona-vilnoyi-torgivli-z-yes-stvoryuye-dlya-ukrayini-unikalni-36413.

As of January 1 2016, DCFTA which is a part of the Association agreement signed in 2014 provisionally entered into force for Ukraine. Full application of the whole DCFTA will be enhanced when all the EU member states ratify the agreement.[16] In fact provisional application of DCFTA would begin earlier, however Russian opposition prevented the process. Due to Moscow's concerns, the EU proposed trilateral talks between the EU Russia and Ukraine; however despite the launch of the talks, Russia continued its tough position and the parties could not reach a concrete result for a considerable time. This process has mounted with the embargo imposed to Russia by the EU after Russia's annexation of Crimea. Nevertheless, despite the ongoing challenges, implementation of AA /DCFTA made a considerable progress.

What will DCFTA bring to Ukraine?

Currently, the EU is Ukraine's largest trading partner, accounting for more than a third of its trade. It is also the main source of Foreign Direct Investment (FDI).[17]

According to the official EU view, DCFTA will bring new economic opportunities to both sides. On the one hand, Ukraine consumers will have the advantage of reaching the goods from lower prices and benefit from the easy access to the EU market and on the other hand, this agreement will facilitate the EU businesses to invest in Ukrainian economy.[18] Enhancing privileged access to both sides, DCFTA decreases the import duties and red tape and enhances favourable circumstances to both sides' business circles.[19]

Economic effects of the agreement have been considered to be detected in the long term. From Ukrainian point of view, easy access to European single market for companies, improvement in the economic standards and

[16] At the beginning of April, 2016, agreement is rejected in the referendum held in the Netherlands. 61.1 % of the voters rejected as this is interpreted as a reflection of anti-EU tendencies. "Netherlands reject EU-Ukraine partnership deal", accessed April 10,.2016, http://www.bbc.com/news/world-europe-35976086.

[17] For facts and figures: Countries and Regions, Ukraine, European Commission Trade, accessed November 24, 2015, http://ec.europa.eu/trade/policy/countries-and-regions/countries/ukraine/.

[18] "The trade part of the EU-Ukraine Association Agreement becomes operational, on 1 January, 2016", European Commission Trade Policy News Archive, 31 December 2015, accessed January 4, 2016, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1425.

[19] European Commission, *EU-Ukraine Deep and Comprehensive Free Trade Area, Economic Benefits and Opportunities,* accessed January 4, 2016, http://trade.ec.europa.eu/doclib/docs/2015/december/tradoc_154128.pdf.

competitiveness through adopting related EU legislation have been counted as long term benefits of the agreement.[20] Additionally, modernisation of industries,[21] diversification of Ukrainian exports,[22] and enhancement of an appropriate climate for investors[23] could be counted among the long term benefits of DCFTA. All in all, the agreement paves the way for modernisation of Ukrainian economy. However, according to Raik, the gains of the agreement will highly depend on the domestic reforms to be undertaken by Ukraine itself.[24]

Ukraine is committed to fully apply the agreement in ten years; however the country is still trying to comply with the criteria in order to implement the DCFTA. According to the roadmap, reforms regarding food safety, energy sector, customs, public procurement, protection of intellectual property rights and phytosanitary are on the way and transition will be stage by stage. Nevertheless, currently the overall implementation of the conditions for DCFTA is slow as indicated in the monitoring results.[25]

Despite the emphasis on benefits of AA and/or DCFTA, some criticisms have been voiced as well concerning the ENP and its institutional arrangements which could be also applied to the other countries other than Ukraine. Some of the criticisms take their roots from the essence of the EU policies while the others are partly related to the structural deficiencies of the countries in question. In this sense, regarding the EU policies; complex nature of the EU procedures (e.g., almost every chapter of Ukrainian DCFTA has its own specific procedure for legal approximation) [26] is mentioned. Above all, according to some views, it is "costly" and "problematic" for these countries to comply with the extensive EU acquis

[20] Piotr Kościński, "Ukraine: A DCFTA after All", Bulletin, *The Polish Institute of International Affairs*, No.110 (842), (2015):1.

[21] Iana Dreyer, "Trade Policy in the EU's neighbourhood, Ways Forward for the Deep and Comprehensive Free Trade Agreements," *Notre Europe*, (2012): 27.

[22] Countries and Regions, Ukraine.

[23] Veronika Movchan & Volodymyr Shportyuk, "EU-Ukraine DCFTA: The Model for Eastern Partnership, Regional Trade Cooperation," *CASE Network Studies and Analysis*, No. 445, (2012): 17.

[24] Kristi Raik, "EU-Ukraine trade agreement finally enters into force," *FIIA Comment*, The Finnish Institute of International Affairs, No.1, (2016): 1.

[25] Press briefings, Ukraine Crisis media center, Kyiv, December 1, 2015, accessed December 3, 2015 http://uacrisis.org/38192-vilnoyi-torgivli-z-yes.

[26] Guillaume Van der Loo, "Enhancing the Prospects of the EU's Deep and Comprehensive Free Trade Areas in the Mediterranean, Lessons from the Eastern Partnership," *Ceps Commentary*, (2015): 3.

since these countries will not become EU members[27]. Besides the costs of the reforms,[28] especially the weak economic structures of these countries[29] make the alignment with the EU acquis harder for them. According to Langan, DCFTAs offered to North Africa countries after the Arab Spring carry the risk of exacerbating "economic asymmetries" between the parties and therefore increase poverty in the region.[30] Furthermore, according to some existing research, ENP countries that conclude DCFTAs with the EU may not equally benefit from the agreement, while the small countries may not fully take the advantage of the agreement, the others may increase their exports to the EU markets.[31] In addition to these criticisms, necessity for the EU's financial and technical support, especially for Ukraine is mentioned in order to counter the sanctions of Russia.[32]

Finally, as the extensive EU acquis overtaken by these countries taken into consideration, it is obvious to encounter problems during the implementation of the EU legislation.

Concluding Remarks

Association Agreements concluded with ENP countries are agreements to forge close economic relations with these countries, however the political aims targeted by concluding these economic and trade related agreements should be strictly kept in mind as well.[33]

As it is clearly observed in the case of Ukraine, although DCFTA look like a trade deal between Ukraine and the EU, it is also a political symbol

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[27] Dreyer, **"**Trade Policy in the EU's neighbourhood, Ways Forward for the Deep and Comprehensive Free Trade Agreements," 2.

[28] Movchan & Shportyuk, "EU-Ukraine DCFTA: The Model for Eastern Partnership, Regional Trade Cooperation," 17.

[29] Dreyer, "Trade Policy in the EU's neighbourhood, Ways Forward for the Deep and Comprehensive Free Trade Agreements,"13-15.

[30] Mark Langan, "The moral economy of EU relations with North African states: DCTFAs under the European Neighbourhood Policy," *Third World Quarterly,* Vol.36, No.10, (2015): 1827.

[31] Marie-Luise Rau, "Conquering the EU market with new comprehensive trade agreements-Simulating DCFTAs between the EU and neighbour countries," *Paper prepared for presentation at the EAAE 2014 Congress 'Agri-Food and Rural Innovations for Healthier Societies*, Ljubljana Slovenia, (2014):2.

[32] Kościński, "Ukraine: A DCFTA after All," 1.

[33] Panagiota Manoli, "Political Economy aspects of Deep and Comprehensive Free Trade Agreements," *Eastern Journal of European Studies*, Volume 4, Issue 2, (2013): 51-73 and Dreyer, "Trade Policy in the EU's neighbourhood, Ways Forward for the Deep and Comprehensive Free Trade Agreements," 22.

representing Ukraine's political choice in favour of Europe. Russia has opposed the agreement for a considerable period and tried to gain some concessions and demanded Ukraine to remain in its sphere of influence. Therefore, success of the DCFTA with Ukraine in economic terms will also determine the success of ENP in general and the Eastern Partnership in particular. Recently the EU proposed the same kind of DCFTAs to some other neighbours and consequence of these agreements might provide new policy formulations for the ENP. All in all, taking into consideration of the current developments, (possible) failures and successes of ENP would be followed through the case of Ukraine. However, given the scale and effect of current challenges that the EU faces such as the refugee crisis, economic crisis and the political landscape emerged with the UK's EU referendum, problems emerging from the ENP may be regarded as less important to the EU. Nonetheless, it is obvious that the EU will allocate most of its efforts to ENP countries in its external relations in the following period; given the fact that a new enlargement round has not been foreseen by the EU after the current candidate/ potential candidate countries of "Western Balkans" and "Turkey".

All in all, while the complex and extensive institutional ENP arrangements are mostly in economic nature, political meaning of the arrangements are evident, especially for countries like Ukraine. In other words, the economic features of ENP arrangements cannot be easily differentiated from the political aims of both parties. From the EU's point of view, as "more for more" principle indicates, the country that properly implements the relevant criteria that take place in action plans and the agreements will get more aid and benefit from the EU. This economic approach will also have political connotations for both sides, especially for the country that will approach the EU in political terms as well. Therefore, possible economic costs of DCFTAs will probably be compensated by possible political gains by the ENP countries.

ENP has various deficiencies in the sense that it does not provide enough motivation for the countries for the reforms and forces the countries to adopt extensive bureaucratic procedures and legislation. In the case of eastern neighbours, Russia could be considered as an international actor that cannot be ignored as events in Ukraine has demonstrated. Structural weaknesses of the southern and eastern neighbours also hinder the success of ENP to an extent. However bearing in mind the political meaning of the agreements, expected economic costs of the arrangements would be more bearable and acceptable especially for the "eastern neighbours" aspiring to establish closer links with the EU. Despite all the deficiencies, it is evident

that in comparison to the other third countries, institutional arrangements constructed for ENP countries are more detailed and complex with regard to the EU external relations.

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TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHİP (TTIP): A DRIVE FOR THE MODERNIZATION OF THE EU-TURKEY CUSTOMS UNION?

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Abstract: *Turkey is one of the countries closely observing negotiations of the US–EU Transatlantic Trade and Investment Partnership (TTIP). The country's primary concern is TTIP's potential impact on the Turkish economy given its long term trade relation with the EU under the Customs Union (CU), even though this deal has gradually become less equipped to handle the new dynamics of global trade integration. In a way, this concern also reflects the difficulty of being the lesser party to an old generation trade deal challenged by the new generation free trade agreements[1] of the greater party, the EU. The asymmetries in Turkish participation and consultation on decisions relating to the CU stem from the initial design of the agreement which itself was established as a transitory mechanism leading to Turkey's full EU membership at a later date. Thus the paper discusses the possible impact of TTIP on Turkey due to EU-Turkey CU, considering that this might trigger a critical juncture to modernise the CU.*

Introduction

The Association Agreement or the so called Ankara Agreement envisaged the economic association between the European Economic Community (EEC) and Turkey to develop in three stages, namely the preparatory, the transitional, and the final stage. It was the transitional stage which aimed at setting the timetable towards the establishment of a CU between the parties. Article (2)2 of the Ankara Agreement provides that "a

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[1] Nowadays FTAs are regarded as less complicated way to obtain gains in trade whereas the CU agreements are perceived as tools of regional identity building.

customs union shall be progressively established." Turkey is expected to become one of three countries that have entered into a CU with the EU prior to becoming a candidate country. Hence the CU reflects a process that started in 1963 with the signing of the Association Agreement and was reaffirmed in 1973 with the entry into force of the Additional Protocol to that Agreement[2], laying down the conditions and timetable for implementing the obligations of the transitional period. In addition to the rules for the establishment of the CU, the Additional Protocol envisaged the free movement of persons and services. Article 12 states that "the Contracting Parties agree to be guided by Articles 48, 49, and 50 of the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them". And in Article 13 the parties "agree to be guided by Articles 52 to 56 and Article 58 of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom of establishment between them," and in Article 14 that "The Contracting Parties agree to be guided by Articles *55, 56* and 58 to *65* of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom to provide services between them". As the type of CU specified was more than a usual CU, coming closer to an establishment of a common market including the free movement of workers, freedom of trade in services, harmonization of rules of competition, Kramer (1996:205) points out that it is "an additional indication that the relationship was not intended to stop here".

Under the CU, Turkey adopted the EU's common external tariff (CET) for most industrial products and both parties agreed to eliminate all customs duties, quantitative restrictions and charges with equivalent effect on their bilateral trade. The EC would abolish all customs duties and equivalent taxes on industrial imports from Turkey with the exception of certain sensitive products such as cotton yarns, cotton textiles, and machine woven carpets. Petroleum products were subject to tariff reductions within quota limits. The Association Council was the governing body to oversee the timely implementation of the measures, including the complementary ones.

By 1973, the EC had abolished all customs duties and quotas for Turkish industrial products, with the exception of textiles and clothing which later came under the so-called voluntary export restraint agreements

[2] For the text of the Ankara Agreement see *Official Journal of the European Communities*, 29.12.1964. For the text of the Additional Protocol, see *Official Journal of the European Communities,* 31.12.1977.

concluded between the EC authorities and Turkish textile exporters. Concerning agricultural imports from Turkey, under the Ankara Agreement, they were treated as imports from a third country, and subjected to the CET. However, from the beginning, the Community granted tariff concessions on agricultural imports and tried to protect its agricultural sector by the non-tariff barriers of the Common Agricultural Policy (CAP). The concessions were broadened to the gradual elimination of duties by January 1987 on primary agricultural products having a regulated market in the EC. There are variable levies and additional duties for processed products.

Turkey was given a lengthier period of adjustment to make reductions to the customs tariff for industrial imports from the EC within the framework of two separate lists with different time-spans, taking into consideration the competitiveness of the industries concerned.[3] However, the tariffs could be reduced only twice, in 1973 and 1976, whereas in 1978, under great economic difficulties and frustrated by the EC's turning a blind eye to its demands, Turkey took the step of freezing the terms of the Association Agreement under Article 60 of the Additional Protocol, which allowed both parties to take requisite measures in case of regional or general economic disruption.

The relations of Turkey with the EC came to a standstill following the military intervention in 1980. After the blocking of the fourth financial protocol in June 1981, the European Parliament (EP) passed a resolution suspending the Joint Parliamentary Committee in January 1982. The free circulation of Turkish workers in the Community as of 1986 was put off. The decline in economic relations including trade was supplemented by the emergence of divergent views on political issues. At the second half of the 1980s, the economic reforms in Turkey had brought a major transformation in the economy. With the acknowledgement of the failure to proceed with the CU, Turkey, on 14 April 1987, formally applied for full membership based on article 237 of Rome Treaty. The application did not meet with approval of the EC. In its 1989 Opinion on Turkey's membership application, the European Commission concluded that it was not the appropriate moment for starting accession negotiations taking into account the economic and political situation in Turkey[4], though it confirmed

[3] For detailed assessment of trade relations see Balkır (1993:100-139).

[4] The Opinion identified four major economic weaknesses, including major structural disparities in both agriculture and industry, macroeconomic imbalances, high levels of industrial protection and a low level of social protection. On the political front, the

Turkey's eligibility for membership and recommended the completion of the CU as a way to deepen the bilateral relationship in accordance with the political will presented at the time of the signing of the Ankara Agreement[5]. Thus for Turkey, the CU became almost the only mechanism to recover the relations.

After long debates both on economic and political issues, the 36th Turkey-EC Association Council on 6 March 1995 took the Decision that the CU was to enter into force on 31 December 1995.[6] According to the Decision, Turkey is expected to fulfill the following conditions: a) elimination of customs duties and charges having equivalent effect applied to the Community industrial products; b) elimination of quantitative restrictions or measures with equivalent effect such as the Mass Housing Fund levy; c) in relation to third countries, aligning itself with the CET over a period of five years; d) aligning itself progressively with the preferential customs regime of the Community over a five year period. This concerns both the autonomous regimes and preferential agreements with third countries.[7] e) incorporating into the legal order instruments to remove technical barriers to trade; f) elimination of customs duties on processed agricultural products not under the agreed lists; g) implementation of the

humanrights situation and respect for the identity of minorities were mentioned as areas that have not reached the required level in a democracy.

[5] Commission of the European Communities, Commission Opinion on Turkey's Request for Accession to the Community, SEC (89) 2290 final/2, p. 8.

[6] Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union, Official Journal L 035, 13/02/1996 P. 0001 – 0047, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21996D0213%2801%29:EN:HTML, 23.05.2015.

This decision could only be adopted within the framework of a political compromise. Greece, which had for a long time vetoed initiatives supporting the completion of the CU in the Council, agreed with this step on the condition that Cyprus would be included in the EU's pre-accession process despite the division of the island.

[7] The autonomous regimes referred to in Article 16 are: Generalized System of Preferences; the regime for goods originating in the Occupied Territories; the regime for goods originating in Ceuta or Melilla; the regime for goods originating in the Republic of Bosnia-Herzegovina, Croatia, Slovenia, and the territory of former Yugoslav Republic of Macedonia. The preferential agreements referred to in Article 16 are: the Europe agreements with Bulgaria, Hungary, Poland, Romania, Slovakia, the Czech Republic; the Free Trade Agreement with Faroe Islands; The Association Agreements with Cyprus and Malta; the Free Trade Agreements with Estonia, Latvia and Lithuania; the Agreement with Israel; the Agreements with Algeria, Morocco, and Tunisia; the Agreements with Egypt, Jordan, Lebanon and Syria; the Free Trade Agreement with Switzerland and Liechtenstein; the Agreement on the European Economic Area.

commercial policy regulations, the Community's competition rules, protection of intellectual, industrial and commercial property rights; and h) elimination of state aids and incentives that are incompatible with the proper functioning of the CU. The EC, on the other hand, had to end its restrictions on textile and clothing imports from Turkey by abolishing the voluntary export restraint arrangement which had always been contrary to the stipulations of the Additional Protocol. Trade in agricultural products was excluded from the Decision, although the Association Council reaffirmed the intention concerning the move towards the free movement of agricultural products, conditional upon Turkey's adoption of CAP measures. Concerning processed agricultural products, Turkey was allowed to apply tariffs on imports from third countries for listed goods with agricultural components.

Beside the fact that Turkey would later find out that successful implementation of the trade regime is not a guarantee for full membership, at the outset, the CU Decision looks favorable to the EC's interest than to Turkey's. The implementation of the Community case law makes the Turkish market more secure environment for European firms for investment and trade purposes. The cost of the CU to the EC is minimal, a total of Euros 1.5 billion financial aid which will be spread over five years, between 1996 to 2001. In reality Turkey received only 52 million Euros[8]. Togan (2011:33) shows that the share of EU contribution in total cost of assuming the obligations of the CU has amounted to 9.28%.

Asymmetry in the EU-Turkey Customs Union

The asymmetry in participation and consultation on decisions relating to the CU was there from the start and comes from the original design of the agreement which expects it to be a transitional arrangement before Turkey moves towards full EU membership[9]. Article 28 of the Ankara Agreement gave the right for Turkey to ask for full EU membership on successfully completing the CU, although accession would not be automatic. Thus, Turkey perceived the CU, not as an end in itself, but as a step toward deeper integration and eventual EU membership, although unfortunately the timing and circumstances were not clearly stipulated in Article 28 of the Association Agreement.[10]

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[8] Odabası, 2004: 8.
[9] World Bank (2014:ii)
[10] Kabaalioğlu (2010: 55).

Turkey has no voice in the formation of Common Commercial Policy as it can not participate in trade policy committees. Even though the consultation and decision making mechanisms envisaged in the CU are drawn in Articles 54-60 of Decision 1/95[11], the lack of effective mechanism was the deficiency in the functioning of these procedures. It was the Turkish legislation that has to be harmonized as far as possible with Community legislation in areas of direct relevance to the operation of the CU, but the Union can, moreover, amend related legislation according to its priorities without consulting Turkey. The Community is only obliged to inform Turkey as it adopts any Decision under the EC Treaty which might affect Turkey's interests.

Concerning the Common Customs Tariffs, Article 13 envisages that Turkey, in relation to third countries align itself to the Common External Tariff. According to the Article 14 paragraph 2; under no circumstances Turkey may apply a customs tariff lower than the CET for any product. It is the EU which sets out CET in accordance with its priorities. According to Article 16 Turkey is obliged to gradually align itself with the preferential customs regime of the Community over a five- year period and to conclude trade agreements with the countries with which the EU has preferential trade "agreements.

The limited scope of the deal, its asymmetric nature and ineffective dispute mechanism are all known flaws of the Decision 1/95. The quotas on Turkish trucks and Turkey's not sharing the customs duties collected at the different ports and customs of the EU by way of the EU budget are some other conditions showing the unequal competition under the CU between Turkey and EU countries[12]. Turkish authorities were not the only ones who realised these flaws. Stefan Füle, European Commissioner for Enlargement and European Neighbourhood Policy, during the conference in Brussels on 10 April 2014 stated that "The customs union has its flaws and remains incomplete. Both the European Union and Turkey have a number of concerns that each side is eager to solve. Some of these concerns are linked to the legal design of the customs union, which had been conceived as an interim agreement before Turkey would become a full member of the European Union".[13]

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[11] DECISION No 1/95 OF THE EC-TURKEY ASSOCIATION COUNCIL of 22 December 1995 on implementing the final phase of the Customs Union (96/142/EC)

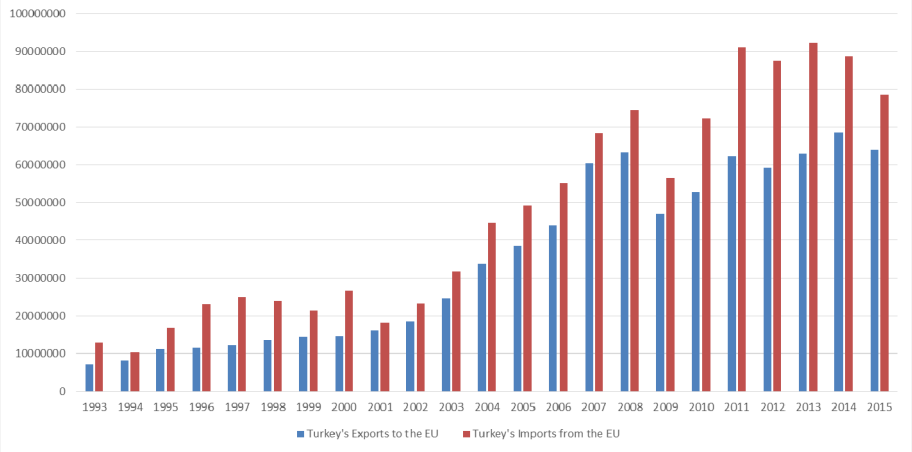
[12] Kabaalioğlu (2010: 54).

[13] S. Füle, 'Mutual Benefits of the EU-Turkey Customs Union', available at: http://europa.eu/rapid/press-release_SPEECH-14-317_en.htm

CU challenged by EU's Changing Trade Trajectory

Adopting substantial parts of the acquis has facilitated the transformation of Turkish industry and the modernisation of economic legislation, which steered the economy's international competitiveness and boosted its trade with the EU as well as with other countries, especially the Middle East and North Africa region, over the last two decades [14]. The bilateral trade between the EU and Turkey increased more than fourfold since 1996, EU still is the main trade partner and principal FDI source for Turkey. The World Bank calculated that the CU has brought important trade benefits for both parties, which are significantly higher than under a free trade arrangement. The report states that "it has provided an anchor on Turkey's applied tariffs for industrial products and negated the need for rules of origin (ROOs) on bilateral trade"[15].

Figure 1: *Turkey's Trade with EU (in US$)*



Source: Turkish Statistical Institute (TUİK) figures

The design flaws in the CU has become increasingly problematic due to the EU's Global Europe strategy, launched in October 2006, responding partly to slow progress in the WTO Doha Round of multilateral trade negotiations, and leading to far-reaching free trade agreements between the EU and its trading partners. The EU also works on the establishment of so-called 'deep and comprehensive free trade areas' with its neighbouring

[14] For detailed analysis see Balkır and Kuştepeli 2013.
[15] World Bank (2014:i).

countries[16]. These had direct impact on the trade policies of EU partners including Turkey, depending on their levels of integration. The concern of Turkey was aggravated due to its obligations under the CU and in the absence of a realistic EU accession perspective in the foreseeable future. Many of the FTAs concluded in the 90s and beginning 2000s concerned the new members of the EU and also other developing countries which were not direct competitors of Turkey in the EU market. Thus Turkey also concluded a series of bilateral FTAs in line with the EU[17]. But the situation changed in the later years, with EU trade deals with developed countries, and TTIP is entirely different. Moreover, Turkey cannot enter into FTAs with the third countries which it prioritizes unless the EU has already concluded a FTA with them[18].

As Article 45 of Decision 1/95 provides that "the parties shall endeavour, through exchange of information and consultation, to seek possibilities for coordinating their action when the circumstances and international obligations of both parties allow", this has led to the inclusion of the so-called a 'Turkey clause' in bilateral FTAs between EU and third countries[19]. This entails the other country to reach a bilateral FTA with Turkey. However, several problems exist in practice. DG Trade treats TR as a third country and the EU neither does run parallel track negotiations nor can force third countries to conclude a free trade deal with Turkey. The third country is generally reluctant to make reciprocal concessions to Turkey,

[16] The EU has concluded association agreement providing for the establishment of DCFTAs with Ukraine, Moldova and Georgia. With the EU's southern neighbours DCFTA negotiations are ongoing with Morocco. The preparation phase with Tunisia and impact assessment studies for Jordan and Egypt are being worked on.

[17] World Bank (2014:25) "…the EU has FTAs with 48 countries while Turkey has concluded FTAs with just 19, two of which the EU does not have FTAs with (Syria and Georgia). Turkey has 17 FTAs in force, namely with EFTA, Macedonia, Bosnia-Herzegovina, Albania, Israel, Palestine, Morocco, Tunisia, Egypt, Syria(suspended), Georgia, Serbia, Montenegro, Chile, Jordan, South Korea and Mauritius. Agreements with Lebanon and Kosovo will be in effect after the completion of internal ratification procedures. Meanwhile, there are 14 countries/country blocs that Turkey has started FTA negotiations; namely Peru, Ukraine, Colombia, Ecuador, Malaysia, Moldova, Dem. Rep of Congo, Ghana, Cameroon, Seychelles, Gulf Cooperation Council, Libya, MERCOSUR and Faroe Islands. Moreover, Turkey has launched initiatives to start negotiations with 12 countries/country blocs, which are the USA, Canada, Japan, Thailand, India, Indonesia, Vietnam, Central American Countries, other ACP Countries, Algeria, Mexico and South Africa."

[18] Togan 2011:36

[19] This clause aims to ensure a parallelism between the EU's and Turkey's free trade policies in line with Decision 1/95 and Article XXIV of the GATT.

because while a FTA opens up to trade concessions the entire CU area of the EU, which also includes Turkey, the partner country only accepts tariff-free imports from the EU member countries, and not from a candidate country, Turkey. Thus, an asymmetric preferential market access is established between Turkey and EU's FTA partners.[20] FTA-partner products can enter Turkey duty-free by way of trade deflection via the EU market, which causes a tariff revenue loss compared to the pre-FTA situation. Thus the lack of enthusiasm of FTA-partners to negotiate with Turkey imposes indirect unilateral trade liberalization on Turkey, while being unfavourable for Turkish exporters competing with EU exporters in third country markets.

There is also a time gap of several years between the entries into force of the parallel FTAs and sometimes the third country may simply refuse to conduct parallel free trade negotiations with Turkey.[21] This may lead to the introduction of origin controls that could undermine the benefits of the CU.[22] The World Bank has already forewarned that as the number of FTAs increases, the asymmetry problem for Turkey will only get worse[23]. With respect to all these problems, the Turkish government suggested the inclusion of a "reinforced Turkey clause", suggesting that Turkish industrial products exported to a given third country would be considered of EU origin until the FTA between Turkey and the given third country enters into force[24]. Of course, the effectiveness of such a reinforced Turkey clause will largely depend upon its legally binding nature[25], and moreover enabling automatic access for Turkish products covered under the CU will be confined to industrial products. In many cases, such as TTIP, the political and economic realities will not allow for this option to be imposed or enforced.

What TTIP means to Turkey?

Turkey like many countries perceives TTIP as exclusive, not inclusive; and wants to protect itself from the restrictive impact of regulatory measures on trade. The impact of TTIP on any country depends on the existing level of

[20] Balkır, Eylemer and Taş, "Customs Union: An End in Itself or a Step towards Accession?" İktisadi Kalkınma Vakfı, http://www.ikv.org.tr/images/upload/file/balk%C3%84%C2%B1r-eylem-tas-teblig.pdf (accessed March 13, 2013).

[21] M. Yapıcı, 2013 'Turkish Perspective on Free Trade Agreements under the Turkey-EU Customs Union', Brussels, available at: https://yerelce.wordpress.com/2013/06/19/turkish-perspective-on-ftas-murat-yapicis-presentation/.

[22] World Bank, *op. cit.*, p. 25.

[23] World Bank, *op. cit.*, p. 28.

[24] World Bank, *op. cit.*, p. 29.

[25] South Africa turned down the Turkey Clause as part of its negotiations.

economic integration between the EU/US and the third country. If a country is intensely integrated into the EU and/or US value added networks, then it will be affected if no satisfactory solution is found. *Docking* only appeals to 'inner circle' having preferential trade agreements with TTIP parties. Turkey has a CU with the EU and in the accession process, supposedly is in the inner circle, but it has no FTA with the US.

Turkey's trade deals and obligations under the CU becomes more critical considering TTIP is expected to circumvent nearly half of the global economic output and 30 percent of world trade.[26] The deal is supposed to include both goods and services, tariff and non-tariff barriers and FDI. According to the World Bank report, Turkey maintaining tariffs on US imports (assuming no trade deflection via the EU), suggests a welfare loss of US$130, and if Turkey eliminates its import tariffs on US manufactures (or US trade is deflected via the EU) then the welfare loss increases to US$160 million. Thus Turkey would face welfare losses up to US$ 160 million if it were not to conclude a FTA with the USA when the EU did. In case of TTIP covering regulatory reform, the potential loss for Turkey would be much larger than US$160 million[27].

Turkey's integration with the US market is very limited. USA's small share in Turkey's total trade has been gradually decreasing. From 5.25% in 1996, it came to 3.18% in 2015. Turkey's trade with the EU also decreased due to intensifying trade relations with its neighbours and emerging economies. However, Turkey has trade deficit concerning both parties. As TTIP will decrease Turkey's competitive power in the U.S. market vis-à-vis the goods produced in the EU, there will be more trade deficit with the US due to asymmetry in CU because US can gain access to the Turkish market without reciprocating. On the other hand, less restrictive Rules of Origin with lower thresholds for Transatlantic firms to protect their supply chains, may positively affect Turkish exporters in US market.

[26] World Bank, *op. cit.*, p. 27.
[27] World Bank, *op. cit.*, p. 28.

Share of USA and the EU in Turkey's Total Trade (%)

	USA	EU
2011	4.11	40.84
2012	4.26	37.69
2013	3.63	38.48
2014	3.12	39.34
2015	3.18	40.64

Source: Turkish Statistical Institute Database (Turkey-USA, Turkey-EU), United States International Trade Commission (EU-USA), https://dataweb.usitc.gov/scripts/Regions.asp, (accessed on 27.04.2016).

Turkey, EU, USA Annual Trade ($ billion)

	Turkey's Exports to USA	*Turkey's Imports from USA*	*Balance*	*Turkey's Exports to EU*	*Turkey's Imports from EU*	*Balance*
2011	4.584	16.034	-11.450	62.347	91.128	-28.780
2012	5.604	14.130	-8.526	59.197	87.447	-28.249
2013	5.640	12.596	-6.955	62.925	92.355	-29.430
2014	6.341	12.727	-6.385	68.518	88.783	-20.264
2015	6.397	11.127	-4.730	64.008	78.668	-14.659

Source: Turkish Statistical Institute Database (Turkey-USA, Turkey-EU), United States International Trade Commission (EU-USA), https://dataweb.usitc.gov/scripts/Regions.asp, (accessed on 27.04.2016).

When TTIP is realized, the US products would appear on the Turkish market free of tariffs, while the levies charged by the US on Turkish products would remain in place. Turkey would lose both from decreased customs revenue and also from facing increased competition in its domestic market. If Turkey is actually moving towards EU accession in the near future, all this would not matter. But this is not foreseeable. Furthermore, once a TTIP deal is struck, there is almost no incentive for the US to enter into a FTA with Turkey unless Turkey can provide a better deal.

As there is no option of joint negotiations or granting a seat for Turkey at the negotiating table or even having the European Commission to negotiate on behalf of Turkey, a non-EU country, the only option seems to be is Turkey having the incentive to conclude a bilateral agreement with the US around the same time as the EU. Even if US accepts this proposal, it will raise the prospect of developing a deeper trade agreement with the US than the CU with the EU. Consequently, under any scenario, TTIP will be a turning point for the future of the CU.

The discriminatory nature of TTIP is not only due to tariffs, but also in regulatory cooperation which has a potential to redefine the rules in the global economic system. As the harmonisation of quality standards will have a cost escalating impact for both partners, TTIP is expected to become a system of mutual recognition of quality standards. This will still have a significant impact on all third countries, including Turkey, as they will have to act according to new rules and regulations not only for trade in goods and services but also investments in the EU and the U.S. market. However, in case of TTIP with 'a regulatory harmonization, without recognising Turkish quality certificates, Turkey's losses would be far greater[28].

On the other hand, the income effect of TTIP can be positive on Turkey as higher incomes in the EU mean higher demand for Turkish goods in a market that already accounts almost half of Turkey's foreign trade. However, there will be a trade diversion impact due to preference erosion[29]. If the income impact is strong enough compared to the diversion effect, then Turkey can actually benefit from this agreement. On the global level, countries having preferential trade agreements with the EU or the United States would lose due to preference erosion. These losses increase strongly in the relative importance of the EU or the United States in those countries' exports. So, losses of about 3.1% in Canada, 2.6% in Mexico, and 1.6% in Turkey are estimated[30].

There are studies trying to calculate the impact of TTIP[31], by applying econometric and computational methods to develop estimates of the costs and benefits for the US, EU, and third countries, including Turkey. According to the study by ifo Center for International Economics, on the welfare effects of TTIP, the impact for Turkey becomes positive with spill overs, but it is very low (0.1) compared to EU or US gain, and less than world average (3.9), even less than non-TTIP average (0.8)[32]. Long-run real per capita income relative to baseline, percentage with no spill overs for Turkey is below compared with non-TTIP average and world average. Long-

[28] *M. Raiser, http://www.finanstrend.com/haber/152443/db-raiser-ttip-turkiye-yi-kalkindirir/#.V4jRzUn6vIU*

[29] Felbermayr, G., Heid, B., Larch, L., und Yalcin, E. (2015: 513) "Preference erosion happens within the EU, where a TTIP would dilute the value of the customs union and the single market."

[30] Felbermayr et all.2015:497

[31] Ifo (2013) für BMWi / Bertelsmann, CEPR (2013) for DG Trade, ifo[2]: Felbermayr et al. (2015), CEPR[2]: Egger, Francois, et al. (2015), Aichele, Felbermayr, Heiland (2014)

[32] Felbermayr, G., 4 Dec.2015, ATAUM presentation

run real per capita income relative to baseline, percentage with spill overs, for Turkey is still below compared with non- TTIP average and world average[33]. Another study by Aichele et al. (2014), with no spill over, the figure for Turkey is 0.1, not negative like the other studies and above non-TTIP average (-0.1) but still less than world average (1.3). With spill overs, Turkey's figure increases to 1.2, exactly the same figure for non-TTIP average. According to Egger et all. (2015), a discriminatory agreement would harm most countries outside the agreement, and the direction of third-country impact rests on whether reductions on non-tariff barriers are discriminatory or not.[34]

Modernizing the Customs Union

The Turkey-EU Customs Union has been the cornerstone of Turkey's European integration and its revision clearly became necessary under the challenge created by the dynamics of new generation trade agreements, and TTIP has made it more urgent. Being disappointed by the remarks made by the US Secretary of Commerce, Penny Pritzker, during her visit to Ankara in October 2014, where she stated that Turkey and the US are great allies but engaging further with the TTIP before the necessary economic reforms are taken doesn't make sense either for Turkey or the US"[35]. Since Washington declined to deal, the Turkish government turned to Brussels, for the revision of the CU, attempting to broaden trade relations with the EU in the fields of agriculture, trade in services and public procurement. The World Bank report of 2014 has identified these three areas as being potentially favourable but as yet untapped resources for EU and Turkey. The EU's umbrella organization for business associations, Business Europe, is supporting the modernization of the CU. Opening of the public procurement market to EU will bring about an increased competitive environment for Turkish companies at Turkish market but also to European companies at the European market especially for the construction and transportation sectors where Turkey's competitive edge has grown.[36] Introducing more competition in services and also opening public procurement to competition

[33] Felbermayr, G., 4 Dec.2015, ATAUM presentation Long-run real per capita income relative to baseline, percentage with no spill overs: EU average 3.9; US average 4.9, Turkey -1.6, non TTIP average -0.9, world average 1.6. Long-run real per capita income relative to baseline, percentage with spill overs, Turkey with 0.1 is still below non- TTIP average 0.8 and world average 3.9

[34] http://economicpolicy.oxfordjournals.org/content/30/83/539

[35] https://www.cihan.com.tr/en/pritzkers-laundry-list-for-turkey-1553588.htm?language=en

[36] http://carnegieeurope.eu/2015/10/01/new-era-for-customs-union-and-business-world/isn8

will boost economic productivity in Turkey, and more convergence of economic legislation.

In May 2015, Turkey and the EU announced for the first time their decision to revise the framework and to expand the scope of the CU [37]. The understanding that the CU needs a fundamental revision inspired the European Commission to request the World Bank for an independent evaluation.[38] The World Bank calculated that the CU has brought important trade benefits for both parties, but the "the customs union is increasingly becoming less equipped to handle the changing dynamics of global trade integration" and that "changes are needed to make the customs union work to better effect for both parties…".[39] The CU is narrow in contrast with the new generation of FTAs which includes agriculture, services and public procurement. Agriculture accounts for 10 percent of Turkey's GDP and services for 60 percent and the World Bank study found that precisely in those areas significant trade benefits could be realised for both parties[40] Raiser concludes that widening of the CU to services would allow Turkey to capitalize on its competitive strengths and also prepare Turkey for the opening of its service sector in the context of possible accession to TTIP[41].

Conclusion

Will TTIP be opened to third parties is still uncertain. Can countries convince the US and the EU to accept the principle of the future opening of the partnership by including an "accession" clause in the agreement? This is yet to be seen. As "d*ocking"* only appeals to inner circle then probably Turkey should seek to strengthen its position by cooperating with other inner circle countries having similar goals to join this partnership. Adoption of this position will drive the modernization and deepening of the CU, without linking this to the EU membership negotiations, and in time, will establish a sound basis for Turkey's accession to TTIP, if this option becomes possible.

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[37] 'EU and Turkey announce Modernisation of customs union', 12 May 2015, at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1307.

[38] World Bank, Evaluation of the EU-Turkey Customs Union, Report No. 85830-TR, 28 March 2014.

[39] World Bank, *op. cit.*, p. i.

[40] World Bank, *op. cit.*, pp.57-84.

[41] Raiser 2015 http://www.brookings.edu/blogs/future-development/posts/2015/03/16-turkey-europe-raiser

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REVISION OF THE CUSTOMS UNION BETWEEN TURKEY AND THE EU IN THE CONTEXT OF GLOBAL DYNAMICS AND THE EU'S EXTERNAL RELATIONS MODELLING

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Abstract: *This part explains the implications of the global developments and changing parameters of the EU's external relations, and particularly its trade policy, on the perceptions about the Customs Union (CU), in Turkey. The changing EU trade strategy, mostly characterised by global dynamics, has been oriented towards a 'regional' track in complement to its multilateral approach. The EU trade policy towards trading partners become to be regulated by new generation of free trade agreements (FTAs) and reflect deeper regulations in comprehensive areas. This transformation affects the operation of the CU in two ways. First, the EU's FTAs with its trading partners bring implications in Turkey's trade relations with the EU and third countries. The latter is largely a characteristic of asymmetrical structure of the CU which becomes visible and disturbing for Turkish stakeholdres. The second aspects relates to the fact that in terms of new trade policy modelling of the EU, the CU regime is narrower in scope and less well equipped to overcome rising challenges. These developments induced the EU and Turkey to search for revising the CU to mitigate the problems and make it more responsive towards today's trading environment. However this process faces several difficulties.*

Introduction

Global trade and investment patterns have changed considearbly over the last two decades, markedly from the creation of the WTO. Far East Asian countries and in particular China had high ranking positions in terms of trade growth, investment flows as well as their competitiveness in industries where advanced economies traditionally had dominant positions. Consequently, the global dynamic changes in the world economy had

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repercussions in European (and American) firms and trade policy orientation of these economies (Smeets, 2015). Many factors are driving the process of this phenomenon. The most significant motives are rising globalisation, the creation of global production chains (global value chains) and changing interests of increasing number of economic actors which claim to be the objects of the globalisation process. The international system, with the WTO and other international economic institutions and regimes locating at the core, was required to bring new rules to govern the changes at global sphere.

The EU being a global trade power aimed to counter the implications of the developments by gradually transforming its trade policy towards comprehensive framework. The competitiveness has been a pivotal aspect and expansive policy issues beyond the traditional boundaries of trade like regulatory issues, investments, trade in services, sustainability started to become a part of trade agenda with third countries. The relations with trading partners are regulated under two-track, namely multilateral umbrella of the WTO and rising number of regional trading arrangements (bringing deeper integration models).

The developments in EU trade policy had reflections on the functioning of the Customs Union (CU) with Turkey. The two-decade old regime which was initiated as a transitionary arrangement with tools and provisions reflecting characteristics of 1990s, become unsustainable. It proved to be successful in terms of economic benefits to Turkey and the EU. However, its functoning became subject to criticism from many stakeholders, especially in Turkey because of its diminishing effectiveness to tackle the challenges. The main motives are in many times argued to be stemming from its design flows and narrow scope for managing bilateral trade relations in 21st century[1]. The initiatives to update the CU started with the aim to transform it to satisfy expectations of parties in the light of rapidly evolving global and domestic changes. The domestic procedures that included communication with relevant stakeholders and impact assessments both in Turkey and the EU revealed that the process to uppgrade the CU will be challenging and require steps to avoid preliminary flaws that deeply affected the functioning of the CU.

[1] The first comprehensive study to assess the functioning of the CU was realised by the World Bank and issued in 2014. Subsequent studies by the European Commission and Turkey were held to assess the impact of alternative scenarios to modernise the CU (see, part 5).

Changing Dynamics of Global Trade and the Production Process

The nature of the world economy *changed* when advanced and developing economies and markets became more integrated. Much of the change (and increase) in world trade between early 1990s until the global economic and financial crisis in 2008, is a consequence of liberalization and deregulation among developing countries. Until the early 1990s, emerging markets and developing countries adhered to neo-mercantilist trade policies as a means of engendering faster industrial development and avoiding balance of payments crises. In the 1980s, for example, developing country tariffs were on average about four times higher than those of developed countries and non-tariff barriers of developing countries covered more than twice the share of the import categories of developed countries. The last decade, however, has seen a progressive *liberalization of their tariff regimes* -especially as a result of the Uruguay Round of multilateral trade negotiations- through tariff reductions and partial elimination of several non-tariff barriers. Import growth among emerging markets increased in the early 1990s to more than five times the growth rate of the early 1980s. The liberalisation of world trade under GATT/WTO negotiations stripped away many tariffs and introduced trade facilitating measures. Defensive trade protectionism was still on the agenda, however it became clear that its legitimacy was open to challenge as countries became more export-oriented.

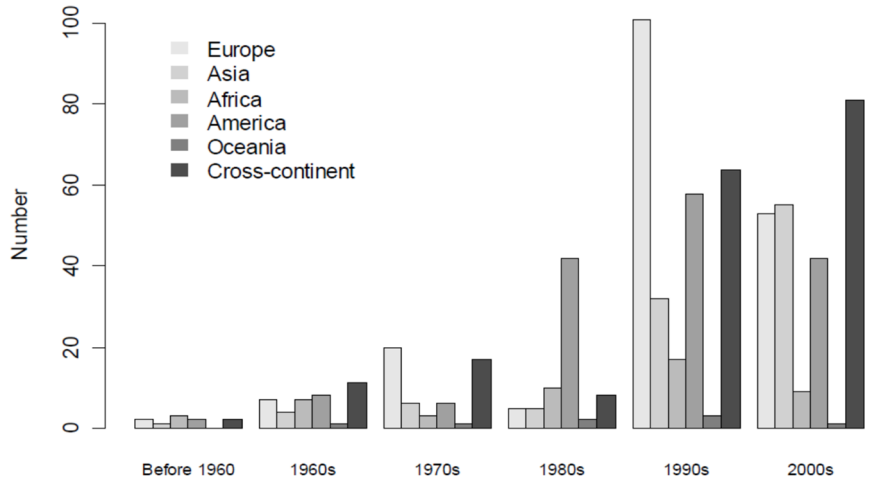
In addition to trade liberalisation, the integration was also facilitated by the *rise of new technologies* and *better communication and transportation networks*. A decline in transport costs, improving information technologies and communication, and innovations facilitated the operations in financial markets, and for business corporations.

Liberalisation of trade along with reduced costs in technological and communication services induced trade expansion. This allowed the fragmentation of global production processes along 'vertical trading networks' involving several advanced economies and developing countries, which was further associated with trade interconnectedness, i.e. multiplying trade links among the countries (IMF, 2011). Thus, the geographical distances between the markets in terms of production, supply of intermediaries, and consumption became less costly and problematic -if not less complex- than before. This can be explained as *global production networking* i.e. firms establishing foreign subsidiaries to outsource certain functions, and to subcontract the production of numerous components in different countries, mainly by means of locating in emerging economies in Asia.

Under the global supply chains (GVCs), the flow of goods, services and inputs have become a top priority and this induced the need to further eliminate distortions to trade and investment flows. It should be noted that despite earlier steps to eliminate, restrictive measures bringing costs to firms operating globally, were still in force in almost all jurisdictions. Accordingly, differences in national *regulatory regimes* and existing tariffs and non-tariff barriers had to be curtailed to provide a smoother operation of the global production networks. This could have been done through further tariff cuts and regulation of non-tariff barriers under WTO. The Doha Round of trade negotiations initiated in 2001 to bring multilateral liberalisation and enhanced rules. However, the Round failed to produce a substantial outcome, but with minor steps. Diminishing possibility to shape trade and investment rules under the WTO could be attributed to multipolarity in global trading regime as a result of rising number of countries with diverse priorities (Baldwin, 2016). Whatever were the motives, the stalemate in Doha Round induced among leading economic actors –mainly in the US- an erosion of confidence to multilateral system and centricity of the WTO.

Baldwin (2011) argued that the WTO lost its centricity, if not its importance, in regulating global trade regime. Many players started to preferr have regional trade agreements (RTAs) as complementary, if not an upright alternative to multilateralism (Blaas and Becker, 2007). The rise in regionalism had become a characteristic of global trade in late 1990s and 2000s. Most of the RTAs extended into cross-continental arrangements reflecting the nature of global production networks, than simply being 'regional' schemes (see, Figure 1). However, Europe and Asia have been the leading regions in their resort to such arrangements[2].

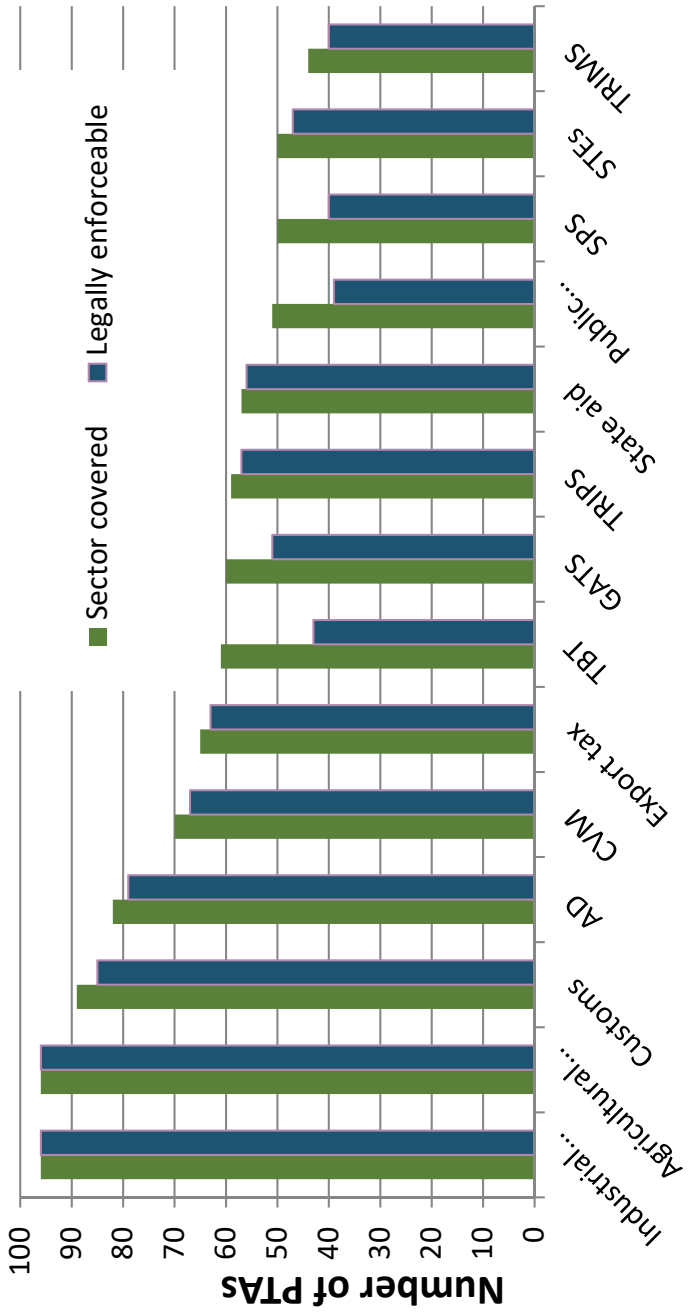
[2] For a comprehensive analysis of regional trade agreements, see DESTA study by World Trade Institute available at: https://www.designoftradeagreements.org/ www.designoftradeagreements.org/index.html/ … and the RTA Exchange initiative jointly implemented by by the International center for Trade and Sustainable Development (ICTSD) and Inter-American Development Bank (IDB), available at: http://rtaexchange.org/site/



Source: DESTA study by the World Trade Institute.

Figure 1. Regional composition of RTAs change over time.

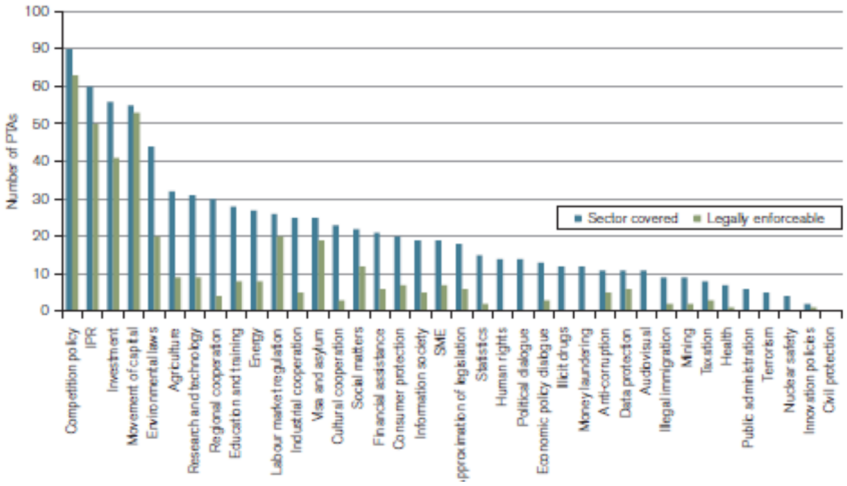
An closer examination of the RTAs indicate that these arrangements mostly include a deeper and a comprehensive agenda covering traditional and other trade-related issues conventionally not covered in WTO sphere and in RTAs of earlier periods. The issues range from several regulatory measures (i.e. standards) to behind-the-border areas where trade and related domestic policy issues intertwined. Thus, the comprehensive nature of them reflects the new realities in global relations (WTO, 2011). The issues covered by proliferating number of RTAs could be described as the *WTO+ policy areas* which are covered by the existing WTO Agreements and several earlier free trade agreements, but still require deeper regulations as these agreements are not developed enough to bring stronger rules. These areas are namely, more tariff cuts in industrial and agricultural goods; customs matters; export taxes; trade in services, invetsments, technical barriers to trade (TBT), sanitary and phytosanitary measures (SPS), state aids, public procurement; safeguard measures; anti-dumping policies and so on. An important characteristic of rising RTAs was that the rules pertinent to WTO+ issues were largely legally enforcable (Figure 2).



Source: WTO, 2011 p.132.

Figure 2. Number of RTAs covering WTO+ provisions

The RTAs started to cover increasingly WTO-X areas such as state-tarding enterprises (STEs), competition policy, different aspects of intellectual property rights (IPR), movement of capital, agricultural issues, environmetal regulations, labour market regulation, visa and immigration issues so on. The latter are policy areas not necessarily; or not broadly covered by the WTO agreements. These issues need more extensive rules under trade agreements. The legal enforcibility of the provisions depend on the agreement and varies among topics covered, however it reveals that areas involving non-trade issues are becoming part of trade agreements amid global economic developments (Figure, 3). Baldwin (2011) described this as the new agenda of 21st century trading environment within which countries seek for innovative rules to overcome challenges.



Source: WTO, 2011 p.132.

Figure 3. Number of RTAs covering WTO-X provisions

In 1990s onwards, many countries benefitted from developments in global production networks, most visibly emerging economies, and China in particular where considerable amount of FDI flowed destined to. As China and other emerging economies had integrated into the world economy, the became key actors in international trade regime. The accession of China to the WTO in 2001 accelerated this process. China in this period transformed into becoming a major actor in global trade. It became second largest economy in GDP terms, leading exporter in the world and the first destination of inward and outward FDI among the developing countries in a decade.

Reflecting the growth of global supply chains, the export structure of many developing countries, mainly emerging economies started to resemble to those of advanced economies. An increased proportion of advanced economy exports were assembled in developing economies. The rising export similarity brought forward both 'complementarity' and rivalry between these two group of countries. Accordingly, overlapping in export structure of emerging economies like China, Mexico, Indonesia, Vietnam, South Korea, Poland, Czech Republic and Turkey with that of the US and the EU was rising (evidenced also through increasing intra-industry trade). However, their exports are still differentiated in terms of price and quality differences (IMF, 2011). The European Union being a 'soft power' through trade still continued its role and gravity in global trade relations (Meunier and Nicolaidis, 2005). However, its competitiveness declined in several manufacturing sectors especially in labour and capital intensive industries. Moreover, competitive pressures from emerging economies caused trade deficits in many European countries and in the US. This reveals that the EU and the US need to concentrate on upgrade markets with higher-value added goods to mitigate competitive pressures.

Venue shifting: from the championship of multilateralism towards regionalism in the EU's external trade relations modelling

The EU has been responsive to the global changes from the very beginning. In its initial market access strategy[3] in 1996, the Commission noted that much of its prosperity depends on foreign trade and investment, and that 'European firms are exposed to a much greater degree of competition than before'. It recommended that the EU should strive to achieve an improved market access in third countries through a systematic and pro-active approach. Accordingly, it should ask trading partners to adhere to and comply with their international (i.e. WTO) obligations to eliminate obstacles to EU exports. In this context, the EU must also act against trading partners' barriers be they trade or investment, which do not fall into the traditional concept of trade barriers. The EU preferred multilateral level. For example, the EU expected its trading partners obey their commitments under Uruguay Round negotiations (built-in agenda), and new issues such as investments, competition, environment, labour standards can be regulated in the WTO realm. The EU also pointed out that bilateral arrangements could generate trade liberalisation provided that they

[3] Commission, 1996 'the Global Challenge of International Trade: A Market Access Strategy for the European Union', COM(96) 53 final, 14 February.

subsequently spread to multilateral field. Thus, the RTAs were secondary to the WTO negotiations for the EU in its earlier strategy.

In this vein, the EU noted that new areas of liberalisation could be launched at the Singapore Ministerial Conference of the WTO in 1996. These are namely; trade and investment, trade and competition, trade and environment; trade and social conditions; trade and finance. These issues, in conjunction with the environment and labour standards were believed to bring benefits to European business by mitigating 'unfair competition' from the trading partners. The issues were refined and broght by the EU in the WTO debate which focused on four areas called as 'Singapore issues'[4] that became prominent for the EU. Thus, The EU had advocated for instituting full-fledged multilateral agreements in the WTO regarding all of these issues.

However, the EU's Singapore agenda was in trouble. In Doha negotiations which started in 2001 the EU insisted on putting them in the agenda. However, it faced with the breakdown of negotiations upon strong resistance from developing countries, had to drop the issues from the agenda, in 2003 WTO's Cancun Ministerial. It can also be proposed that the EU could not insist on the issues because there was no domestic consensus among the members states and business was more interested in market access in services and industrial goods than jeopardising the negotiations with these controversial issues (Woolcock, 2012).

Changing nature of comparative advantages made price competitiveness a significant factor to determine the success and stability in the market. Combined with the shift in world demand towards upmarket and high-tech products, such developments enforced advanced economies, especially European business undertakings to invest in innovation, design and R&D invetments. Global production process also resulted an import dependency to inputs (and intermediates) whose share rose over 50 percent in the EU. The EU, soon had to secure its *access to resources* (i.e. energy, metals, primary raw materials, and components) globally, and to minimise its dependency on external energy sources.

These developments affected the trade patterns and relative competitive position of many European actors depending on the degree and nature of their involvement in the global economy asked for. The global circumstances also motivated civil society actors concerning issues as diverse as the climate change, public health, food security, consumer safety. Globalisation and global value chains also affected European business to face different national

[4] The issues cover investments, competition, government procurement and trade facilitation.

regulatory regimes in terms of technical, environmental, consumer, labour standards; various investment rules, discriminatory public procurement practices, and competition and state aid policies. This induced the EU that has higher standards and regulations to ask for harmonised rules in these areas. It was, thus not surprising the developments in the global economy also induced repercussions in EU's trade policy realm.

A further development was the growing concern over the role of international regimes to govern the world economy amidst global challenges. Thus, rising financial instability following a series of successive crises (i.e. Mexico, Russia, Far East Asia and post-2008 global economic and financial crisis in the Western economies) led to the questioning of the principles and existing institutional structure of international monetary and financial architecture. IMF's responses are found to be insufficient and therefore enhanced governance mechanisms are needed in order to reduce the financial vulnerability. A similar development occured in the realm of trade as globally-induced pressures urged for an expansion of the scope of governance under multilateral regime and regional trading arrangements. This induced an approach in trade negotiations not only to deal with trade instruments (tariffs, trade measures etc.) but also a wide range of trade-related domestic regulatory issues. In this context, the EU has been one of the ardent supporters for a more inclusive and broadened trade regime.

The EU in its *Global Europe*[5] strategy in 2006, in order to contribute to stimulating growth and jobs, highlighted the 'need to adapt the tools of EU trade policy to new challenges, to engage new partners, to ensure Europe remains open to the world and other markets open to' EU (p.2). This new strategy indicated that the EU's trade agenda transforms into a new phase where market access will be key to European exporters especially in competitive sectors, trade in services, public procurement. The strategy also indicated that the EU focus should be to complement the multilateral system with the free trade agreements. It stated that FTAs 'if approached with care, can build on WTO and other international rules by going further and faster in promoting openness and integration, by tackling issues which are not ready for multilateral discussion and by preparing the ground for the next level of multilateral liberalisation' (p.10). This signalled for the coming periods of the orientation in EU's trade policy. Indeed, Lisbon Treaty in 2009 brought significant changes to trade policy and essentially clarified the EU competence and extended it into key areas. Accordingly, trade in services,

[5] *Global Europe Competing in the World: A Contribution to the EU's Growth and Jobs Strategy,* The European Commission, 2006. http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf

trade related aspects of intellectual property and foreign direct investments. This brought an end long standing debate on the competence in these fields, although special provisions were set to regulate sensitive sectors in services.

Table 1. EU trade strategy under different terms, changing concerns and venues

Term	Main strategy document	state of affair in WTO	objectives / attention	priority issues	Negot. venue
1995-1999 **Santer-Brittan**	***1996 Communi-cation***	**1996 Singapore Ministerial Conference**	**Market access (non-reciprocal)** **NTBs** **New Rules**	**Singapore issues** **Built-in agenda**	**WTO** **WTO+** **WTO-X**
1999-2004 **Prodi-Lamy**	***Lisbon Strategy***	**failed Seattle Summit '99** **Doha Development Round- 2001** **Cancun 2003**	**Market opening isn't enough. Behind-the-border measures to be focused** **Business support and societal needs**	**Built-in agenda** **Development**	**WTO** **WTO+** RTAs
2004-2009 **Barrosso-Mandelson** **(2008-2009)** **Barrosso-Ashton**	**2006** ***Global Europe*** **strategy**	**Hong Kong 2005** **2006 Doha suspended**	**Market access (reciprocal)** **New Rules** **Jobs and growth**	**Investment issues** **IPR** **Public Procuremet** **Trade in services**	**RTAs** **WTO**
2010-2014 **Barrosso II - de Gucht**	**Trade, Growth and World Affairs, 2013** *as a core component of* ***EU's 2020 Strategy***	Extended Doha negotiation with meager results	**-Assess progress in Global Europe** **-Sustainable and inclusive growth** **-Global crisis**	**High-tech; 'green' growth;** **Services;** **Raw materials;** **Climate change**	**RTAs** WTO
2014-2019 **Juncker-Malmström**	***Trade for All*** **2015**	stalled DDA	**Responsible trade & investment policy** **Jobs and growth**	**Effectiveness; transparency; and values to consider societal needs vs. globalisation**	**RTAs (i.e.TTIP and DCFTAs)** WTO

Starting in mid-2000s and with the *Global Europe* strategy the FTAs became the central venue for the EU to regulate its trading relations with its partners though WTO track has never been abandoned. The domestic policy priorities has been decisive in shaping its trade agreements. As Woolcock, 2007 once emphaised:

"The EU has not used a single model in its FTAs. All agreements appear to be negotiated flexibly to suit the EU and its partners in each specific case. Nor does the EU make offensive use of the *acquis communautaire.* Clearly the *acquis* shapes the EU's negotiating position, just as domestic policies shape a single country's position in any negotiation, but the EU has not (to date) been very aggressive in pushing for harmonization *à la acquis communautaire*. The EU has however, been explicit about its desire to promote regional integration in other regions of the world. In this sense it has sought to export the idea of regional integration more than the specific *acquis communautaire*." (p.4).

The EU modeled its trade relations with its trading partners mainly under its new generation Free Trade Agreements covering an expanded agenda based on its trade strategy. These multiple models of FTAs have different characteristics with respect to depth and comprehensiveness depending on trade patterns of the EU with third countries, market access opportunities and interests of stakeholders reflected in the agreements. Besides customs union links with Andorra, San Marino and Turkey, the EU has an increasing number of preferential trade arrangements[6]:

European Economic Area with Norway, Iceland and Liechtenstein;

- FTAs in force with various countries like South Africa, Ukraine, Western Balkans, Georgia, Switzerland; South Korea, Chile, Peru, Ecuador, Colombia, and CACM;
- FTAs already concluded and waiting for adoption/ratification with Canada (CETA), Singapore and Armenia;
- Economic Partnership Agreements (EPAs) with several ACP countries (the agreements are negotiated and concluded seperately with different regions (some are implemented provisionally and some wait for ratification);
- Negotiations to modernise FTAs with Mexico, Morocco and Tunisia in the form of DCFTAs;

[6] For a recent overview of EU's FTAs and other trade agreements see, http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf

- Free trade agreement negotiations continue with US (under TTIP)[7]; Japan, India, many ASEAN countries, MERCOSUR (Brazil, Argentina, Uruguay and Paraguay); GCC (Gulf Cooperation Council);
- There is the potential to start free trade partnership with Australia, New Zealand, Bolivia, Angola, Azerbaijan, Cambodia and Laos.

Many of these agreements are ambitious and aim to expand the governance of trade and investment relations with improved rules and new regulatory arrangements in line with the EU's global strategy. The EU is involving in such comprehensive agreemets with countries having more competitive positions in global trade. This brings direct repercussions for the CU which inevitably is required to be updated in order to avoid the adverse implications of these new generation agreements on Turkey's trade relations. One common misconception is that if parallel trade agreements are concluded by Turkey, this evades the problem of asymmetry. However, if a modernisation of the CU is held, this should maket the CU not less ambitious than the FTAs with third countries with regard to the scope. Hence, a narrower coverage only involving industrial and processed agricultural goods shall not suffice to make new framework for bilateral relationship a state-of-the-art arrangement to tackle challenges.

EU Free Trade Agreements: Initial responses in Turkey

The CU, from the inception has been perceived as a 'political step', beyond a technical process, for Turkey's accession to the EU. The deficiencies in its institutional structure (for example, decision making procesures, EU's preferential schemes with third countries, settlement of disputes) have been overlooked because of the political understanding that viewed the CU as a transitionary period which will end up with Turkey's eventual membership sooner. However, developments changed the idea to spark criticism over the functioning of the CU. The major issue is of course related to open-endedness in Turkey's accession process which brings uncertainty about the future of Turkey-EU relations. At more technical level, one important development has been the changing nature of EU's commercial policy field linked to global dynamics, as outlined in the preceding parts. In this context, the EU policy coverage expanded into areas like investment and trade in services, and became more intertwined with

[7] Following three years of intense talks, TTIP negotiations are now effectively on hold, pending the change of Administration in Washington and a clarification of its policy stance on trade with the EU.

other trade-related issues. Second, EU's choice to govern its commercial relations with its trading partners has largely transformed from multilateral disciplines into bilateral scemes, namely free trade agreements. The latter is largely characterised by 'deep' and 'comprehensive' nature of arrangements whereby the coverage goes beyond industrial goods and extend into several regulatory areas. Thus, the scope of these agreements reflect recent developments in global trade much extensively than Turkey's CU. The developments, in conjunction with the political uncertainties in Turkey's accession process, led to the questioning of the functioning of the CU itself.

The critics over the CU largely converge around two major problems: First, the EU's increasing number of FTAs has been central point of critique of the functioning of the CU, especially starting in mid-2000s. It is asserted that the EU FTAs with its trading partners would bring implications as a result of Turkey's commitments under the CU Decision. Accordingly; the policy stakeholders started to emphasised the following problems[8]:

i) The EU's FTAs can cause the problem of 'erosion of preferences' that Turkish firms enjoy in European markets. However, one point must be clarified in these kinds of assessments. Turkey had already a preferential tretament under yhe CU for long, but the EU being a sovereign entity can have similar deals with other trading partners. Actually, all of its FTAs should be considered as 'trade re-orientation' rtaher than 'trade diversion' because these FTAs equalise conditions for third country traders. However, it should be noted that preferential trading agreements (like FTAs) are far from ideal unless they are a part of a broader political strategy (Erixon and Lee-Makiyama, 2010). In this respect, the CU is argued to be a stage in Turkey's full integration to European economy. The criticism in Turkey is not directly relevant to rising competitiveness of third parties, but that Turkey's position is not taken into consideration by the EU in framing its trade policy choices. Turkey cannot affect the revision or negotiation of EU's trade agreements because it is not a member. It is explicitly excluded from the consultation mechanism when the EU adopts trade policy decisions with respect to third countries.

[8] See, Akman (2010) for a detailed examination of critics.

ii) Turkish firms cannot receive an automatic reciprocal access to third country markets with which the EU concludes an FTA, while the products from these countries can enter into Turkish market with no tariffs and quantiative limitations. This 'asymmetry' is argued to affect Turkey's terms of trade and welfare adversely. The EU's trade partners that had concluded FTAs with the EU or continue to negotiate may refrain from concluding similar agreements with Turkey despite the 'Turkey Clause'. This clause requires these partners to start parallel negotiations with Turkey, but it is not a binding mechanism and many partners including South Africa, Algeria and Mexico refused it. The turning points was with the US that initiated Transatlantic Trade and Investment Partnership (TTIP) with the EU but refused to negotiate with Turkey of a free trade agreement[9]. Moreover, the EU reflects its own priorities in its FTAs, and these agreements do not take into account Turkey's special interests[10].

iii) There are latecomer effects. In particular, Turkey can conclude FTAs only after the EU has concluded the FTAs. As a result the FTA with Turkey is concluded usually after a couple of years after the conclusion of the FTA with the EU. This puts Turkish exporters into disadvantageous position with regards to EU exporters, who can obtain preferential status by penetrating into third country markets several years earlier.

iv) Turkey cannot enter into FTAs with third countries with which the EU has not accorded a deal. This restrains Turkey's freedom to enter into negotiations with a third country. There are exceptions to this. Turkey concluded its FTA with Malaysia eralier than the EU, and exploratory talks with Pakistan for an agreement. Nevertheless, these initiatives are not welcome by the EU.

The second critique was related to the 'asymmetries' in the decision making and Turkey's participation. Accordingly, it became more difficult for Turkey to follow and align its domestic

[9] For an evaluation of TTIP from Turkey's perspective, see Akman (2014).

[10] However, it should also be considered that Turkey has difficulties in offering liberalisation commitments in several FTAs. Its willingness is shallow especially regarding primary agricultural goods in the case of Colombia, Ecuador and Canada; and standards vis-a-vis Japan, Canada and other advanced economies.

legislation to EU as a result of expanding *acquis,* under the existing consultation mechanisms and dispute settlement understanding. As argued in the World Bank Report (2014)[11]:

> "A key challenge is that while Turkey has the obligation to align itself with the common commercial policy and technical legislation of the EU in areas covered by the CU, it cannot participate in all of the EU's decision making mechanisms in these areas. Even in those 140 EU committees where Turkey does participate, it has observer status and so is not allowed to vote. Furthermore while Turkish experts are sometimes consulted on draft measures concerning the CU, they are not systematically communicated to them. In those cases where draft legislation is transmitted, it is often communicated at a late stage. This means that Turkey sometimes is informed of new regulations when they have already been made public or have been sent to the Council. As an accession country, Turkey can only join a committee once it has aligned with the *acquis* but some areas where full alignment with the *acquis* is not yet achieved are nonetheless covered by the CU". (p.38).

The customs union has no proper dispute settlement mchanism. There is no special arbitration procedure apart from well-defined categories of cases:

- Differences between the EU and Turkish legislation…. cause or threaten to cause impairement of the free movement of goods or deflections of trade… (Art. 56(2) of Decision 1/95);
- Safegurad measures taken in accordance with the Agreement (Art. 60 of Additional Protocol); and
- Rebalancing measures taken by either party (Art. 62 of Decision 1/95).

However, as Neuwahl (1999) argued earlier 'it is not always in interest of a party to apply such countermeasures, but the way of arbitration on a problem is closed off'. Ineffective and narrowly defined dispute settlement mechanism cannot cope with poor implementation of the commitments under increasing number of trade barriers.

[11] The World Bank Report, *Evaluation of the EU-Turkey Customs Union,* Report No. 85830-TR, March 2014.

The institutional flaws need to be corrected so that the CU work more efficiently and both parties benefit from the changing global environment. Thus the customs union need to be modernised to make it up-to-date and achive its objectives.

The Need to Revise the Customs Union: Preliminary steps and the challenges ahead

Despite its long-term implications, the customs union between the EU and Turkey was never designed as a full-fledged mechanism for a long-term relationship. Instead, it was scheduled as a transitional arrangement, while not being technically built to resist two decades-old global changes. As time passed, the institutional deficiencies became more visible, indicating a strong need to reduce asymmetries in the decision making processes and to bolster the effectiveness of consultation mechanisms.

The issue was first initiated by S. Füle, former European Commissioner for Enlargement and European Neighbourhood Policy. With Turkey's accession negotiations leading towards an impasse, the European Commission in October 2011 has proposed a renewed "positive agenda" to revitalise the process. The agenda was launhed in 2012, and covered a wide range of issues, including the deepening of economic relations to realise the full potential of the Customs Union[12]. This was an initial step to evalute the CU to get most out of it.

This idea has not been in progress substantially until the parties decided to establish a dialogue to upgrade the CU. In this context, a Senior Officials Working Group was established, in 2014. The Group following a scoping exercise adopted its Report in 2105, lagely based on the influential study by the World Bank[13]. It suggested a series of steps to better implement/amend the CU such as improved joint decision making and dispute settlement mechanisms; participation by Turkey to EU's relevant committees; mutual communication in the field of *acquis* to be incorporated into Turkey's domestic legislation. The Report also indicated that the enhancement of bilateral relations need to broaden the areas to be covered, namely services, public procurement and further liberalisation of primary agricultural products. Thees insights were reiterated by a Memorandum of

[12] *Positive EU-Turkey agenda launched in Ankara,* MEMO 12/359 17 May 2012, http://europa.eu/rapid/press-release_MEMO-12-359_en.htm

[13] For the SOWG Report, see http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154367.pdf

Understanding to modernise the CU between the EU and Turkey, in May 2015.

The impact assessments by Turkey and the EU held independently of each other came to similar findings and proposals for the establishment of a new framework in Turkey-EU bilateral trade relations. Alternatives scenarios proposed in these studies largely converge around three main alternative assumptions; with some variations[14]:

First will be ***to keep the status-quo*** without moving the substance of the CU into broader areas (i.e. industrial and processed agricultural products, only), and having no major changes in the current FTA asymmetries. According to the Yalçın, Aichele and Felbermayr, 2016, this route will bringsalmost no welfare increase (actually a marginal decrease) and lowers GDP for Turkey, and negligible increase in EU's welfare. The Turkish exports will decline to EU market if the EU successfully concludes its FTAs while Turkey cannot with third parties (especially TTIP and MERCOSUR), especially in sectors like metals and transport-equipment.

Second, is the ***replacement of the CU with a Free Trade Agreement (FTA) or DCFTA.*** Under this route, two options can be considered: the current CU is transformed into an FTA for industrial goods, or it becomes a deep and comprehensive FTA (DCFTA) in which trade in all goods (industrial, agricultural) and trade in services are liberalised; and public procurement markets are bilaterally opened. Accordingly, in terms of EU FTAs, Turkey faces no more asymmetrical challenges as it can apply its tariffs towards third countries in full sovereignty, but will have to consider the costs associated with complex rules-of-origin arrangements that need to be integrated.

Despite varying assumptions and modelling, all studies reveal that the result will be a significant drop in welfare and in GDP (0.81-1.21 percent in Yalçın, Aichele and Felbermayr, 2016). Turkey's analysis indicates the declien in case of downgrading the CU to an FTA, while DCFTA can raise the GDP by 1.6 percent. However, this increase will not be as high as in the deepening (third scenario below) of the CU. Similarly, the EU's impact assessment also reveals that Turkey can have a marginal GDP gain under

[14] An independent leading study held by Ifo Institute in Germany in 2016 analysed impact of similar alternative scenarios. See, Yalçın, Aichele, and Felbermayr (2016), *Turkey's EU integration at a crossroads',* GED Study, Bertelsmann Stiftung, available at: https://www.bertelsmannstiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/NW_Turkey_s_EU_integration.pdf

DCFTA, its consequences for many sensitive sectors will be negative because of the negative income effect of the DCFTA overall.

Third alternative is a broad-based one. It offers that the ***Customs Union is upgraded*** to keep the existing customs union in industrial goods unchanged while trade in agriculture and fishery products (partly or in full), trade in services (and establishment); non-tariff barriers; and public procurement can be liberalised under a free trade agreement. The studies reveal the highest gains under this route, in terms of welfare and GDP as well as bilateral exports increase. According to Commission's impact assessment[15], the GDP increase in Turkey will be sizeable at 1.46 percent (though some sensitive agricultural sectors will end up with severe competitive pressures), and 1 to 1.9 percent in Turkey's assessment analysis. The Ifo study also proves that the welfare gain will be significant for Turkey in the case of partial and comprehensive deepening, but the highest gains accrue to both Turkey and the EU (almost 2.5 percent; and 0.73 percent respectively), if this scenario is coupled with a case where Turkey can conclude basic or equivalent free trade agreements FTA partners of the EU. An extension of the EU-Turkey Customs Union to the agricultural and service sectors would have a strong positive welfare effect on the Turkish economy. The gross domestic product could rise by an additional 1.84 percent. Turkish exports to the EU could increase by 70 percent overall.

The figures in all assessments illustrate that an enhancement of the customs union (i.e. third route) will bring further benefits. Despite differences in trade modelling and alternative scenarios, they all come to the conclusion any enhancement of the bilateral trade framework and modernising the CU operation will bring the highest economic gains. The gains will be lower or even negativein other options like any *rollback to Free Trade Agreement (or a DCFTA also covering products already regulated under the CU)* replacing the CU. It is also more constructive compared to "*do-nothing approach*" (i.e. to keep the status quo). compared to a replacement of the CU with an FTA, or doing nothing. It is estimated that *upgrading* can bring a strong and positive welfare effect on the Turkish

[15] The European Commission's impact assessment document accompanying its '*Recommendation for a Council Decision authorising the opening of negotiations with Turkey on an Agreement on the extension of the scope of the bilateral preferential trade relationship'*, is available at: http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2016/swd_2016_0475_en.pdf .
The document is based on the findings of the World Bank (2014) and the independent BKP study (2016) available at: http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2016/turkey_anx6_en.pdf

economy, GDP and employment. It is expected to correct the deficiencies in the existing system to release unfulfilled trade potential; to mitigate insufficiently predictable and stable trading environment; and to prevent poor implementation of the commitments.

Upgrading in this context requires concrete actions to take in many prominent issues:

- ***Widening:*** The bilateral framework need to be broadened into all aspects of trade. The enhancement can be through keeping the scope of the existing customs union unchanged, but with necessary institutional amendments. It can be extended into new areas by means of establishing a deep and comprehensive FTA (DCFTA) in primary agricultural goods, trade in services, and public procurement in line with the EU's new generation trade agreements with advanced and other emerging economies. Modernisation of the CU will increase interdependence which serves as an insurance against the negative implications arising from unfavourable political sentiments.

- ***Reducing asymmetries:*** A further alignment by Turkey of the European *acquis* will definitely improve predictability in business environment and investment climate. However, alignment requires more effective operation of consultation mechanisms, notifications, and institutional coordination. Elimination of asymmetries by including Turkey in every possible EU committees with respect to the FTAs with third countries will encourage Turkey for a better harmonisation of its commercial policy.

The Council of the EU started is deliberations on the Commission`s proposal in January 2017. The proposal is under discussion in the Council Working Groups COELA and Trade Policy Committee, as well as in the European Parliament (INTA Committee). The negotiations can start once the Council adopts the negotiating directives, and Turkey takes its decsion to start. In the meantime, informal exploratory talks with a view to facilitating the future negotiation process continue.

Ultimately upgrading is possible through a process of mutual political consensus. It also requires a strong motivation to make necessary reforms in turkey. However, the framework of the CU must be modernised to make it more resilient to future developments so that it helps to mitigate the negative implications stemming from stalled accession negotiations and at the same

time creating a sustainable architecture for smoother operation of the association relationship.

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