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The EU-Turkey Customs Union: Towards a Revision of the Legal and Institutional Framework?

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INTRODUCTION

More than half a century ago, Turkey and the European Economic Community initiated a new era in their relations by signing an association agreement. The relations anchored Turkey in Europe and envisaged to slowly integrate Turkey in the internal market, possibly even making Turkey a European Member State ('MS') one day. To achieve this goal, a customs union ('CU') was established, entering into force in 1996. The rationale behind this CU was to change the economic odds of Turkey for the better.

Fast forward to the present day and it is clear that Turkey is a state with which the European Union ('EU') maintains close ties. Turkey even takes place on the list of a few countries, enjoying a privileged status. Turkey is closer on its way of becoming a full-fledged MS: it has acquired the status of candidate state, and the accession negotiations are ongoing.[1] More importantly, the CU has integrated the Turkish economy in the European internal market to a large extent. This has proven to be a catalyst for the increase of the trade between the European Union and Turkey. The Turkish Ministry of EU Affairs indicates that this trade volume has grown from USD 36,2 billion in 1996 to USD 142,8 billion in 2010.[2] The World Bank estimates that this was USD 147 billion 2012.[3] This placed Turkey as the fifth largest trading partner of the EU,[4] while the EU was the most important trading partner for Turkey.[5]

The final goal of the association and the reason why the CU was put in place, has not been fulfilled. Twenty years after the coming into force of this CU, Turkey is still not a European MS. While at a certain point in time, it seemed within reach: Turkey was indeed heading in the right direction and accession to the Union seemed likely. The odds seemed to have changed however, when both Chancellor Merkel and ex-President Sarkozy implied that Turkey is not a European state in the sense of article 49 TFEU, by opting for a 'privileged partnership.' Additionally, the Turkish government has been under heavy criticism. While the economic indicators are positive, freedom of expression and press appear to have

[1] Of the 35 chapters, 14 have been opened and 1 provisionally closed. Available at http://ec.europa.eu/enlargement/countries/detailed-country-information/turkey/index_en.htm

[2] Turkish imports of goods from the EU increased from USD 24.3 billion in 1996, to USD 78.7 billion in 2015, while the Turkish exports to the EU increased from USD 12.5 billion increased to USD 64 billion. Statistics available at the Turkish Statistical Institute, http://www.turkstat.gov.tr/UstMenu.do?metod=temelist

[3] World Bank, *Evaluation of the EU-Turkey Customs Union,* Report No. 85930-TR, March 28, 2014, 1. ('World Bank Report')

[4] See http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_122530.pdf

[5] See http://www.turkstat.gov.tr/PreHaberBultenleri.do?id=21783

regressed and judiciary is not fully independent.[6] Thus, as former President Chirac emphasized that the outcome of the accession negotiations were open-ended, the accession of Turkey to the EU is not guaranteed.[7]

Exactly this question holds important repercussions for the working of the CU. It is no secret that the CU had deficiencies and anomalies from the very start, yet nobody could foresee these problems to become much clearer as time passed by. This is clear from the report, prepared by the World Bank, which resulted in an extensive analysis in 2014 to map the economic and legal functioning of the CU. Its general assessment is positive as the CU *'was a pioneering effort'* by which *'trade integration between the EU and Turkey has increased dramatically over the last two decades'* and *'brought greater benefits than a free trade agreement'* for the parties. Yet, the ongoing political and economic transformation *'is exposing design flaws in the CU.'*[8] In turn, these flaws have translated themselves into more powerful threats to the domestic economy of the partners, leading to obstacles in the internal policies of both parties. Both parties take measures to safeguard their economies, these hinder the functioning of the CU and render the free movement obsolete. More worryingly, while Turkey was willing to accept the anomalies so long the goal of accession was in sight, changing trends in global trade and in EU-Turkey relations have led to a national frustration.

The purpose of this paper is to address and analyze the anomalies and deficiencies which impede the proper working of the CU. Possible solutions to how the working of the CU might be improved will be sought. Chapter 1 examines the legal background of CU, puts forward how it was conceived and discusses the subject matter of the CU. Chapter 2 lists and analyzes the deficiencies and problems that have been at the core of many complaints. In chapter 3, this paper will try to formulate solutions and envision the future reforms to be undertaken. Finally, a conclusion will be provided.

[6] See Turkey Progress Report 2015, http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_turkey.pdf

[7] D. DINAN, *Ever Closer Union: An Introduction to European Integration,* Hampshire, Palgrave Macmillan, 2005, 156-157.

[8] World Bank Report, 1.

CHAPTER 1: THE EU-TURKEY CUSTOMS UNION

A. The Legal Framework

a) Association Agreement

After becoming a member of the Council of Europe in 1949 and of NATO in 1952, Turkey tried to achieve even closer relations with the European Economic Community by seeking to become a member in 1959, after which the Association Agreement with Turkey[9] ('Ankara Agreement') was signed in 1963. This agreement was concluded as a mixed agreement, whereby both the European Economic Community, and the MS signed the agreement, and entered into force on January 1, 1964.

The Ankara Agreement was concluded on ground of former article 238 EEC (217 TFEU), the legal base for the conclusion of association agreements with third countries. What association exactly means and entails, cannot be defined in one clear-cut definition. Becoming associated does not have a pre-determined set of rules or objectives, nor identical means in each process of association. However, it can be safely stated that all association agreements set out a legal framework, in which further legal relations between the EU and the associated country are established. Contrary to article 207 TFEU, which essentially is meant to promote, facilitate or manage trade in case of a direct or indirect effect on trade of goods, association agreements go much further. The latter are not limited to commercial areas but might entail economic, political, technical, financial, cultural, environmental areas and possibly even free movement of persons.[10] Simply put, association can be *"anything between full membership minus 1% and a trade and cooperation agreement plus 1%."*[11] More specifically, association agreements envisage to create special and privileged links with a third country, ties which allow that country to participate in the Community system to a certain extent.[12] With this general context of association agreements in mind, it is thus safe to say that these agreements can indeed envision far-reaching objectives. This especially holds true for the Ankara Agreement.

[9] Council Decision (64/732/EEC) *OJ* L 217, 29 Dec. 1964, 3685-3686.
[10] D. EDWARD, R. LANE, *Edward and Lane on European Union Law,* Edward Elgar Publishing, Cheltenham, 2013, 893.
[11] D. PHINNEMORE, *Association: Stepping Stone or Alternative to EU Membership?,* Sheffield, Sheffield Academic Press, 1999, 23. ('PHINNEMORE, Association')
[12] Case C-12/86, *Demirel* [1997] ECR 3719, 9.

The Preamble stipulates that one of the objectives was to *'to promote the continuous and balanced strengthening of trade and economic relations.'* This stood alongside the objective of *'a continuous improvement in living conditions in Turkey*' through *'accelerated economic progress and the harmonious expansion of trade'* with the aim to *'reduce the disparity between the Turkish economy and the economies of the MS.'* While the economic and social goals can be seen as tied together, these objectives are not the ultimate goals. To this end, the Preamble envisages that the *'support given by the European Economic Community to the efforts of the Turkish people to improve their standard of living will facilitate the accession of Turkey to the Community at a later date.'* Additionally, article 28 of the Ankara Agreement, whenever the circumstances and conditions have made sufficient progress, *'the Contracting Parties shall examine the possibility of the accession of Turkey to the Community.'* Thus, the Ankara Agreement was a *'genuine pre-accession agreement,'* which preparing Turkey for an accession to the EEC.[13] Following this ultimate objective, Turkey would become a full-fledged European MS one day. This accession-perspective explains why the Ankara Agreement was concluded as a mixed agreement, whereby both the Community and the MS acted as signatories of the treaty, even though there was no reason to act in such a way from a legal point of view.[14]

The Ankara Agreement prescribes a gradual transition to the goal of accession, and to this end, it lays down different phases. Article 2(3) lays down a preparatory, transitional and final stage. The preparatory stage had a duration of 5 years, with the view of strengthening Turkey's economy.[15] The transitional stage was supposed to last 12 years, in which the CU was to be established, and economic policies aligned.[16] Finally, the final stage is based on the CU and prescribes the closer coordination of economic policies.[17]

[13] M. MARESCEAU, "Turkey, A Candidate State for the Union" in N.N. SHUIBHNE, L.W. GORMLEY (eds.), *From Single Market to Economic Union: Essays in Memory of John A. Usher,* Oxford University Press, 2012, 318. ('MARESCEAU, Candidate'). The Court of Justice, however, does not have a clear view, occasionally emphasizing that the Ankara Agreement *'pursues solely a purely economic objective'* (See Case C-317/08, *Ziebell* [2011] ECR I-12735; Case C-221/11*, Demirkan* [2013] not yet published), while changing views in another case by stating that the Ankara agreement is based on grounds *'that goes well beyond considerations of a purely economic nature'* (See Case C-450/11, *Dülger* [2012] published in the Electronic Reports).
[14] M. MARESCEAU, "A Typology of Mixed Agreements" in C. HILLION, P. KOUTRAKOS (eds.), *Mixed Agreements Revisited: the EU and its Member States in the World,* Hart Publishing, 2010, 17.
[15] Article 3 Ankara Agreement.
[16] Article 4 §1 Ankara Agreement.
[17] Article 5 Ankara Agreement;

The CU is a very specific element in the external relations of the European Union, setting the Ankara Agreement apart from many other association agreements. Not only does an association based on a CU belong, both in its objectives as its content, to the most far-reaching agreements,[18] establishing such a CU is *'an exceptional and almost unattainable objective in trade relations with a third country, and the Association Agreement, by establishing a CU, clearly went far beyond the creation of a classical free trade area and even existing models of internal markets between EU and non-EU MS, such as the EEA or the partial and incomplete bilateral internal market with Switzerland do not establish a CU.'* [19] It is to be acknowledged however that Turkey is not the only third country to have this CU with the EU: both Andorra and San Marino also enjoy the most integrated economic cooperation. Yet, these microstates are not capable of holding the same economic clout as Turkey due to their geographical size. Even if a comparison would be made however, the CU with Turkey envisages a stronger commitment. The agreements with Andorra and San Marino only establish what is needed for a CU, whereas Turkey adopts a larger range of the *acquis* for the establishment of an internal market for goods.[20]

In addition to the CU with the microstates, which are not MS, the EU had in practice established a CU with other third countries: Greece, Cyprus and Malta. The idea behind the CU with all these third countries was to put in place a transitory framework, and was in essence a step towards complete accession to the European Union.[21] Both for Greece and Turkey, a CU was initially considered as the preferred basis for any association between the EEC and the third country, whereas the objective of a CU in the relations with Malta and Cyprus was less clear, since the agreements merely envisaged the *'progressive elimination of obstacles to trade.'*[22] Yet, the relations with Turkey have followed another path and Turkey has failed to become a MS. Anyhow, it needs recognition that the establishment of

[18] C. FLAESCH-MOUGIN, *Les Accords Externes de la Communauté économique Européenne, essai d'une typologie,* Bruxelles, ULB, 1979, 211.
[19] MARESCEAU, Candidate, 322.
[20] See below. O. TURHAN, "The Implications of the Visa Requirements for the EU-Turkey Customs Union: Free Movement of Products-Not the Producer" in D. THYM, M. ZOETEWEIJ-TURHAN (eds.), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship*, Nijhoff Publishers, 2015, 266. ('TURHAN, Implications')
[21] C.Z. PIRIM, "The EU-Turkey Customs Union: From a Transitional to a Definitive Framework," *LIEI* 42, 2015, 36. ('PIRIM, Transitional')
[22] It needs recognizing however that the Ankara Agreement did not provide for a timetable for tariff reductions; indicating the need for greater flexibility due to Turkey's relative economic weakness. D. PHINNEMORE, Association, 46-47.

a CU is still a very rare achievement: even the other current candidate MS[23] do not enjoy such a close economic cooperation with the European Union.

Thus, it is clear that the CU expresses the main rationale behind the Ankara Agreement: the gradual integration of the Turkish economy in the internal market.[24] The nature of a CU was described in the Birkelbach Report,[25] laying down the first strict conditions for membership:

> *"the advantage of an association based on a CU consists especially in a progressive rapprochement of the associated country to the Common Market preparing the ground for its future accession. This is why this formula is particularly recommended for countries which wish to adhere to the Community but which do not fill the necessary economic conditions for accession. If these countries are ready to get out from the political order that results from the narrow links of the association to respect the established principles and to submit themselves to the institutional control of the association, the CU will offer them more advantages than the other types of association."*

The general framework of the Ankara Agreement prescribes the CU as one, albeit very important, facet of the integration. The Ankara Agreement foresees other ways to integrate Turkey in the EU. To this end, the Ankara Agreement is characterized by the non-discrimination provision,[26] together with the progressive implementation of free movement of workers,[27] the abolishment of restrictions on free movement of establishment,[28] and services.[29] While these last three economic provisions are programmatic in nature, the further implementation of this agreement has been trusted to the Association Council.[30] Yet it is clear that all of these provisions point to the European *acquis* as guiding principles. This

[23] Albania, FYROM, Montenegro and Serbia.
[24] T. TAKACS, "Legal Status of Migrants under the Association, Partnership and Cooperation Agreements of the EU. How far from EU Citizenship?" in L.S. TALANI (ed.), *Globalisation, Migration and the Future of Europe: Insiders and Outsiders,* Routledge, New York, 2012, 82.
[25] Report by Willi Birkelbach on the Political and Institutional Aspects of Accession to or Association with the Community, 19 December 1961, 26, available at http://www.cvce.eu/en/obj/report_by_willi_birkelbach_on_the_political_and_institutional_aspects_of_accession_to_or_association_with_the_community_19_december_1961-en-2d53201e-09db-43ee-9f80-552812d39c03.html (available in French)
[26] Article 9 Ankara Agreement.
[27] Article 12 *Ibid*.
[28] Article 13 *Ibid*.
[29] Article 14 *Ibid.*
[30] Article 22 *Ibid.*

is the reason why the Ankara Agreement had been called an '*integration agreement*.'[31] The main plan consists in integrating Turkey in the internal market, on multiple smaller levels, so as to be able and diminish the impact when Turkey finally joins the EU as a whole. The Turkish government perceived the CU as a facet, part of some kind of pre-accession strategy, tying Turkey to the European Union and thus making accession likely, especially as it brought with it an increased political dialogue and introduced a structured relationship.[32]

b) Additional Protocol

While the Ankara Agreement mentioned the free movement of goods, the further implementation of this CU and the other basic freedoms were dealt with by the Additional Protocol ('AP').[33] This protocol was signed on 23 December 1970 and entered into force on January 1973. It forms an integral part of the Ankara Agreement[34] and it initiated the transitional stage. A timetable for abolishing tariffs and quotas was prescribed. In this regard, the contracting parties undertook different obligations.

The Community was to abolish customs duties, charges and all quantitative restrictions on imports from Turkey.[35] The AP did however foresee in exceptions. The EU could charge import duties, regarding some oil products above a fixed quota, and could implement a phased reduction of duties on imports of particular textile products. Moreover, restrictions in sensitive areas, especially agriculture, steel and iron, textiles, existed. These accounted for a significant part of Turkey's exports to the EU, and thus hindered a full liberalization in Turkey's advantage. It could thus be argued that the AP is protective in nature.[36]

Turkey on the other hand, had the obligation of reducing customs duties and charges made on EU exports to Turkey. These products were classified in two lists. The first category existed in products for which Turkey was deemed to be competitive relatively short after the

[31] M. MARESCEAU, "Les Accords d'Intégration dans des Relations de Proximité de l'Union européenne" in C. BLUMANN (ed.), *Les Frontières de l'Union eoropéenne,* Larcier, 2013, 174.
[32] H. ARIKAN, *Turkey and the EU: An Awkward Candidate for EU Membership?,* Ashgate Publishing, 2006, 86. ('ARIKAN, Awkward Candidate')
[33] Additional Protocol and Financial Protocol, *OJ* L 293, 29 Dec 1972, 3-56.
[34] Article 62 AP.
[35] Articles 9 and 24 AP.
[36] ARIKAN, Awkward Candidate, 65.

AP entered into force.[37] This list was to be subject to no or lower duties after 12 years, thus to be achieved in 1985.[38] The second category of goods were deemed not so competitive.[39] This list was due to be made free of duties after 22 years.[40] Additionally, Turkey undertook to eliminate all quantitative restrictions by 1995, in line with the prescribed progress.[41] Thirdly, the adoption of the Common Customs Tariff (CCT) during the transitional period was a prerequisite.[42] Furthermore, if the EU and Turkey would be able to achieve the free movement of agricultural products, Turkey had the obligation to align the agricultural policy with the Common Agricultural Policy of the EU.[43] Finally, the AP prescribes for closer harmonization in the fields economic policies between the parties, among which competition law and taxation.

For completeness' sake, it needs to be mentioned that the AP envisaged to implement the free movement of workers progressively, between the twelfth and the twenty second year after the entry into force of the Ankara Agreement, thus between 30 November 1974 and 30 November 1986.[44] This was left to the Association Council. This Council was also to take measures to in the field of free movement of establishment and services to abolish existing obstacles and impediments.[45] An interesting given in this area is the standstill-clause, laying down that the both the EU and Turkey cannot introduce any new restrictions than the ones that existed on the moment of entry into force of the AP.

[37] S. TOGAN, "Turkey, Tunisia, and Israel: A Comparison of Agreements with the European Union" in B. HOEKMAN, H. KHEIR-EL-DIN (eds.), *Trade Policy Developments in the Middle East and North Africa,* World Bank Institute, 2000, 77.
[38] Article 10 AP.
[39] ARIKAN, Awkward Candidate, 65.
[40] Article 11 AP.
[41] Article 25 AP.
[42] Article 17 AP.
[43] Article 33 AP.
[44] Article 36 AP.
[45] Article 41(2) AP.

B. Decision 1/95

The long awaited decision of the Council was adopted in 1995, 32 years after the signing of the Ankara Agreement. The meeting in the Association Council held in November 1992, signaling the start of negotiations between the European Communities and Turkey on the modalities for the completion of the CU. [46] These negotiations lasted from 1993 to 1995 and led to the adoption of Decision 1/95[47] by the Association Council on 6 March 1995, which entered into force on 1 January 1996. This decision establishes the CU and prescribes the modalities thereof. In essence, the CU of Decision 1/95 is based on two main grounds: the removal of different sorts of technical, administrative, legal and financial barriers to trade and creating fair competition for the goods circulating within the CU.[48] More specifically, the Decision envisions two specific ways of achieving those objectives: firstly, it establishes the free movement of goods within a common customs territory. Secondly, Turkey is obliged to align itself with the *acquis communautaire* in several internal market areas.

a) Free Movement of Goods

By the establishment of the CU, all customs duties and charges with equivalent effect have been abolished,[49] all quantitative restrictions between the parties are prohibited[50] and Turkey aligns itself to the common customs tariff in its trade relations with the outside world.[51] The first two requirements can be classified as the internal dimension of the CU, while the latter as the external dimension.[52] These changes can be seen as requirements of a CU *sensu stricto,* constituting key characteristics of any CU. The scope of application is however rather limited. The application *ratione materiae* of Decision 1/95 only concerns the free movement of goods and the related issues. After all, Decision 1/95 did not refer to any other freedoms of the EC Treaty, and thus freedoms other than the free movement of goods (such as services and public procurement) remain out of the scope of the CU. These are subject to further decisions of the Association Council.[53]

[46] WTO, *Dispute Settlement Reports 1999. Volume VI: Pages 2095 to 2556,* Cambridge University Press, 1999. 2374.
[47] Decision 1/95 *OJ* L 035, 13 Feb 1996, 1-47.
[48] TURHAN, Implications, 265.
[49] Article 4 Decision 1/95.
[50] Article 5 and 6 Decision 1/95.
[51] Article 13 Decision 1/95.
[52] TURHAN, Implications, 261.
[53] A.F. TATHAM, *Enlargement of the European Union,* Kluwer Law International, 2009, 147.

More specifically, the CU applies to industrial goods and the industrial component of processed agricultural goods. Agricultural products as such have been left out of the CU by article 2 Decision 1/95. By only focusing on industrial products, essential economic areas have remained outside the scope of the CU.[54] *In concreto,* Turkey cut all duties and equivalent charges on the imports of industrial goods from the MS to zero, while the EU did the same for the Turkish imports, maintaining the duties and charges on other sectors. All the customs duties and equivalent charges have disappeared in the year 2000, due to some transitional periods which can be considered as the starting point of truly unrestricted trade between both parties. [55] However, the Community already undertook and abolished nominal tariff rates on the imports of industrial goods from Turkey, as early as 1 September 1971, by concluding an interim agreement and thereby almost achieving the CU at the beginning of the transitional period.[56] With the establishment of the CU, Turkey thus granted reciprocal market access to the EU.

The industrial products benefiting from the abolishment of these obstacles, pursuant to article 3 Decision 1/95[57] are:

- goods produced in the Community or Turkey, including those wholly or partially obtained or produced from products coming from third countries which are in free circulation in the Community or in Turkey.
- goods coming from third countries and put in free circulation in the Community or in Turkey.

For the second category, to establish when products from third countries are in free circulation, article 3§2 Decision 1/95 foresees three conditions. The import formalities are complied with, any payable customs duties or charges having equivalent effect have been levied by either party and if the products have not benefited from any reimbursement of those duties or charges.

A specific document serves as a verification whether or not these products can circulate freely in the territory of the CU. Industrial products principally require an A. TR.-

[54] IBP INC., *Turkey: Investment and Business Guide, Volume 1: Strategic and Practical Information,* International Business Publications, 2015, 255-256.

[55] J. FRANCOIS, "Accession of Turkey to the European Union: Market Access and Regulatory Issues" in B.M. HOEKMAN, S. TOGAN, *Turkey: Economic Reform & Accession to the European Union,* World Bank, 2005, 128.

[56] H. KABAALIOGLU, 'The Customs Union: A Final Step Before Turkey's Accession to the European Union?' in *Marmara Journal of European Studies,* vol. 6 No 1, 1998, 116. ('KABAALIOGLU, Final Step')

[57] Which is a direct copy from article 2§1 Ankara agreement, which in turn was a taken literally from article 10§1 of the Rome Treaty. See KABAALIOGLU, Final Step, 117-118.

certificate.[58] Decision 1/2001[59] of the Cooperation Committee lays down in detail the modalities, and conditions of issuing this certificate. In essence, an A. TR.-certificate provides proof that the goods are in free circulation and indicates their origin.[60] The certificate lays down details of the arrangement and conditions that the goods must meet for the non-payment of any duties. It is used by the customs authorities to determine the rate of duty to be applied, which is thus zero, while without it normal customs duties would apply.[61] Interestingly, this certificate only provides for the status of the origin, and is not a certificate of origin as such. This is best exemplified by the EUR1-certificate, which is used for the import of most agricultural goods or iron and steel products, whose the origin is important.

While neither coal and steel-products, nor agricultural products formally reside under the scope of the CU, the trade liberalization achieved in both areas cannot be forgotten. For the former, a specific trade agreement was concluded by Turkey with the former ECSC.[62] Both parties, in a joint communication to the World Trade Organization, stated that the agreement is *'intended as the complement to the CU in respect of products covered by the European Coal and Steel Community and as a transitional arrangement in respect of such products until […] the year 2002,'*[63] the year of expiry of the ECSC. These products circulate between the parties freely.[64] This agreement was signed on 25 July 1996 and entered into force on 1 August 1996. It was further supplemented by its Protocol No. 1, as amended by Decision 2/99 of the ECSC-Turkey Joint Committee,[65] laying down the rules of origin for the coal and steel-products.

Agricultural products[66] on the other hand amount to a more fragmented picture. Including agricultural products in the liberalization process was dictated by article 17 Ankara Agreement. Pursuing articles 33-34 AP, the achievement of free movement of agricultural

[58] 'Admission Temporaire Roulette.' The arrangements dealing with this document can be found in Decision 1/96.
[59] Decision No 1/2001, *OJ* L 098, 07 Apr 2001, 31-43.
[60] C. PIDGEON, *A Study Guide for the Operator Certificate of Professional Competence (CPC) in Road Freight. A complete self-study course for OCR and CILT examinations,* Kogan Page Limited, 2016, 232.
[61] For further information, see *What is an ATR Certificate,* available at http://www.barringtonfreight.co.uk/blog/atr-certificate/
[62] Agreement between the European Coal and Steel Community and the Republic of Turkey, *OJ* L 227, 07 Sep 1996, 3-34.
[63] WT/REG22/N/1/Add. 1.
[64] Article 2, *supra* 50.
[65] Decision No 2/99, *OJ* L 212, 12 Aug 1999, 21-30.
[66] As defined in Annex I to the Amsterdam Treaty.

products depends on the adjustment of Turkey with the Common Agricultural Policy ('CAP'). While this adjustment was set to be achieved by 1995, 22 years after the entry into force of the AP, it still is unfulfilled to date. Consequently, agricultural products do not enjoy full free movement as such. Another explanation for the exclusion of agricultural products can be found in the political sensitivities that the CU reflects.[67] When compared with other agreements, the CU lacks behind as some FTAs have gone further by including agricultural products.[68] It might thus be stated that the CU with Turkey appears to be outmoded. Nonetheless, all of this has not hampered setting up a preferential status for agricultural products. Both parties have progressed in the preferential treatment of some agricultural products, as part of Turkey's alignment with the CAP on the road to membership.[69]

The situation for agricultural products should however be nuanced. The industrial component of processed agricultural falls within the scope of the CU and consequently enjoy the same treatment as industrial products. For these products, only tariffs on the agricultural components can be levied. This component is established pursuant article 19 Decision 1/95, which clarifies that they are obtained *'by adding together the quantities of basic agricultural products considered to have been used for the manufacture of the goods in question multiplied by the basic amount corresponding to each of these basic agricultural products.'* Since the industrial component is not subject to any customs duties, one could logically expect a greater increase in the trade of processed agricultural products. It seems that such an effect seems rather to have been quite weak.[70] A possible explanation is found in the Rome Treaty, which classifies most processed agricultural products as agricultural products in Annex 2, thus leaving it outside the scope of the CU.[71]

For the agricultural products themselves, these are dealt with by Decision 1/98[72] of the Association Council, prescribing the opening of the Turkish market for specified agricultural commodities, while the reverse situation is dealt with by Decisions 1/72, 1/80 and 1/98 for

[67] J. FRANCOIS, "Accession of Turkey to the European Union: Market Access and Regulatory Issues" in B.M. HOEKMAN, S. TOGAN, *Turkey: Economic Reform & Accession to the European Union,* World Bank, 2005, 129.
[68] Especially the new generation of FTA's. E.g. the FTA with Korea includes both industrial as agricultural products.
[69] *Ibid.,* 127.
[70] A. BURELL, "Turkey's Foreign Trade Position" in A.M. BURELL, A.J. OSKAM (eds.), *Turkey in the European Union: Implications for Agriculture, Food and Structural Policy,* CABI Publishing, 2005, 164.
[71] *Ibid.*
[72] Decision No 1/98 *OJ* L 86, 20 Mar 1998, 1-38. This was last amended by Decision 3/2006, amending Protocol 3 on the rules of origin.

the lifting of European duties for Turkish agricultural products imported in the Union. As a result, and limited to the most striking examples, most *ad valorem* tariffs (thus tariffs on the value, and not on size or quantity) on agricultural products imported from Turkey have been lifted since 1987, while also reducing some specific tariffs. 'Core' CAP products (being cereals, cereal products, sugar, sugar products and olive oil) remain subject to high tariffs, while many processed products still face high specific duties, an entry price system exists from some fruit and vegetables and seasonal *ad valorem* tariffs are still in place for some fruit and vegetables.[73] In general, these bilateral arrangements have led to a significant drop in protection tariffs, leading to a *de facto* FTA for agriculture.[74] For the Turkish agricultural goods imported in the Union, 67 percent of the tariffs have been lifted, while 85 percent was exported duty free to the EU in the period 2008-2010.[75]

Caution is needed with liberalization in this sphere, since they essentially remain subject to cautious bilateral actions.[76] Firstly, there is no time frame to be applied to this process, not setting any clear obligations and thus leaving the issue at the will of the parties. Secondly, *'the provisions of paragraph 1 shall not restrict in any way the pursuance of the respective agricultural policies of the Community and Turkey or the taking of any measures under such policies,'*[77] preserving the autonomous actions of each party. And finally, a safeguard clause can be activated by either party, if *either the quantities or the prices of imported products from the other party in respect of which a preferential regime has been granted causes or threatens to cause disturbance of the Community or Turkish markets.'*[78] Thus, while there are indeed far-reaching concessions culminating to a *de facto* partial liberalization of agricultural products, parties firmly keep the strings in their hands, and a case-by case analysis is required to see the applicable tariffs on various products.

b) Legislative Alignment

[73] See A. BURELL, "Turkey's Foreign Trade Position" in A.M. BURELL, A.J. OSKAM (eds.), *Turkey in the European Union: Implications for Agriculture, Food and Structural Policy,* CABI Publishing, 2005, 163.
[74] World Bank Report, 61.
[75] *Ibid.*
[76] See *supra* 55, 127.
[77] Article 1§2 Decision 1/98.
[78] Article 5 Decision 1/98.

A second key aspect obliges Turkey to align itself with EU law. The idea behind the export of the *acquis* to Turkey essentially is the creation of a parallel legal order,[79] providing a basis to ensure the free movement of goods and to establish a common commercial policy ('CCP'). While these two areas are essential for the functioning of a CU in a technical sense, Decision 1/95 goes further. Turkey is obliged to align itself in areas beyond the adjustment of its tariffs and elimination of quantitative restrictions, namely on the domains of technical barriers to trade, intellectual and industrial property rights, and competition. It should be clear that the obligations of Turkey go beyond what is needed for the free movement of goods and for what is needed for a CU *senso strictu*.[80] Seeing that the obligations on Turkey are far-reaching, it can be understood when looking at the aim of moving further towards the establishment of a common market in which workers and services would enjoy free movement and competition rules would be harmonized. So the legislative alignment on itself serves as an '*additional indication that the relationship was not intended to stop here.*'[81] For the purposes of this paper,[82] the areas of alignment can be differentiated in four categories. Firstly, Turkey undertakes to align itself in the area CCP and implement the EU customs legislation. Secondly, technical barriers to trade in industrial products need to be removed. And finally, Turkey is required to take over the *acquis* relating competition policy and intellectual property law. These laws all mirror either primary or secondary EU law.[83]

An interesting feature in this regard is the case law of the Court of Justice. While it is longstanding case law of the Court of Justice that provisions in agreements with third countries, even when substantially identical to the provisions of the EU Treaties, do not necessarily got an identical interpretation,[84] the Association Council has enabled such an interpretation. Article 66 Decision 1/95 incorporates the homogeneity clause. It stipulates that substantially identical provisions will be interpreted *'in conformity with the relevant decisions of the Court of Justice of the European Communities.'* Due to the absence of a

[79] A. OTT, "The EU-Turkey Association and Other EU Parallel Legal Orders in the European Legal Space," *LIEI,* 42, 4, 2015, 6. ('OTT, Parellel')
[80] OTT, Parellel*,* 27.
[81] H. KRAMER, "Turkey and the European Union: A Multidimensional Relationship with Hazy Perspectives," in V. MASTNY, R.C. NATION (eds.), *Turkey between East and West: New Challenges for a Rising Regional Power,* Westview Press, 1996, 205.
[82] The customs union requires Turkey to adopt EU law in the fields of origin of goods, customs value of goods, introduction of goods into the common customs territory, customs declarations, release for free circulation, suspensive arrangements and customs procedures, movement of goods, customs debt and right of appeal.
[83] S. PEERS, "Livin in Sin: Legal Integration under the EC-Turkey Customs Union," *EJIL* 7, 1996, 414. ('PEERS, Sin')
[84] Such an interpretation depends on an analysis of the provision in the light of both the purpose and the objective of the agreement and in its context. See Case C-170/80, *Polydor v. Harlequin* [1982] ECR 329.

specific time limit, it can be uttered that a CU by its essence encourages such an identical interpretation with the dynamic *acquis,*[85] thus including all the developments of the EU law after the signature of Decision 1/95. This view is further reinforced by the fact that an opposing view would lead to a situation, whereby *'the supplemental value of such homogeneity clauses is diminished.'*[86]

i. Customs legislation and common commercial policy

In its external relations with the world, Turkey takes on the obligations to conducts its commercial relations with third countries based on the European *acquis*. A first and important aspect in this regard is the use of a common customs tariff ('CCT'), which is used on imports from third countries entering the common customs territory through Turkey. Imposed as a key characteristic of any CU by article XXIV GATT, article 13 Decision 1/95 obliges Turkey to adjust itself. Moreover, Turkey cannot change the CCT unilaterally, but is bound to be informed when the Union moves in such a direction, and *'prior consultations shall be held within the CU Joint Committee for this purpose.'*[87] The importance of a CCT necessitates the administrative authorities of both parties to mutual assistance and cooperation. In this regard, article 2§1 Annex 7 of Mutual Assistance stipulates that the parties undertake to assist each other *'...in ensuring that the customs legislation is correctly applied, in particular by the prevention, detection and investigation of operations in breach of that legislation.'* Concretely, the customs law in Turkey was reformed deeply, taking over large parts of the Union's Common Customs Code for the relevant products. This mainly included the Combined Nomenclature, CCT, provisions on tariff classification, customs duty relief, duty suspensions and certain tariff quotas.[88] The changes resulted in protection against imports much lower than the previous Turkish 'nominal protection rates.'[89]

Additionally, Turkey subjects itself to the CCP of the EU. Pursuant to article 207 TFEU, the European CCP entails not only changes in tariff rates and tariff and trade agreements regarding trade in goods and services, but also import and export policy and the measures to

[85] R. PETROV, "Exporting the *Acquis Communautaire* into the Legal Systems of Third Countries", *Eur. Foreign Aff. Rev.*, 13, 2008, 38.
[86] OTT, Parallel, 22.
[87] Article 14 Decision 1/95.
[88] S. TOGAN, "The EU-Turkey Customs Union: A Model for Future Euro-Med Integration," March 2012, 4. ('TOGAN, Model')
[89] *Ibid.,* 2.

protect trade such as in cases of dumping or subsidies. While article 12 Decision 1/95 obliges Turkey to implement an exhaustive list of regulations, Turkey also takes on the obligation to harmonize its commercial relations with third countries as such. Turkey essentially subjects itself to concluding preferential trade agreements with the same third countries, parallel to the agreements that the European Union has already concluded. To this end, article 16 Decision 1/95 prescribes that Turkey will *'take the necessary measures and negotiate agreements on mutually advantageous basis with the countries concerned.'* This has led to the current situation, in which Turkey has 17 Free Trade Agreements ('FTAs') in force, while 14 countries (or country blocs) have entered negotiations to conclude an FTA with Turkey.[90] These FTAs envisaged a liberalization in industrial goods, in addition to mutual concessions on specific agricultural and processed agricultural goods.[91] Next to FTAs, Turkey also bases its Generalized System of Preferences ('GSP') on the EU's, whereby preferences are granted to non-agricultural goods, which also includes raw materials and semi-finished goods.[92] These agreements have progressively liberalized Turkish tariffs on most industrial products, while selectively liberalizing agricultural products.[93]

A final aspect in the CCP, is the use of trade defense instruments ('TDIs'). Since these instruments touch on the import policies, these form an inherent part of the CCP. Consequently, whenever safeguard, countervailing, or antidumping measures are taken by the Union, Turkey has principally the obligation to align itself with these measures and adopt identical measures. While this holds true for relations with third countries, TDIs can be legally applied between the parties. This stands at odds with, and even contradicts the Single Market, which does not allow trade defense instruments to be used in intra-EU trade.[94] Its rationale is found in forcing Turkey to align in the other spheres.[95]

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[90] This number is lowered from 33, of which 11 needed to be repealed due to EU's 2004 and 2007 enlargement. 5 countries are currently in the process of ratifying. See list of countries at http://www.economy.gov.tr/portal/faces/home/free-trade/turkey-free?_adf.ctrl-state=13krfidkbo_172&_afrLoop=1489665900775326# (last visited 12 June 2016)

[91] S. TOGAN, *Economic Liberalization and Turkey,* Routledge, 2010, 18.

[92] *Ibid.*

[93] World Bank Report, 24.

[94] Paper prepared by the Directorate General for External Relations, *Bringing EU-Turkey trade and investment relations up to date?,* 2016, 18 ('Trade and Investment'). Trade defense instruments other than safeguard measures can be suspended if Turkey shows that it has adopted and enforces EU law and case law to prevent case law being distorted within the customs union. For a more detailed analysis, see I. VAN BAEL, J.-F. BELLIS, *EU Anti-Dumping and Other Trade Defence Instruments*, Kluwer Law International, 2011, 29-30.

[95] *Ibid.*

On a general assessment, the 2015 Progress Report concludes to a finding that progress was made, and Turkey *'maintains a good level of preparation'* in the area of CCP. Yet, some points were remarked.[96] Firstly, Turkey should further strive to complete its alignment with the GSP. This is in addition to the fact that Turkey does not have a similar stance to the EU position on membership of certain multilateral export control arrangements. Secondly, Turkey deviates from the CCT, instead using additional duties for certain products.

ii. Abolition of technical barriers to trade

Free movement should not be hampered by technical requirements, possibly different for each party. These include product standards, technical regulations and conformity assessment systems by which all products are deemed to comply with any requirement.[97] In essence, there are two ways to eliminate TBTs: harmonization and mutual recognition. Decision 1/95 has chosen for the former,[98] and Decision 2/97 lists the legislation to be taken over. Turkey has aligned itself to many European and international standards. In the area of technical regulation, Turkey's technical regulation is aligned with the New Approach Directive, while the alignment on the Old Approach is only partly complied with.[99] Furthermore, quality infrastructure, entailing certification, inspection, accreditation and metrology and operation of standardization, has been adopted.

While the commodities in the harmonized sphere do enjoy free movement, the same could not be said for the commodities not falling under any legislation. These in the non-harmonized area and are governed by national laws.[100] With the view of eliminating barriers in this sphere, Turkey had to adopt the mutual recognition principle in the concerned area. This happened rather late, on 1 January 2013. On the EU side, Communication 2003/C256/02 established that a MS must allow Turkish products free access to its markets, seeing that it offers an equivalent level of protection of the various interests involved. Yet to

[96] *Supra* 9, 80.
[97] For an in-depth analysis regarding TBTs, see S. TOGAN, "Technical Barriers to Trade: the case of Turkey and the European Union," *JEI* 30 (1), 2015, 121-147. ('TOGAN, Barriers')
[98] Article 8 Decision 1/95.
[99] Progress Report, 34. The 'Old Approach' was used by the EU from the sixties to mid-eighties, which prescribed the harmonization of technical norms in a very detailed way. Due to the complexity and burdensome character, the 'New Approach' aims for 'essential requirements for protecting health, safety and environment.
[100] TOGAN, Barriers, 130.

avoid such a verification process, mutual recognition essentially requires a high degree of harmonized standards and testing procedures between the parties.[101]

iii. Competition policy and intellectual property law

Both competition and intellectual property law safeguard a proper level playing field in trade. For competition law, with the idea to maintain the competitive forces in the market and making sure that the CU did not become distorted, Turkey was required to adopt common competition rules, state rules and install mechanisms to operate it. Given that no competition legislation, and by extension no competition policy enforcement existed,[102] Turkey had to start from scratch, adopting the 'Law on the Protection of Competition' in 1994 and the establishing a competition authority. These measures can be seen as direct copies of the Treaty provisions article 101 and 102 TFEU. In the same vein, article 32 and 33 Decision 1/95 prohibit anti-competitive agreements and abuse of dominance, while article 34 restricts state aid. Further, a competition authority was installed to see on the enforcement of the provisions. Turkey was additionally required to adapt all of the existing aid schemes to EU standards, while also complying with the notification and guidelines procedures.[103] The obligations in this area are strict, and far more explicit than other agreements.[104] It is criticized to be excessive.[105] It falls outside the basic framework of a CU, and even some MS did not comply with such conditions in the earlier days: it wasn't until 1990 that Italy had national competition law. As for the current situation, Turkey is 'moderately prepared.' While some progress was made, state aid policy seems not to have known any progress and is lacking.[106]

In the area of intellectual property rights, *'the parties confirm the importance they attach to ensuring adequate and effective protection and enforcement of intellectual industrial and commercial property rights.'* It suffices to say that a detailed list of both Union legislation and international conventions were listed to be implanted by Turkey, including the Uruguay

[101] *Supra* 84, 16.
[102] TOGAN, A Model, 10.
[103] Article 39, §2 Decision 1/95. It was however only from 2010 that Turkey adopted law on state aid. See I. VAN BAEL, J.-F. BELLIS, *EU Anti-Dumping and Other Trade Defence Instruments*, Kluwer Law International, 2011, 41. ('BAEL, Anti-dumping')
[104] E.g. contrary to the Europe Agreements, which only state that anti-competitive behavior is 'incompatible' with those agreements, if they affect trade. See PEERS, Sin, 417-418.
[105] KABAALIOGLU, Final Step, 123.
[106] Progress Report, 41.

Round Agreement on TRIPS. The rationale is that the CU can only function *'if equivalent levels of effective protection of intellectual property rights'* are upheld.[107] However, it needs to be pointed out that a derogation of the above mentioned principle of homogeneity, exists in the fact that the annex provides the non-affection of national rules on the exhaustion of International Property Rights.[108] Turkey holds a good level of preparation, while new legislation should be adopted, the battle against counterfeit goods and piracy should be enhanced and awareness spread.[109]

[107] Article 32, §2 Decision 1/95.
[108] PEERS, Sin, 417.
[109] Progress Report, 40-41.

CHAPTER 2: A FLAWED CUSTOMS UNION

A. The Institutions of the Association

The Ankara Agreement prescribed many ambitious goals to be achieved after a period of time. As described above, the Ankara Agreement was a framework agreement. Thus many these goals could not be fulfilled automatically. Rather, institutions were set up for the purpose of furthering and developing the Ankara Agreement. These institutions include an Association Council, an Association Committee and a Parliamentary Committee. All of these institutions are characterized by two main features: their autonomy in relation to the institutions of both parties and decisions being taken on base of rigorous bilateralism.[110] In essence, any progress in the development of relations is based on intergovernmental cooperation, making the goodwill of both parties an essential condition to determine both the functioning and progress.[111]

Among the institutions, the Association Council is the primary player. It has taken far-reaching steps for the purposes of achieving the objectives of the Ankara Agreement, and proved itself to be primordial in taking decisions about the operation of the CU. The Association Council with Turkey is even considered as the most powerful council ever created by any trade agreement of the EU.[112] Article 23 Ankara Agreement stipulates '*the Association Council shall consist of members of the Governments of the Member States and members of the Council and of the Commission of the Community on the one hand and of members of the Turkish Government on the other.'* The tilted balance was redressed by subjecting decisions in the Association Council to an unanimity vote.[113] The Association Council itself set up other committees, pursuant to article 24§3 Ankara Agreement to assist in the performance of its tasks, and specifically to ensure the continuing cooperation necessary for the proper functioning of the agreement. The Association Committee was set up, and is filled with technicians from both sides to develop the association. An additional body is the Parliamentary Committee, which is concerned with the Turkish accession to the EU. A last body, is the CU Joint Committee which was created by article 52 Decision 1/95. It has the objective to ensure that everything functions properly. More specifically, it *'shall carry out an exchange of views and information, formulate recommendations to the*

[110] J. RAUX, *Les Relations extérieures de la Communauté Économique Européenne,* Cujas, 1966, 416-417.
[111] H.B. ELMAS, *Turquie-Europe: une Relation Ambiguë,* Syllepse, 1998, 118.
[112] PEERS, Sin, 421.
[113] KABAALIOGLU, Final Step, 127.

Association Council and deliver opinions with a view to ensuring the proper functioning of the CU' and *'the parties shall consult within the Committee on any point relating to the implementation of the customs union decision which gives rise to a difficulty for either of them.'*[114] Essentially, it is thus a consultation platform in certain areas. This committee meets once a month, indicating that parties understood the importance of close cooperation for the establishment of a CU.

The institutional framework is not without problems. The intergovernmental nature of the relations seems to be a serious drag on the development. Unanimity boils in practice down to a double consensus: next to sharing views with the third country, a common position needs to be established through an internal decision among MS *a priori*. The veto right granted to both parties makes the management of meetings difficult and is makes it hard for the Association Council to promote progressive integration.[115] A second issue concerns the CU Joint Committee. While it is indeed created for the purpose of guarding the functioning of the CU, it is not granted sufficient means to realize its objectives.[116] Finally, the lack of any adequate dispute settlement mechanism in a CU robs private parties of any recourse.

It is argued that the general structure of the Ankara Agreement is characterized by an *'institutional void.'* Specifically, this points *'not so much to a lack of institutional structure for the implementation of the agreements, but rather its diplomatic or intergovernmental character, which […] translates in practice into a lack of parliamentary control and an absence of recourse to judicial dispute settlement.'*[117] This is especially troubling in a situation where Turkish accession is not actual, and certainly not bound to happen soon, while '*the nature of these institutional shortcomings is such that they can be sustained only for a limited period of time.'*[118] If the associated country loses its perspective of accession, it thereby loses its incentive to respect and uphold EU law at the risk of not completing full integration. Situated in this sphere, two major defects become untenable when in the longer run: an inadequate decision-making mechanism and the lack of dispute settlement in the association.

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[114] Article 52§1&2 Decision 1/95. Contrary to the EEA Joint Committee, the CU Joint Committee cannot take decisions, but makes recommendations to the Assocation Council, who will take eventual decisions.
[115] G. LE GUILLOU, *L'Union Européenne et la Turquie,* Apogée, 1999, 243.
[116] C.Z. PIRIM, *Un exemple d'association à la Communauté européenne: le cas de la Turquie,* Bruylant, 2012, 124-125. ('PIRIM, Exemple')
[117] N. NEUWAHL, 'EU-Turkey Customs Union: a Balance but no Equilibrium,' *Eur Foreign Aff Rev* 4(1), 1999, 42. ('NEUWAHL, Balance')
[118] NEUWAHL, Balance', 42.

a) Consultation and Information-sharing

In the area of decision-making, Turkey cannot properly exercise influence on the process. As an associated country situating itself somewhere between a MS and a third country, Turkey has the ability to a certain extent of influencing policies. However, this ability only exist to a minor extent and Turkey's voice passes by largely unheard. In an economic integration of such a depth, close coordination is wished for. The existing situation dictates that Turkey with its many harmonization obligations takes the role of a mere follower of the EU. In a relationship deprived of an accession perspective, the Turkish situation is difficult and untenable.

As an associated country, Turkey has no representatives sitting in the institutions of the MS. This idea combined with article 12§1 Decision 1/95, which puts forward that Turkey will apply law *'substantially similar to those of the Community's commercial policy'* creates a very uncomfortable situation for Turkey. The main repercussion is the absence of a right to vote, and consequently not being able to influence the policy course and legislation. The speech given by Prodi, in which he put forward that the ENP countries could *'share everything but institutions'* can be applied to Turkey to the extent they entail the lack of a voting right. While Turkey has representatives in 140 Committees, they have observer status and thus certainly no right to vote.[119] In practice, Turkey applies policies without its involvement in the decision-making.[120] Turkey cannot veto anything, creating a situation that Turkey is required to apply a customs legislation and an external trade policy, which are fully determined by the MS of the Union. Concretely, Turkey has to adopt the CCT and integrally adopt the CCP, without having a say.[121] It is rightfully contended that Turkey's foreign trade policy is unilaterally formed in Brussels.[122]

This is not to say that there isn't any consultation mechanism or information-sharing with Turkey. While Turkey cannot be seen as decision-maker, it can be said to be a decision-shaper, albeit a weak one. To this end, Decision 1/95 foresees in Articles 54-60 the areas and

[119] World Bank Report, 38.
[120] PIRIM, Transitional, 41.
[121] PIRIM, Exemple, 433-443.
[122] H. KABAALIOGLU, 'Turkey's Relations with the European Union: Customs Union and Accession Negotiations' in P. MÛLLER-GRAF, H. KABAALIOGLU (eds.), *Turkey and the European Union,* Nomos, 2012, 15. ('KABAALIOGLU, Relations')

the procedures that must be followed when laws concerning the CU are adopted. *In se,* granting a third country access to the decision-making process by means of a consultation mechanism should not be taken for granted. The procedural means to achieve consultation are only preserved for external agreements which pursue a high level of mutual economic integration.[123] The most far-reaching involvement third countries in terms of decision-making procedures, is created by the European Economic Area ('EEA'). For the EEA, it is the homogeneity requirement, by which treaty provisions need to be identically interpreted as the case law of the Court, that explains the involvement of EFTA-countries. While the mechanisms with other countries fall short of the depth reached with the EEA, the degree of involvement in the decision-making procedures depends on the specific objectives of the specific agreements, as the bilateral political arrangements between the third country and the EU.[124] The high level of integration of the CU brings about a considerable degree of involvement.[125] The consultation mechanism of the CU is partly inspired by the consultation mechanism of the EEA. But the provisions have *'compounded by the failure to adjust them to reflect Turkey's involvement in the EC's trade policy.'*[126] It should be noted however that there is a difference between consultation and information: while the former is essentially a way to take a third country's position into account, whereby the third country thus acts as a decision-maker, the later serves as a fundamental procedural tool to achieve the uniform interpretation and timely implementation of the *acquis communautaire* in the third country. The procedures differ for three different areas: areas of direct relevance, the CCT and trade agreements with third countries.

'In areas of direct relevance to the operation of the CU,' both consultation and information-sharing procedures are set out. It is in these arears that Decision 1/95 prescribes the procedures in articles 54-60 Decision 1/95. These areas are the ones in which Turkey takes on harmonization obligations: commercial policy, legislation on technical barriers, intellectual property law, customs and competition.[127] Whenever the Union draws up new legislation in aforementioned areas, by article 55 Decision 1/95 Turkish experts must be consulted, copies of the proposal must be sent to Turkey and regular meetings with the CU Joint Committee must be held for the purposes of a second consultation. Whenever draft

[123] R. PETROV, "Exporting the Acquis Communautaire into the Legal Systems of third Countries," *Eur. Foreign Aff. Rev.,* 13, 2008, 47. ('PETROV, Exporting')
[124] PETROV, Exporting, 45-46.
[125] PETROV, Exporting, 46.
[126] PEERS, Sin, 423.
[127] Article 54§2 Decision 1/95.

regulations are tabled before Committees or subsequently referred to the Council, Turkish experts must be consulted.[128] Whenever the relevant legislation is adopted, by article 56 Decision 1/95, Turkey must be informed for the purpose of adopting corresponding legislation. As a non-MS, the legislation adopted by the Union also has to be adopted by Turkey in its internal order, since there is no direct effect.[129] During this process, Turkey still maintains the right to amend the relevant legislation,[130] subject to prior consultations in the CU Joint Committee to ensure that Turkish legislative intervention won't interfere with the CU. While principally there is an obligation to consult Turkish experts, this remains an informal consultation. This does not seem to work properly, since the informal nature *in se* means the lack of systematic conduct.[131] Moreover, while there indeed is a consultation mechanism, prescribing Turkish experts to take part in the process, the Commission is not obliged to follow their advice. If consequently the consultations fail, either informally or in the CU Joint Committee, the CU Joint Committee can recommend methods to avoid injury in accordance with article 58 Decision 1/95. If the legislative differences result in *'impairment of the free movement of goods, deflections of trade, or economic problems,'* parties can take safeguard measures, with a notification sent to the CU Joint Committee.

Regarding the CCT, Turkey is only informed. Article 13§2 Decision 1/95 defines the obligation of Turkey to make the needed changes in its tariff according to the CCT. In addition, article 14§1 Decision 1/95 prescribes Turkey to be informed if any changes by the EU in the CCT. In the intra-European sphere, article 31 TFEU defines that *'Common Customs Tariff duties shall be fixed by the Council on a proposal from the Commission.'* Turkey is fully absent from this picture. The CCT actually entails the common tariff of the EU.[132] Yet, as an inherent part of any CU, the CCT has to be applied by Turkey in a uniform way.

[128] Articles 59 and 60 Decision 1/95.
[129] KABAALIOGLU, Final Step 130.
[130] Article 57 Decision 1/95.
[131] World Bank Report, 38.
[132] J. LEBULLENGER, C. RAPOPORT, 'Les contraintes générées par l'union douanière' in E. LANNON, J. LEBULLENGER (eds.), *Les défis d'une adhésion de la Turquie à l'Union européenne*, Bruylant, 2006, 248. ('LEBULLENGER, Contraintes')

It is in the sphere of trade agreements, that the institutional and consultation mechanisms seem to be especially failing.[133] The absence of Turkey's involvement in the GSP and Trade Policy committees leads to a total absence of the Turkish voice in the formation of the CCP.[134] Committee 133, in which the MS define the common negotiating position, does not grant Turkey any say.[135] While EEA provisions have been replicated, they have *'compounded by the failure to adjust them to reflect Turkey's involvement in the EC's trade policy.'*[136] The AP mentioned that the parties would agree on a system before harmonizing commercial policy. Decision 1/95 does not provide any such provisions, instead focusing only on EU legislation.[137] The failure to hear Turkish interests and concerns is regarded as a breach of the implicit requirement of a CU, which would necessitate Turkey to be consulted for the purpose of forming a common position prior to starting negotiations.[138] As a regional power, Turkey has a divergent trade policy with different trading partners,[139] which results in radical different interests. Moreover, loose from the ability to be consulted, the absence of a right to vote as such concerning the making of its own external policy, has been dubbed an *'essential problem of sovereignty,'*[140] even as the sacrifice of sovereignty was justified as a 'dowry' in view of full accession.[141]

Thus, notwithstanding the deeply integrated economic relations that Turkey entertains with the EU through the working of the CU, for the purposes of decision-making, and even decision-shaping for the CCT and trade agreements, Turkey is still considered to be a third country. This creates an asymmetrical situation. Turkey is adopting many of the common policies, which are dictated fully by the MS. This situation can best be described as taking

[133] It is open for discussion whether article 55 Decision 1/95, which foresees an obligation to consult Turkey when legislation is adopted in areas of direct relevance to the customs union, applies to agreements with third countries. It is worth mentioning that article 53 AP prescribes consulting for the purposes of common commercial policy, yet is explicitly only applicable in the transitional period, thus not in the customs union. See O. BÜLBÜL, A. ORHON, "Beyond Turkey-EU Customs Union: Predictions for Key Regulatory Issues in a Potential Turkey-U.S. FTA Following TTIP," *Global Trade and Customs Journal* 9 (10), 2014, 446. ('BÜLBÜL, Beyond')
[134] C. BALKIR, "Europeanization of trade Policy: an asymmetric track" in A. GÜNEY, A. TEKIN (eds.) *The Europeanization of Turkish Public Policies: A Scoreboard,* Routledge, 2016.
[135] H. KABAALIOGLU, "Turkey-EU Customs Union: Problems and Prospects", DEÜ SBE Dergisi, Vol.12(2), 2010, 50. ('KABAALIOGLU, Customs Union')
[136] PEERS, Sin, 423.
[137] PEERS, Sin, 416.
[138] KABAALIOGLU, Customs Union, 50.
[139] Aside from the EU, the major export markets are Iraq, Russia, USA, UAE and Iran.
[140] LEBULLENGER, Contraintes, 254.
[141] D. AKAGUL, 'Le Cinquième élargissement de l'Union Européenne et la question de la Candidature Turque: la Fin d'un Cycle mais quelles Perspectives?,' *Revue du marché commun et de l'Union européenne* 4179, 1998, 359-369.

all the obligations and responsibilities of a MS, without enjoying the benefits, the most important being participating in decision-making institutions.[142] This defect is aggravated when taking into consideration that Turkey is limited to a large extent in its autonomy: the many areas of harmonization, the CCT which is to be applied to all third countries and the elaboration of the CCP with the outside world. The CU does not allow Turkey to make choices other than the ones the EU dictates. This implies not only an economic, but also a political dependence on the EU.[143]

b) Dispute Settlement

i. The lack of an effective judicial mechanism

Various dispute settlement mechanisms are set up by the Ankara Agreement. In intra-European affairs, it is to be acknowledged that the CJEU has played a primordial role in the creation in safeguarding and ensuring the customs union and by extension the internal market by giving progressive interpretations to provision. The Court is widely regarded to have played a vehicle of integration. This stands in contrast to the association, where no court or tribunal can play such a role, since no such far-reaching competences have been granted to any real judicial bodies. The inadequacy of the dispute settlement mechanism is best exemplified by the main dispute settlement mechanism. Article 25§1 Ankara Agreement prescribes the possibility of both parties to resolve any dispute regarding the application or interpretation of the agreement between themselves in the Association Council. This political dispute settlement mechanism should be exhausted before moving to any other option of dispute settlement.[144] However, the problem with this mechanism is that the Association Council would need to take a decision in order to resolve the dispute. In short, a veto right is foreseen in the juridical sphere. This creates a paradoxical situation: dispute settlement depends on the political will of both parties, while the absence of political will is exactly the base for the very existence of any dispute.[145] In the unlikely case that political will is found, further problems are abound. If the needed decisions are adopted, parties are required by article 25§3 Ankara Agreement to take *'the measures necessary to comply with*

[142] KABAALIOGLU, Final Step, 128.
[143] PIRIM, Transitional, 42.
[144] See article 25§4 Ankara Agreement.
[145] PIRIM, Exemple, 139.

such decisions.' In practice, only the EU can take such measures since it is very unlikely that Turkey can exert any meaningful pressure on the Union, due to its economic and political power. An additional problem is that no sanctions are available for non-compliance, possibly leading to new disputes themselves.[146] It should be clear why the dispute settlement in the Association council can be called flawed.

The Ankara Agreement also puts three judicial methods in place. A first option is to hand the case to the CJEU, as foreseen in article 25§2 Ankara Agreement. Yet this also is subject to a unanimous decision of the Association Council, which explains why this has never happened until today. An example in this regard was the general safeguard measure put in place by the Community, which was heavily contested by Turkey. However, Turkey could not undertake any jurisdictional action, not in the Association Council, nor before the Court.[147] Another explanation can relate to the lack of independence of the Court, since questions of independence of the Court might play a role as the case would involve EU MS and a non-MS. Secondly, any case may by article 25§2 Ankara Agreement be submitted to *'any other existing court or tribunal.'* While the question arises which instance this exactly might be, scholars point to the International Court of Justice.[148] One needs to take *Opinion 1/91* of the CJEU into account however. Seeing that the Ankara Agreement and the decisions of the Association Council make part of EU law, granting court other than the CJEU the ability to interpret EU law is contrary to the exclusive competence of the CJEU in this regard. Consequently, such a view might create complications. A third and final judicial method to resolve disputes, is the possibility to go to arbitration, as defined in article 25§4 Ankara Agreement. Article 61 Decision 1/95 subjects the use of arbitration to strict requirements however. Firstly, this method can only be used if and when the Association Council fails to take a decision within 6 months after the ignition of a procedure. Secondly, it can only be used in a limited number of cases: when the case concerns the scope or duration of protection measures outlined in article 58§2 Decision 1/95, safeguard measures taken in accordance with article 63 Decision 1/95 or in the case of rebalancing measures based on article 64 Decision 1/95. Yet, this is not the preferred option neither. It can only be used in a very limited number of cases, and sets out a very cumbersome procedure culminating in a lengthy

[146] K. REÇBER, 'Le règlement des différends entre la Turquie et la Communauté européenne dans le cadre de l'accord d'Ankara,' *Les Cahiers du Cremoc* 39, 2005, 11. (REÇBER, Exemple)
[147] C. SMITS, 'Les mécanismes de protection dans le cadre de l'union douanière euro-turque: des mesures dérogatoires appliquées sans véritable contrôle juridictionnel' in E. LANNON, J. LEBULLENGER (eds.), *Les défis d'une adhesion de la Turquie a l'Union européenne,* Bruylant, 2006, 294. ('SMITS, Mécanismes')
[148] LYCOURGOS, L'association, 121.

character.[149] Moreover, the selection procedure of the arbitrators lends itself to political usage, as it is created *ad hoc* and after political failure.[150] Moreover, the rationale of *Opinion 1/91* could also apply here. However, distinguishing from the proposed EEA Court which failed the test, the arbitrators' decision would only have explicit legal effect in Turkey, and will not be considered EU law as such. It could also be said that the CJEU will still uphold its powers, since it is likely to affect trade with the EU.[151] This question has remained theoretical until today.[152]

It is clear that the dispute settlement is entrusted to political bodies, which remains the preferred option. Consequently, natural and legal persons cannot bring any case before a court/tribunal if they are affected in any way.[153] They would still be able to inform their respective governments about the situation, who then will act on their behalf, while third states remain excluded even from bringing a case before the Association Council.[154] The exclusion of private parties is in the context of a CU a very unfortunate element and can be considered a tremendous lacuna. Indeed, *'in associations where commerce needs to be totally liberalized or at least partially integrated, there are not only State interests, but also those of economic operators and of the new economic space constituting the CU. In this context, all litigations demand a precise and clear judicial solution. Solutions resulting from diplomatic negotiations should only have a residual character, only reserved for cases in which vitas interests of States are at stake.'*[155] The high age of the Ankara Agreement might explain the inadequate mechanisms for such an in-depth integration. The dispute settlement can rightly be regarded as *'museum quality example of EEC external relations antiquity.'*[156]

[149] C. LYCOURGOS, *L'association avec union douanière : un mode de relations entre la CEE et des Etats tiers,* P.U.F., 1994, 124. ('LYCOURGOS, L'association')
[150] SMITS, Mécanismes, 297.
[151] Sin, 427.
[152] C. TOBLER, "Dispute Resolution Under the EEA Agreement" in C. BAUDENBACHER (ed.), *The Handbook of EEA Law,* Springer, 2016, 203.
[153] An exception could be Turkish citizens living and residing in an MS, who could ask for a preliminary reference before national courts. See REÇBER, Exemple, 15.
[154] KABAALIOGLU, Final Step, 131.
[155] LYCOURGOS, L'association, 102. (own translation)
[156] Board, 292.

ii. Uncontrolled trade defense instruments

The preference for political dispute settlement creates a void of effective control when the parties wish to use trade defense instruments ('TDI'). As mentioned above, TDI are legal under Decision 1/95, and essentially give an incentive to align with the EU *acquis.* The EU may drop the use of TDI, being anti-dumping, anti-subsidy and trade barrier actions against Turkey, if Turkey *'has implemented competition, state aids control and other relevant parts of the acquis communautaire which are related to the internal market'* as dictated in article 44§1 Decision 1/95. Contrary to judicial review, Decision 1/95 only provides for a review of these TDI in the Association Council, different than an automatic suspension once the Association Council establishes that the conditions are met.[157] In practice, this would mean that TDI other than safeguard measures will only be questioned when Turkey can show, firstly that it has adopted, and secondly that it is enforcing all the provisions and case law ensuring that competition won't be distorted within the CU.[158] Yet this *quid pro quo* has not lived up to its potential.

While the situation of TDI against third parties will not be further elaborated on, it should be pointed out that discrepancies exist between the TDI used by the EU and those used by Turkey. The World Bank notes approximately 15 percent of 329 different products in Turkey investigated and 336 products investigated by the EU to show any overlap.[159] This leads to a fragmented picture, whereby the coordination in the relations with third countries are lacking. More worryingly in view of the CU, the use of TDI between the EU and Turkey seems to be on the rise, thereby impacting free movement of goods. In numbers, Turkish application of antidumping duties might cost up to USD 1 billion in imports from the EU, while the measures of the EU cost USD 500 million.[160]

TDI serve a political goal, and essentially serve to avoid competition being distorted or are used for even protectionist reasons. In the sphere of the CU, there are a few possibilities. Firstly, safeguard measures can be invoked by the parties. While some safeguard measures were explicitly limited to the transitional period, as defined in the AP, others remain capable of being invoked no matter when. Article 63 Decision 1/95 extends the application of article

[157] PEERS, Sin, 416.
[158] BAEL, Anti-dumping, 29.
[159] World Bank Report, 41.
[160] Annex 12 World Bank Report.

60 AP, which prescribes that if *'serious disturbances'* occur in a sector of the economy of either party, necessary protective measures may be taken. This general safeguard clause can be taken loose from any guilty conduct. Additionally, specific safeguard clauses can be found in Decision 1/95. 58§2 Decision 1/95 grants possibilities to take the '*necessary protection measures'* if discrepancies between EU and Turkish legislation or in areas of direct relevance to the CU would lead to impairment of the free movement of goods or deflections of trade, with priority being given to the measures least disturbing the functioning of the CU. A second specific clause is found in article 5 AP, which gives the same means to combat threats to the economy if differences in customs duties, qualitative restrictions or measures having equivalent effect exist. Article 5 AP however only applies in the transitional period, as Decision 1/95 has not extended its applicability to the final phase.[161] Article 7 Decision 1/95 allows measures to be taken on grounds of public morality, public policy or public security, health, life of humans, animals or plants, protection of national treasures or industrial and commercial property. While the establishment of a CU would principally imply that the parties abandon the measures to protect their economies within,[162] the prohibition of quantitative restrictions and measures having equivalent effect, as stipulated in articles 5 and 6 Decision 1/95, is thus not absolute. While arbitrary or discriminatory behavior is not allowed, practice can be different. This is best exemplified by footwear.[163] Turkey imposed safeguard measures from 2006-2014, increasing with duties of USD 1.50 for textile and synthetic footwear, while leather footwear was subject to increases of USD 2.35. While safeguard measures principally are permitted, the legitimacy of these measures at hand was very dubious.[164] The circumstances in which the duties were applied could not give rise to the invocation of above mentioned articles. Other products to safeguard measures have been discriminatory taxes on alcoholic beverages, a ban on beef, elevated duties on metal, tools and carpets etc. These might all be seen as breaches of article 4 Decision 1/95, which requires Turkey to refrain from introducing any new customs duties or measures having equivalent effect, since they have no real ground to be applied.[165]

Moreover, the intensity of the safeguard clauses is not defined. It could indeed be maintained that the general safeguard clauses would have the risk of being explained broadly. The words

[161] SMITS, Mécanismes, 276.
[162] SMITS, Mécanismes, 274.
[163] FOREIGN TRADE ASSOCIATION, *The EU-Turkey Customs Union. Is it Working?,* 2015, 9p. ('FOREIGN, Working')
[164] FOREIGN, Working, 3.
[165] FOREIGN, Working, 5.

used in the provisions could lead to a problem of interpretation, leading to differences in appreciation between the parties, while being robbed of judicial control in any form. The form of control would depend on the efficiency of the control, happening within the Association Council. This body would *nota bene* take decision regarding measures, undertaken by the parties represented in that Council.[166]

Additionally, article 44§2 Decision extends the application of the modalities of anti-dumping of article 47 AP to the final phase. While only prescribed for the transitional period, the measures can thus remain in force when the CU is achieved. In cases of dumping, the party may take, after notifying the Association Council, anti-dumping duties. This is *in se* contradictory with the spirit of the CU.[167] Anti-dumping duties are not allowed in the intra-European sphere, but only can be imposed on third countries. Yet, the failure of Turkey to fully and timely align its policies in some areas has led to repercussions in trade of goods, thereby hitting the market. Moreover, there is no form of consultation whatsoever in this regard. While article 47 AP intended to use consultations for the purposes of settling disputes, with the entry into force of Decision 1/95, the consultation mechanisms of Section II Chapter V cannot be used due to its exclusion article 46 Decision 1/95 in the final phase. The possibility of antidumping measures has especially been used in the area of textiles,[168] and has evidently led to high costs in trade.

The use of TDI with the control being passed to the Association Council is very lamentable. Both parties can invoke measures that hamper the free movement of goods. Even worse, this happens without any true control. The only body which can be said to exert some form of control is the Association Council, thus a political body giving rise to political backlashes and bickering. Without any mechanism to verify whether the measures are needed or legitimate, the working of the CU remains subject to protectionist policies pursued by the parties.

[166] LYCOURGOS, L'association, 84.
[167] KABAALIOGLU, Final Step, 124.
[168] SMITS, Mécanismes, 288.

B. FREE TRADE AGREEMENTS

a) The Constraints of Free Trade Agreements on Turkey

The problem of a lacking seat at the decision-making institutions can be best epitomized by the unequal standing Turkey suffers in its pursuit to aligning with the CCP. For its relations with third countries, article 16 Decision 1/95 binds Turkey to conclude the same or similar preferential agreements and implement the GSP. By the failure to press the Turkish position in the trade negotiations, unintended economic consequences can arise. Specifically in the sphere of concluding agreements with third states, there are two pressing issues: Turkey's incapability to influence EU trade policies and the manifestation of trade diversion.

Seen from a EU perspective, CCP is an exclusive competence of the Union.[169] This entails that the European Commission negotiates any FTA with third states on behalf of the Council. The idea is based on the conferral of power, by which the MS have ceded part of their sovereign powers to a supranational institution. So the Commission negotiates and acts only as a representative of EU. Seeing the idea of conferred powers, which are found in the Treaties, the Commission cannot conclude agreements on Turkey's behalf. Turkey needs to do this itself, by concluding agreements on a '*mutually advantageous basis with the countries concerned.'* Such a conduct is cumbersome.

In line with the failure to hear Turkey's voice in the decision-making process, a situation of dependence of the associated country on the EU is created, leading an asymmetrical situation.[170] A first pillar of this problem, is due to the largesse of the EU economy, the EU's own interests are pursued in trade negotiations while Turkey has to follow. This leads to a second problem, the 'latecomer effect.' Turkey is able to conclude a similar agreement only after a period of time, usually a few years.[171] During this period, trade diversion renders Turkish industries and competitors at a disadvantage, but also makes it hard for Turkey to negotiate such a deal since third states would already profit from the status quo. Consequently, Turkey has no leverage in the negotiations, and finds itself even in a weakened position. Thirdly, Turkey has its hands bound: only third states which already have concluded a trade agreement with the EU can be seen as potential partners for

[169] Article 3(e) TFEU.
[170] K. DERVIS, M. EMERSON, D. GROS, S. ÜLGEN, *The European Transformation of Modern Turkey,* Centre for European Policy Studies, 2004, 74.
[171] TOGAN, A Model, 27.

Turkey.[172] This is exemplified by the need of EU's approval for Turkey's desire to negotiate and conclude an FTA with Macedonia, while the EU preferential regime towards the latter was only the GSP.[173] An even clearer example was Turkey's wish to create a free trade zone in the Black Sea Region, which was fiercely opposed by the Commission: *'Greece as a member of the EU and Turkey as an associated country to the EU's CCP on the basis of a customs union cannot participate on their behalf to regional free trade agreements.'*[174] Article 16 Decision 1/95 thus unilaterally puts Turkey a heavy burden.[175]

Trade diversion is the second big headache. The establishment of a CU instead of a FTA minimizes the risk of trade diversion and thus the resulting welfare loss.[176] The creation of a CU is thus economically rational, but necessarily comes at the cost of partly transferring sovereignty. *In concreto*, while parties to a FTA abolish only tariffs among themselves, they are free to maintain their own tariffs towards third parties. This can lead to a situation where goods are imported in the free trade zone through the country with the lowest tariffs, only to freely exported to other FTA-parties afterwards. In principle, this defect is tackled by a CU, which uses a CCT and leaves no incentive to import through one specific point. Nonetheless, precisely the issue of trade diversion manifests itself in the EU-Turkey CU.

Above, it was mentioned that Turkey only could have market access in third countries if Turkey concluded a preferential agreement. Here, third countries have market access to Turkey by first importing into a MS, then freely exporting to Turkey. Due to the absence of any internal borders of the European Customs Area, the free flow of goods is hard to be stopped. In short, Turkey grants market access whenever goods from third countries are imported in the EU, without being granted the possibility to be active in the market of the third country.

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[172] S. TOGAN, "On the European Union-Turkey Customs Union," *CASE NETWORK Studies&Analyses*, 2011, 36.
[173] O. KARAKAS, *Türkiye ile ABD Arasinda Olasi Bir Serbest Ticaret Anlasmasinin Dünya Ticaret Örgütü ve Avrupa Biligi Cerçevesindeki Yükümlülüklermiz Açisindan Incelenmesi,* available at http://www.mfa.gov.tr/turkiye-ile-abd-arasinda-olasi-bir-serbest-ticaret-anlasmasinin_-dunya-ticaret-orgutu-ve-avrupa-birligi-cercevesindeki-yukumluluklerimiz-acisindan-incelenmesi.tr.mfa
[174] COM (97) 597 Final, 14 Nov 1997, 7.
[175] Note that only Turkey has the obligation to align. If turkey would go ahead and conclude own FTAs, contrary to its obligations, the EU has no alignment obligations. This would however not nullify the requirement for a customs union to have a harmonized external regime, in line with article XXIV GATT. 'From the Board,' *LIEI* 294. ('Board')
[176] E. FAUCOMPRET, J. KONINGS, *Turkish Accession to the EU: Satisfying the Copenhagen Criteria,* Routledge, 2008, 98. For instance, the failure to conclude an agreement with Mexico and South Africa, would lead to a loss of exports amounting to 226 million USD annually. See World Bank Report, 26.

This is at odds with the rationale of the Turkish alignment with the CCP: it is precisely to avoid trade diversion, but also to keep up with the acquis in the general idea of integrating Turkey into the European sphere.[177] As mentioned above, 17 FTAs have been concluded by Turkey, while numerous negotiations are being conducted. At the current situation, there is a gap: the EU has around 50 FTAs in force. It has proven hard to close the gap because the third country already enjoys access to the Turkish market, thereby having lost the incentive to proceed towards a trade liberalization. Moreover, the third country finds itself in a more advantageous position than if a trade preferential agreement with Turkey would be concluded: it does not have to open his own market. So what can bring the third country to the negotiating table? The failure to conclude an agreement due to the unwillingness of the third country rests on Turkey's shoulders: if the third country is not willing to conclude a preferential agreement, Turkey fails to fulfill its obligations under article 16 Decision 1/95.[178] This situation leads to a double negative effect. It poses a heavy burden on the Turkish economy: Turkey is forced to apply reduced or no tariff rates, while the third countries do not reduce their duties for Turkish imports. Secondly, Turkey also suffers tariff revenue losses,[179] as the goods won't enter the European Customs Area through Turkey.

The first years of the CU brought no major problems: the third countries had relatively small economies or Turkey was able to sign similar FTAs. With changing global environment however, ever more pressure is put on the Turkish economy. With its communication *Global Europe,*[180] Europe has sought an alternative to the multilateralism of the Doha Round of WTO negotiations, currently in deadlock, and increased its interests in regionalism by focusing on bilateral and preferential trade agreements with relatively big economies.[181] While their goods are in direct competition with Turkey's, these modern FTAs also contain many non-tariff rights and obligations which go further than the CU.[182] They also cover areas much more than trade in goods, such as services and government procurement. Hence, they are dubbed 'Deep and Comprehensive FTAs.' It is safe to say that Europe will continue these ambitious plans on global trade, as the priorities of *Global Europe* were reemphasized in the *Europe 2020 Strategy*.

[177] M.S. AKMAN, "The European Union's Trade Strategy and Its Reflections on Turkey: An Evaluation from the Perspective of Free Trade Agreements," *Sosyal Bilimler Enstitüsü Dergisi* (12) 2, 2010, 19. ('AKMAN, Strategy')
[178] TURHAN, Implications, 255.
[179] TOGAN, A Model, 27.
[180] European Commissin, *Global Europe Competing in the World: A Contribution to the EU's Growth and Jobs Stategy,* 2006.
[181] Such as US, Canada, Mexico, Japan and Korea.
[182] S. BASKIN, J. VERMULST, "The EU and Turkey: Privileged Partner or More?," *GTCJ* 11(1) , 2016, 17-18.

These new FTAs made preference erosion the main worry.[183] Since other countries have obtained better access to the EU market, Turkey is facing ever more competition at the expense of its preferential status under the CU. This leaves Turkey on the one hand with unbalanced obligations on one side, while the new partners obtain more rights under their FTAs. Given the negotiations for TTIP with US, CETA with Canada and the envisioned FTA with Japan, these problems are set to rise. A second anomaly is the nature of the CU itself: it is seen as a more advanced and deeper form of economic integration than the new FTAs, since it achieves internal free circulation and sets up an external institutional capacity.[184] Yet, it suffers an inflexibility for a long term relationship.

The government laments that the status quo doesn't serve Turkey at all. Instead, it is a *'unilaterally beneficial outcome for the EU.'*[185] These worries have not gone unnoticed to Europe. Attempts were undertaken to improve the situation by including the 'Turkey clause' in its agreements with third countries. This clause was first used with Algeria in 2005, and aims to improve Turkey's negotiation process with the countries concerned. It makes the third country endeavor concluding a mutually advantageous agreement with Turkey. This solution seems to be flawed. Firstly, the clause itself has no binding nature. The wording usually obliges the third country to make the best efforts. Many countries refrain from concluding agreements with Turkey since they are not obliged to do so, rendering the clause ineffective.[186] Algeria still has no FTA with Turkey. A second problem is that this clause sometimes is omitted from the negotiations, thereby leaving out even a weak incentive.[187] The weaknesses of this clause necessitate other solutions. Turkey often suggested one, whereby the coming into effect of the agreement between the EU and the third country would be contingent on the conclusion of an agreement with the same content with Turkey.[188] The EU has not given any effect to this. Another possibility was granting Turkey a seat at the negotiating table, alongside the European Commission and the representatives of the third country. Nonetheless, this depends on the willingness of the negotiating parties to accept

[183] AKMAN, Strategy, 24.
[184] Board, 294.
[185] H. YAZICI, 'Turkey-EU Relations and the Customs Union: Expectations Versus Reality,' *Turkish Policy Quarterly* 11(1), 2012, 30.
[186] KABAALIOGLU, Customs Union, 50.
[187] Since it is not part of the EU's negotiating mandate, it is sometimes fully left out: e.g. South Africa refused the Turkey clause as part of the negotiations. World Bank Report, 29.
[188] TURHAN, Implications, 255.

Turkey, not always easy to achieve.[189] A possible fourth solution proposed by the Turkish government, and embraced by the World Bank, is the revised or 'reinforced' Turkey clause,[190] creating a double effect. It would invite the partner to negotiate and conclude a FTA with Turkey, in a timeframe as nearly as possible with the agreement with the EU, preferably in a parallel manner. And if the agreement with Turkey would be concluded later than the initial agreement with the EU, Turkish products in free circulation would be seen from EU origin, and thus would benefit from market access in the third country. This clause would ideally be legally binding. This could be a strong encouragement for the third country to conclude trade agreements with Turkey.[191] It seems to be seen however, whether such a clause will be put in effect by the EU.

[189] E.g. Both the EU and U.S. repeatedly refused Turkey's inclusion in the TTIP-negotiations without being a Member State. See http://hurriyetdailynews.com/modernizing-turkey-eu-customs-union-a-must.aspx?pageID=238&nID=87044&NewsCatID=396. Turkey is even refused observer status during the negotiations.

[190] M. YAPICI, *Turkish Perspective on FTAs under the Turkey-EU CU (with a Special Emphasis to TTIP),* 2013, 22. ('YAPICI, Perspective')

[191] YAPICI, Perspective, 22.

b) TTIP: A Breaking Point?

Yet, the Turkish unease and worries have been elevated by the ongoing negotiations of the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US.[192] The magnitude and economic impact of the TTIP cannot be overemphasized: the negotiating parties account for nearly half of the world GDP, make up 30 percent of global trade, and 65 percent of foreign direct investments. In essence, the objectives of the TTIP can be divided in two. On one hand, the TTIP seeks to remove the customs tariffs between the two parties. On the other, it will try to remove non-tariff barriers, pursue the harmonization of rules regarding investments, public procurement, labor, intellectual property, environmental and competition policies and the opening of access to markets in the field of services.[193] The combination of the broad subject matter of the TTIP and the flawed CCP under the CU lead to a situation in which *'Turkey stands as a unique example which would be directly and most drastically affected once the TTIP is concluded.'*[194] The looming economic danger even led the Turkish President to threaten to leave the CU and join the Shanghai Cooperation Organization instead.[195]

The effects of the TTIP on Turkey are twofold: it is felt in the area of market access, and also brings about regulatory effects. In the former, while the negotiating partners are expecting to gain many economic benefits and growth from the agreement, the picture for Turkey is not that optimistic. In the absence of any involvement in the agreement, Turkey will suffer trade deflection.[196] American goods will find their way to the Turkish market, while also leading to preference erosion in the EU. On the other hand, Turkish goods will not be able to enter the US, because the rules of origin will be most likely targeting those goods coming from the MS. In numbers, welfare losses are estimated by the World Bank to be around 130 million USD for loss of the comparative advantage in the EU market. In areas in which tariff peaks still are in place between the US and the EU, sectors such as textiles and clothing, Turkey is thus bound to lose. This would also be the case for the automobile

[192] For a comparison of the scope of the deep-integration agreements, see Trade and Investment, 29-31.
[193] BÜLBÜL, Beyond, 444.
[194] BÜLBUL, Beyond, 455.
[195] See K. KIRISCI, *Don't Forget Free Trade With Turkey,* 15 April 2013, on http://www.brookings.edu/research/opinions/2013/04/15-free-trade-turkey-kirisci (futher: 'KIRISCI, Don't')
[196] For a full analysis, see K. KIRISCI, 'TTIP's Enlargement and the Case of Turkey,' *Istanbul Policy Center* 2015, 17p.

sector. The figure rises to 160 million USD if trade deflection is added.[197] Other estimates put the figures of welfare loss to 0.75 percent[198] and 1.56 percent[199] of the GDP, if Turkey would not adopt, nor implement the TTIP rules. This would be a dramatic figure. The Turkish minister of EU Affairs has put the estimate of the loss at 3 billion USD.[200] Nonetheless, a positive note can be made. If Turkey would be able to take part in the negotiations, and ultimately conclude a FTA with the US, this would result in a welfare gain of 130-260 million USD.[201] The advantages can also be gained by regulatory convergence.

This leads to the second issue. TTIP falls in the fully in sphere of WTO-plus agreements,[202] which are agreements focusing on and enhancing regulatory features. In addition to dealing with the technical barriers to trade, the TTIP tries to remove sanitary and phytosanitary barriers and other regulatory barriers in goods and services.[203] The latter is situated in the general idea to remove non-technical barriers to trade. In short, non-technical barriers to trade are removed through regulatory convergence, mutual recognition, harmonization and future cooperation on regulations.[204] It needs to be emphasized that the areas of regulatory convergence of the TTIP go much further than the CU with Turkey. While Turkey aligns itself in the areas of intellectual property law, competition and the elimination of technical barriers to trade, and contains a mere reference to public procurement,[205] the TTIP includes services, investments, labor, environment and public procurement. The regulatory side of the CU thus falls short of the TTIP. On itself, the limited range of regulatory convergence in the CU can lead to a benefit: it gives Turkey flexibility in arranging certain regulatory issues with FTA-partners, and leaves thus room for Turkey to maneuver in its negotiations.[206] Yet with two economic giants concluding an agreement touching on regulatory aspects in many fields, Turkey is bound to feel its effects. In essence, TTIP could lead to new and more stringent regulations, which could be imposed on several business sectors. A process of

[197] World Bank Report, 27.
[198] P.J.F. EGGER, M. MANCHIN, D. NELSON, 'Non-tariff Barriers, Integration and the Transatlantic Economy,' *Economic Policy* 30,
[199] G. FELBERMAYER, B. HEID, M. LARCH, E. YALÇIN, 'Macroeconomic Potentials of Transatlantic Free Trade: A High Resolution Perspective for Europe and the World,' *Economic Policy* 30,
[200] http://www.todayszaman/com/business_eu-customs-deal-at-risk-if-tafta-excludes-turkey_363620.html
[201] World Bank Report, 27.
[202] J. PELKMANS, 'TTIP: Political and Economic Rationale and Implications', *Intereconomics* 6, 312. ('PELKMANS, Rationale')
[203] PELKMANS, Rationale, 312.
[204] A. LEJOUR, F. MUSTILLI, J. PELKMANS, J. TIMINI, 'Economic Incentives for Indirect TTIP Spillovers', CEPS, 2014, 3. Available at https://www.ceps.eu/system/files/No%2094%20TTIP%20Spillovers.pdf
[205] The Turkish government doesn't see any legal obligation in that provision, pointing only to the political intent. The negotiations were initiated in 1996, but was suspended in 2002, thus currently there is no regulation.
[206] BÜLBÜL, Beyond, 448.

harmonization of laws, regulations and technical standards with the TTIP-imposed regulations would be awaiting Turkey.[207] It could also be argued that Turkey might eventually benefit from the system. If and when the EU and the US would agree on liberal rules of origin, and put in place a system of mutual recognition of quality standards, Turkey would be able to enter the US market, offsetting the problems created by trade diversion and preference erosion.[208] This would depend on a loose interpretation of the rules of origin, something which does not seem to likely. In short, the loss of Turkey would be much greater if TTIP was to include regulatory harmonization, without recognizing Turkish quality certificates.

[207] H.M. BOYRAZ, *Possible Impacts of TTIP on Turkey,* 6 February 2015, available on http://www.atlantic-community.org/-/possible-impacts-of-ttip-on-turkey
[208] KIRISCI, Don't.

C. VISA REQUIREMENT

a) Visas Hampering the Free Movement of the Producer

The establishment of the free movement of goods through the CU was only one facet on the road to membership. Other freedoms would be gradually achieved: free movement of workers was envisioned to be achieved by the end of 1986, while free movement of services and freedom of establishment were entrusted to the Association Council to be progressively liberalized. Nonetheless, as free movement of goods has been established by the CU, other freedoms have not known a parallel development. Free movement of workers has been developed to some extent,[209] while the freedom to provide services and freedom of establishment have known little progress. Yet, in none of these areas do Turkish citizens have a right of first entry to the European market: they do not enjoy unrestricted market access. In short, while the integration on different fronts would lead to Turkey entering the Common Market, the full integration in one area gets the backlash of the failure to integrate in the other areas. All Turkish citizens, economically active or not, have to obtain a visa when they wish to enter the territory of the EU. Consequently, as pointed out by the former Turkish President Gül, this leads to a paradoxical situation where goods can circulate freely in the internal market, while their owners and producers cannot.[210]

Since the EU is the largest market for Turkish goods, Turkish businesspeople and economic operators at large need to travel frequently to the EU for the purposes of attending trade fairs, negotiating contracts, meeting people, attending meetings etc. Yet, the visa-requirement imposed on Turkish nationals hampers these activities, increases the costs or even renders it impossible. Regulation 539/2001[211] puts Turkey on the blacklist, thus subjecting its nationals to a visa. Currently, Turkey is the only candidate state without a visa-free regime with the EU. This stands in contrast, even with some non-European countries who have visa-free travel.[212] This draws a strange picture in a hierarchical sense: while Turkey is integrated to a large extent in the European sphere through its ongoing accession negotiations on the one

[209] In this regard, Decision 1/80 grants certain rights to Turkish workers, who are legally employed and entered the workforce of any Member State, fully according to that state's laws.
[210] Turkish President Gül slams EU Visa Policy for Turkey, 05 April 2013 http://www.hurriyetdailynews.com/turkish-president-gul-slams-eu-visa-policy-for-turkey.aspx?pageID=238&nID=44296&NewsCatID=338
[211] Council Regulation no. 539/2001 of 15 march 2001 listing the third countries whose nationals must be in possession of visas when crossing the external and those whose nationals are exempt from that requirement, *OJ* L 81, 21.3.2001, 1-7.
[212] Such as Brazil, Honduras, Paraguay.

hand and economically firmly linked to the EU by the CU on the other, Turkish nationals do certainly not feel Turkey's privileged position in terms of market access when compared to other third country's nationals. This issue even leads to legal schizophrenia, whereby Turkey implements the blacklist of the Schengen *acquis* in the course of the accession negotiations while also being on the blacklist itself.[213]

Whenever each party's nationals move to the territory of the other, both the EU and Turkey principally require a visa. European businessmen, service providers, industrialists, academics and by extension all EU citizens can enter Turkey, either with a visa obtained at the border or, for the nationals of certain MS, no visa at all.[214] This is easily done: upon arrival in Turkey, EU citizens can obtain all the necessary documents in a very short period of time (usually a matter of less than a half-hour) and upon the payment of a small fee.[215] This stands in stark contrast to the situation of Turkish citizens. To highlight the problems Turkish businesspeople face, two studies[216] were conducted to research and pinpoint the difficulties. As can be read extensively in both documents, there have been many complaints by Turkish citizens. The frequently heard complaints will be mentioned.

Firstly, Turkish citizens are required to provide the consulates with excessive paperwork and only obtain visas with a duration deemed too short. Various legal and official documents need to be obtained by the applicant,[217] such as bank accounts, the firm's circular, an invitation, social security registration, the firm's tax registration… Any MS can even add additional requirements to the list. This results in a cumbersome process, in which the applicant needs to spend time and effort to gather all these documents, which applicants find highly 'disproportionate.'[218] An additional problem is the duration of the visa: the visa applied differs in many cases from the visa issued. This is even aggravated by issuing a single-entry visa even if the visa applied was a multi-entry one. The second major problem, is the level of visa fees and delays in processing times. While the standard visa fees are high

[213] N. TEZCAN/IDRIZ, P.J. SLOT, *Free Movement of Persons between Turkey and the EU: The Hidden Potential of Article 41 (1) of the Additional Protocol,* The Hague, CLEER, 2010, 9. ('TEZCAN: Potential')
[214] KABAALIOGLU, Customs Union, 51.
[215] For a list of the countries whose nationals need a visa, and those Member States which are exempted, see http://www.mfa.gov.tr/visa-information-for-foreigners.en.mfa.For EU citizens obtaining a visa on arrival, this fee typically costs €25. See http://www.mfa.gov.tr/data/KONSOLOSLUK/e-visa-fees-en-31-december.pdf. Yet, different fees for different categories apply.
[216] See World Bank Report, 77-81; IKV, *Visa Hotline Project. Final Report,* Economic Development Foundation Publications, 2010, 76p. ('IKV, Visa')
[217] For an overview of all the documents, see IKV, Visa, 36-39.
[218] IKV, Visa, 40.

on themselves,[219] many 'disguised' charges are also levied.[220] Turkish nationals need to pay fees of the intermediary agencies, PIN code fees to get appointments, commission fees of the bank etc. This naturally raises the overall cost for Turkish citizens, raising ever more barriers. It is further aggravated by the time required to process the visa. While the Code for Visas prescribes a period of 15 days for a decision to be taken by the consulate, this limit is often exceeded by the issuers. Turkish businesspeople thus are in an uncomfortable situation, whereby they need to plan multiple weeks up front whether and how business trips should be conducted. Thus they are required to wait, even weeks, which can lead them to miss appointments and during which they reside in uncertainty whether or not the visa will be refused. This leads to the third important issue, which is visa refusal. The MS to which Turkey exports the most, and which thus are the most visited by Turkish businesspeople are Germany, France and the UK. Yet, ironically, the highest percentages of visa refusal, come exactly from these countries: 10, 7 and 7 percent of all visa applications respectively.[221] While the actual rejection rates do not seem very high, the fear of not getting a visa defines the business strategies of Turkish businesses:[222] due to the perceived likelihood of rejection, respondents decided not to apply for a visa. For Germany, this number was as high as 70 percent, while for Greece this percentage dropped to 11 percent of the respondents. Moreover, in the case of a rejection, 65 percent of the respondents cancelled the business trip fully, while the rest either had to reschedule or sent somebody else instead.[223] All this leads to a significant number, 50 percent, considering the visa requirement as a 'significant distraction,' while having an absolute need to travel. Additionally, it discourages 20 percent, travelling only to the EU when absolutely necessary, while 5 percent even cancels all relations.[224] Most strikingly, the Turkish businesses even let their business strategies define by visa restrictions: 57 percent of the businesses changed their conduct, by either focusing on the domestic market, or by prioritizing relations with non-EU markets, such as US, Middle East and Asia.[225]

All of the above leads to serious problems and worries for the Turkish business community. In a world where business contacts are ever more crucial due to the prevalent production

[219] Starting from €60.
[220] IKV, Visa, 49.
[221] World Bank Report, 79.
[222] *Ibid.*, 80.
[223] *Ibid.,* 80.
[224] *Ibid.,* 80.
[225] *Ibid.,* 81.

chains, it indeed can be uttered that *'limiting the freedom of movement of a business person who manufactures goods for EU markets is against all sorts of commercial logic and ethics.'*[226] However, the visa policy vis-à-vis Turkey is found in the concern on migration:[227] easing visas will lead to permanent and possibly even undocumented migration from Turkey, while also migrants from Africa, Middle East and South Asia would easily transit through Turkey to get access to the Schengen area by crossing the border with Greece. Nonetheless, the side-effects of this policy are a great cost to bear as it inevitably leads to repercussions on the functioning of the CU. It puts Turkish businesses at a disadvantage when compared to the citizens of the EU, due to additional costs and difficulties.[228] In short, it distorts the level playing field in the market to a certain extent, since the difficulties impact fair competition and equality of market entry conditions.[229]

It is indeed true that the CU is not the intra-European Common Market, and thus the same interpretation does not apply. For the latter, the Court established in *Gaston Schul* that *'the concept of common market […] involves the elimination of all obstacles to intra community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market.'* [230] This logically entails the prohibition of non-tariff barriers at large including quantitative restrictions and measures having equivalent effect, which has an impact on the commercial flows.[231] While the Court indeed established in *Ziebell* and *Demirkan* that the *Polydor*-principle applies, meaning that provisions in different treaties do not necessarily get an identical interpretation, but instead depend on the objectives, context and wording, it is worth noticing that the nationality of both the importer and the exporter are irrelevant for the free movement of goods.[232] In conclusion, the visa requirement can be seen as a measure having equivalent effect,[233] and thereby hampering trade between EU and Turkey.

b) The Standstill Clause as Fragmented Visa Liberalization

[226] IKV, Visa, 58.
[227] World Bank Report, 78.
[228] TEZCAN, Potential, 9.
[229] TURHAN, Implications, 271.
[230] Case C-461/03, *Gaston Schul Douane-expediteur* [2005] ECR I-742.
[231] J. PELKMANS, *European Integration, Methods and Economic Analysis,* Pearson Education, 2006, 80.
[232] N. SHUIBHNE, *The Coherence of EU Free Movement Law, Constitutional Responsibility and the Court of Justice,* Oxford University Press, 2013, 35.
[233] For the full analysis, see TURHAN, Implications, 248-276.

The lack of market access needs to be nuanced for service providers. While no steps for service liberalization, MS cannot act to the detriment of Turkish service providers, and those who wish to establish themselves. To this end, article 41(1) AP reads: *'The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.'* In essence, they dictate that MS cannot introduce any new laws that would make the exercise of these economic freedoms dependent on more stringent conditions.[234] While the standstill clause does not confer any right to Turkish citizens, it is in essence an instrument to freeze the relevant national provision on the date of the entry into force of the AP in that MS.[235]

In *Soysal,*[236] Turkish lorry drivers were confronted with a new visa requirement. This stood in contrast with the past situation, whereby service providers such as Mr. Soysal could easily pass through the borders for the purposes of delivering cargo. The visa was required by a German law, which itself was the national translation of Regulation 539/2001. The CJEU emphasized the burden and difficulties of obtaining visa, as described above. It said that a visa requirement *'is liable to interfere with the actual exercise of providing services, in particular because of the additional and recurrent administrative and financial burdens involved in obtaining such a permit which is valid for a limited time.'* Moreover, the Court emphasized that the denial of such a visa flatly prevents the exercise of that freedom. Since visas are seen as restrictions for the purposes of article 41(1) AP, every MS needs to apply the more lenient visa laws applicable on Turkish service providers. *In concreto,* this entails for the first 9 MS that the standstill clause cements the legal provisions as of 1 January 1973, the date of entry into force of the AP. For all other states, the rules that were in force at the date of accession will be applied.[237] The fact that the German law was a transposition of secondary law, doesn't change anything to the case since international treaties with third countries enjoy primacy of secondary laws.

Since *Soysal,* the first entry of Turkish service providers into a MS is covered by the standstill clause. While in the better days, many bilateral agreements were concluded with Turkey for the employment of her nationals and MS were enthusiastic to see all the freedoms

[234] Case C-16/05, *Tum and Dari* [2007] ECR I-530.
[235] K. GROENENDIJK, E. GUILD, *Visa Policy of Member States and the EU Towards Turkish Nationals after Soysal,* Nijmegem, Economic Development Foundation, 2010, 16.
[236] Case C-228/06, *Soysal* [2009] ECR I-1031.
[237] TEZCAN: Potential, 10.

of the Ankara Agreement realized. Nonetheless, in the aftermath of the oil crisis, the enthusiasm was replaced by an increasing number of restrictions and impediments on free movement.[238] While the visa requirements were more liberal or even non-existent in certain states, these were introduced towards the end of the 70's, and beginning of the 80's. The outcome of *Soysal* battles this situation, grants much more lenient visa and immigration laws and leads MS to liberalize their laws for Turkish service providers. The created situation is a complex one however: every single MS has to check its own applicable laws, creating a complex total of many different sets of rules.

As a response, the Commission released *Guidelines on the Movement of Turkish Nationals Crossing the External Borders of EU MS in order to Provide Services within the EU,*[239] which concerns only Germany, Denmark and the Netherlands, all part of the Schengen-area. These guidelines prescribe that Turkish service providers need to prove that they or their employers are established in Turkey by a certificate of the Chamber of Commerce, or by any other means of proof. They also need to prove that they are travelling to provide a temporary service. Nonetheless, this still does not exempt Turkish service providers fully from obtaining a visa: the guidelines only are of help for those who travel directly to the mentioned countries by plane or by ship. Thus the service providers who do not travel directly are still required to obtain a visa. While the Commission clarifies that the document only provides for a provisional solution, it should be clear that they have very limited practical meaning. it applies only for three MS. The required documents are also still problematic. While a certificate or other documents (such as excerpts of a contract) are easier to come by, they still impose an additional burden on the service provider. They don't render it a 'free movement' as such. A final remark is the requirement of 'direct travel.' Much of the cargo entering the EU is carried on lorries, which will enter the EU from states bordering Turkey. Again, the *Guidelines* do not provide any answer. In conclusion, the provisional answer given by the Commission mitigates the harm to the CU caused by the visa requirement only to a minor extent. Moreover, article 41(1) AP does not cover service recipients, including tourists, people travelling to receive education, medical care etc., The Court rejected this in

[238] N. TEZCAN/IDRIZ, *"Visa Hotline Project" Background Paper: Turkish Citizens' Rights in the EU,* Brussels, Economic Development Foundation Publications, 2010, 12.
[239] Commission Recommendation of 14 December 2012 – amending the Recommendation establishing a common "Practical Handbook for Border Guards" (Schengen Handbook) to be used by Member State's Competent Authorities when carrying out the Border Control of Persons. COM (2012) 9330 final.

Demirkan. If it would have accepted however, the visa issue for the purposes of the CU would have been addressed to a large extent.

D. ROAD TRANSPORT QUOTAS

One of the features in the establishment of the CU is the removal of quantitative barriers or measures having equivalent effect. This holds true both for imports as exports as stipulated in article 5 and 6 Decision 1/95. While the abolishment of these quotas is accomplished in the area of free movement of goods, the same cannot be said of the transport sector. By subjecting Turkish vehicles entering the EU market to road transport quotas ('RTQ') and transport permits, free movement of goods is hit in its means to be effectuated. Consequently, Turkey is dubbed the only country subject to transport quota but not to a trade quota.[240]

Essentially, there are two ways the RTQ are governed. Firstly, there is the ECMT's Multilateral Quota System, in which Turkey participates. The second option is the bilateral track. Turkey has concluded road transport agreements with 58 countries, to varying extents of liberalization.[241] In the intra-European sphere, the transport of goods is seen as a service, and consequently does not come in the ambit of the CU. There has been ongoing liberalization by the MS, envisaging the removal of restrictions in transport services under the Transport Policy *acquis*. Yet, concluding bilateral transport agreements, incorporating RTQs, is still a sovereign competence of the MS. This has led to a fragmented picture, whereby Turkey has concluded bilateral agreements with 25 MS,[242] all of which describe differing RTQs and fees. The situation can be said to be complex: Greece provides 35000 transit permits, while requiring a fee of €100 per round trip, while there is a free quota for Romania, after which Turkey can buy as many transit permits for €1200. Other MS even oblige transport operators to use alternative modes of transport.

The RTQs constitute a major headache for Turkish businesses exporting to the EU market. The system works as follows: the destination/transit country allocates RTQs by means of licenses to another country, which is not to exceed an annually granted maximum. Only with these licenses can Turkish vehicles enter the market, and once above the absolute maximum, no Turkish vehicles are thus allowed in the territory of the license-issuing MS. The problem here is however that the number of permits granted both through the bilateral track as the Multilateral Quota is too small regarding the Turkish demand. That is why RTQs essentially

[240] F. ÜLENGIN et al., 'Effects of quoatas on Turkish foreign trade: A gravity model,' *Transport Policy* 38, 2015, 2. ('ÜLENGIN, Effects')
[241] World Bank Report, 51.
[242] See Annex 14 World Bank Report.

boil down to limiting the number of Turkish vehicles carrying goods throughout the Union.[243] This situation is even aggravated by the several types of road transport licenses: bilateral permits, transit permits, third country permits, multiple permits and return load permits. Thus, when Turkish vehicles are transporting to a certain country, they need transit permits for all the countries they cross in transit, while also needing a bilateral permit for the country of destination. Per lorry, bilateral and transit permits can only be used once. Combined with the fragmented character, this poses a difficulty. While for instance France has a quota for the bilateral permit of 27000, Italy poses a quota of 6000 for transit permits. Turkish vehicles transiting through Italy with their destination France can thus in reality only deliver their goods while making use of maximum 6000 transit permits. Whatever remains from the bilateral permits will thus remain unused, and the bilateral agreements cannot live up to their potential. A way to circumvent these RTQs would be using quota-free routes. Yet this would ultimately culminate to even higher costs.[244]

By requiring the transporters of the goods to obtain permits, which only are granted in limited numbers, the proper functioning of the CU is hampered. The free movement of goods as such is not changed, but the transport underpinning such free movement is. This results firstly in high transport costs for Turkish exporters. During the period 2005-2012, this loss was reckoned to be as high as 10.6 billion USD.[245] Currently, transit liberalization is deemed to add €3.5 billion annually.[246] Transit permits are thus not cheap, and Turkish exporters cannot use the economically most viable way. Moreover, Turkish exporters have no real alternative, as higher fuel expenses come with alternative routes. An additional problem is that the RTQs lead to significant delays in the process of delivering goods, which on itself leads to a decrease of trade volume by 1%.[247] An example at hand is textiles, which is bound to be heavily impacted by RTQs, as its competitive advantage lies precisely in its short transportation time by the use of trucks.[248]

From a legal perspective, article 5 and 6 Decision 1/95 are exact copies of (ex) article 28 and 29 TEC.[249] Thus, the clarification given by the CJEU to the latter articles can certainly be

[243] S. TOGAN, *The Liberalization of Transportation Services in the EU and Turkey,* ('TOGAN, Liberalization')
[244] TOGAN, Liberalization,
[245] ÜLENGIN, Effects,
[246] A. ÖZEL, *Impact Analysis Study "EU-Turkey Road Freight Transport Liberalisation,"* International Transporter's Association of Turkey, Bucharest, 2016. ('ÖZEL, Impact')
[247] Liu and Xin, 2011
[248] ÜLENGIN, Effects, 2.
[249] KABAALIOGLU, Relations, 21.

regarded as guidance. In *Geddo,*[250] the Court clarified that a quantitative restriction could be a ban or quota on goods, or any measure amounting to a *'total or partial restraint on imports… or goods in transit.'* This puts both the bilateral as the transit permit as contravening the law. The latter part was further reestablished and extended, when the Court put forward that the free movement of goods would be impacted if MS would be interfering or impeding in any way with the transit, if the goods were destined for another Member State or even a third country. Consequently, goods in transit also enjoyed principally free movement as such. While admittedly the case involved goods originating from or manufactured within a Member state, it does not change anything. Seeing that the established rule is of general character, the Member States would be breaching it if any transit duties or other charges regarding transit would be imposed.[251] As the clearest example, the *SIOT* case should be mentioned as well. A direct excerpt dictates that the *'Customs Union covers the free movement of goods in all conditions. This freedom cannot be exercised fully if the transit of goods is restricted or if there is a threat of restriction in any form… This reveals that it cannot be charged any transit tax or raise any difficulty to the goods transit passing from a member state.'*[252] Even with the *Polydor* principle in mind, these interpretations would apply to the CU with Turkey. While the above mentioned problem of the visas touches upon the unequal evolution in other economic spheres, ultimately failing to make Turkey part of the Common Market, the interpretations given in the described cases were exactly situated in the CU. This interpretation should apply on the RTQ. Consequently, RTQs are non-tariff barriers.[253]

Possible solutions for this problem have been formulated. The World Bank proposes in its analyses that these quotas should be abolished, at least for those goods covered by the CU.[254] This would mean granting the European Commission the mandate to negotiate on the behalf of MS quotas and permits applicable to the entire territory, thereby making it easier for Turkish businesses to apply such a permit one time. Furthermore, road transit agreements similar to those concluded with Hungary and Romania, or a Land Transport Agreement

[250] Case C-2/73, *Geddo* [1973] ECR 865.
[251] S.S. HAGHIGHI, *Energy Security, The External Legal Relations of the European Union with Major Oil- and Gas-Supplying Countries,* Hart Publishing, 2007, 332.
[252] Case C-266/81, *SIOT* [1983] ECR 731.
[253] KABAALIOGLU, Relations, 21.
[254] World Bank Report, 85.

signed with Switzerland.[255] An FTA covering services could also be considered with Turkey, which obviously would include road transport. This however would also entail Turkey to adopt and implement the EU *acquis* on road freight transport, including the EU regulations on market access and competition, prices and fiscal conditions, social conditions, technical conditions, road safety and international transport networks.[256] A final solution, and less innovative, would be keeping the existing bilateral framework, while getting rid of any transit permits and elevating the number of the transit permits according to the real needs.[257]

[255] *Ibid.* 85.
[256] TOGAN, Liberalization.
[257] ÖZEL, Impact.

CHAPTER 3: TOWARDS A CUSTOMS UNION 2.0

A. INSTITUTIONAL REFORMS

While the CU envisages unrestricted free movement of goods, the main problems which are discussed above exactly impair this free movement, rendering it harder or even impossible for the goods to have unrestricted access to any state within the Common Customs Area. With TDI, quotas or subjecting the movement of persons to restrictions, the *condition sine qua non* of a CU is hit. In a legally ideal world, all of this would be resolved if Turkey were to become a MS soon. Due to the CU and the harmonization obligations, the accession of Turkey is considered to be already facilitated.[258] This would be the first and foremost scenario when looking for any improvements in the workings of the CU: if membership is in sight, the preferred option is to do nothing and wait until the problems disappear. Today, that idea seems not a probability. Rather, the current relations dictate accession as a vague possibility. The situation in which Turkey finds itself as an associated country is a difficult one. It could be summarized as being a '*relation deprived of legal economic and political equilibrium.*'[259]

All of these problems are the result of partial integration. More specifically, economic integration without political integration creates a false separation of both, while both are inextricably intertwined. It is in this context that the TDI should be understood. Not only surveillance measures, but also actions not mentioned in this paper: external tariff increases, non-tariff barriers and regulatory restrictions have been utilized, because Turkey wished to protect its internal economy. If Turkey would have been granted a say in its external policies, it would not have to act *a posteriori* to combat any detrimental effects. The lack of Turkish involvement is felt even more profound, when one takes into account the dynamic setting in which the Turkey-EU relations evolve. Indeed, *'the CU should not be considered as a mere economic relationship leading to a simple trade liberalization between two entities in a static environment. The CU process is not in isolation but evolves in a vigorous surrounding within which the actors' perceptions, stakes and expectations change in conjunction with global*

[258] LEBULLENGER, Contraintes, 262.
[259] PIRIM, Transitional 41.

circumstances.'[260] The modernization of the functioning of the EU could be established by amending Decision 1/95, while maintaining its sectoral scope, in two important areas; trade policy and dispute settlement.

a) Inclusion in Trade Policy

The first area of modernization would be the area of decision-making. From the start, it is clear that under no circumstances could Turkey have a right to vote. This was further emphasized with the theory of 'Privileged Partnership,' elaborated on by the Robert Schumann Foundation.[261] Turkey sitting as an observer in relevant Council meetings which directly concerns Turkey is desirable in all cases relevant to the working of the CU.[262] However, widening the CU necessitates that the asymmetries in its design are addressed, where this would certainly imply the area of trade policy. Ideally, letting Turkey participate in the negotiations with the third country, similar to how South Africa maintains the South African CU in its trade agreements.[263] This seems rather hard to achieve as the EU or the third country usually are not willing to have Turkey at the negotiating table. What is achievable however is the reinforced Turkey clause, described above, also safeguards the Turkish interests in a good fashion, leaving the third country no incentive to keep stalling with the negotiations for an FTA with Turkey. If the EU would introduce this clause in its agreements with third countries, the Turkish economy will not suffer in any case. To further minimize the detrimental effects, improved information sharing and consultation mechanism should be sought and used. Primarily, observer status should be granted to Turkey in key bodies, such as the Trade Policy Committee or GSP Committee.[264]Additionally, information-sharing could be enhanced to a large extent with Turkey: the EU could inform and brief Turkey after all talks the EU conducts with third countries.[265] Informal information mechanisms, such as 'Friends of Turkey' could be considered, which acts as an information

[260] M. S. AKMAN, 'Dynamics of the European Union's Trade Strategy and Its Imperatives on Turkish Trade Policy. Prospects for a Functioning Customs Union' in B. AKÇCAY, B. YILMAZ, *Turkey's Accession to the European Union,* 131.
[261] Turkey would enjoy an observer status, in the Council, work groups… but the right to vote wasn't even mentioned. See C. ALTOMONTE, et al., *Le Partenarait Privilégié, alternative á l'adhésion,* Foundation Robert Schuman 38, 2006, 63.
[262] KABAALIOGLU, Customs Union, 50.
[263] BOARD, 294.
[264] TÜSIAD, *A New Era For The Customs Union & the Business World: Ecexutive Summary,* Imak Ofset, 2015, 11. ('TÜSIAD, Era')
[265] *Ibid.*

platform within the European Parliament.[266] Granting Turkey access to the key institutions, is not a safeguard for a perfect future, but it will alleviate many of the Turkish worries and allow Turkey to act informed, while also being granted the opportunity to give its views to the EU MS.

b) Dispute Settlement

A second major change would require the setting up of an effective dispute settlement mechanism. This should not be subject to political conduct, meaning easy to block. While the Association Council should be able to have the primary responsibility to resolve disputes, the lack of political will of either party should not be a possibility to block. If the Association Council is in deadlock, the case should be able to be transferred to courts or arbitration.[267] Caution is needed however. While proper jurisdiction to interpret and apply would be the preferred option, it seems that it won't be possible to create a court. Opinion 1/91 contravenes this. While it would be possible to create a court with the competence to resolve disputes between parties, this would not be acceptable if the agreement *'takes over an essential part of the rules – including the rules of secondary legislation – which govern economic and trading relations with the Community, and constitutes for the most part, fundamental provisions of the Community legal order.'* Seeing the many harmonization obligations Turkey has in the light of the CU and outside it, there is a risk that such a jurisdictional system would not be compatible with the EU Treaties.[268] Yet, from the 80's onwards, contrary to the political settlement in the Ankara Agreement, the EU has opted for settlement of disputes in courts or by means of mandatory arbitration.[269] A possible solution in this regard may be offered by the DCFTA with Ukraine. If consultation falls short, an arbitration panel can come into play, which is appointed by both parties. It is known as a *'quasi-judicial model of trade adjudication,'* [270] which is based on the WTO dispute settlement mechanism, but with faster procedures. The arbitration panel takes a binding decision, and the parties will have the obligation to bring themselves in line with that

[266] M. RAISER, *The Turkey EU customs union at 20: time for a facelift,* http://www.brookings.edu/blogs/future-development/posts/2015/03/16-turkey-europe-raiser
[267] TÜSIAD, Era, 12.
[268] SMITS, Mécanismes, 298.
[269] TÜSIAD, Era, 12.
[270] I.G. BERCERO, 'Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?' in L. BARTELS, F. ORTINO (eds.), *Regional Trade Agreements and the WTO Legal System,* Oxford University Press, 2006, 383.

decision. If this doesn't happen, the complainant can impose proportionate sanctions. The arbitration process obviously should not be limited to the duration of safeguard measures, but extended to any trade irritants, undertaken by the parties. Yet, even with the arbitration, the requirement of homogeneity remains a problem. While Ukraine is not based on the same homogeneity principles as the EEA, Turkey arguably has some homogeneity obligations. Article 66 Decision 1/95 thus comes in play. Another possible solution might be to accept the CJEU's competence, even as that won't be easy to accept for Turkey.

B. A DEEPENED CUSTOMS UNION

The bilateral trade framework is outdated. As it is limited to industrial goods and alignment areas of law, it does not reflect the context for concluding preferential trade agreements any longer. While the CU is a deeper form of integration from a legal perspective, the newer FTAs have overtaken the CU with Tukey, by pursuing a more ambitious trade policy translated in much broader sectoral scopes. This leads indeed to a hierarchical anomaly. The newer FTAs contain areas not touched upon by the CU: services, public procurement and agricultural goods.

The widening of the CU would bring about important benefits to both parties. In the area of agriculture, a drop in food prices and increase in wages is expected to lead to more beneficial results in income distribution. While the situation differs for each product, the general assessment is a positive one. The liberalization of services would lead to Turkey boosting its overall competitiveness, due to the cost and quality. Additionally, by government procurement, Turkey would be finding new markets for its competitive contractors and civil engineers. Yet, the question remains how exactly this should be done. Should these areas be included in Decision 1/95, by extending its scope? Or should alternative ways be pursued, with recourse to a FTA?

It needs to be noted that with the removal of the accession perspective, the harmonization obligations, and all other obligations lose their very reason of existence. Furthermore, the institutional system is currently very lacking. And even when reformed, it still would be a question whether it would be able to let Turkey truly align with its obligations. So in the absence of any accession perspective, it can be said that there is no legal method to force

Turkey to meet its obligations arising from the agreements.[271] With the idea of altering relations, the European Commission presented 5 possibilities in its option mapping, incorporated in the 'Inception Impact Assessment.'[272] The first two will not be discussed here, as the *status quo* is untenable, and the second option, making Decision 1/95 more balanced and operational, is elaborated on in the previous section. The third option envisages to enhance bilateral trade relations to the level of the new FTAs, while the fourth option foresees a combination of the second and third option. The final choice is to replace the CU with a new generation FTA. Additionally, the EEA might be considered an option.

a) Modernizing the Customs Union

Amending Decision 1/95, enhanced bilateral trade relations could be set up, especially suitable in the area of agriculture.[273] This would lead to an increase in foreign direct investment, while also expanding trade in diverse sectors. This option necessarily goes combined with the revision of the institutional framework as touched upon above. Both the Turkish involvement in the Trade Policy and the creation of an adequate dispute settlement mechanism are a necessary precondition to move on in this sphere. The downside is however that this framework can only be changed to a certain extent, whereby Turkey would still be risking trade diversion, and a failure to have a vote in the policy it has to apply.

b) Complementing the Customs Union with a FTA

The extension of the CU could touch upon agriculture, while a comprehensive FTA could cover services, government procurement, investment and dispute settlement.[274] The same remarks as made above can be made: no place in the EU-third party negotiations with all its detrimental effects. Additionally, it does not lead to a comprehensive set of rules covering trade in goods, services and investment.

[271] PIRIM, Exemple, 521-522.
[272] EUROPEAN COMMISSION, *Inception Impact Assessment,* 2015, 3. ('COMMISSION, Inception')
[273] Trade and Investment, 42.
[274] *Ibid.*

c) Replacing the Customs union with a Comprehensive FTA

In a radical policy change, Turkey might opt for a replacement of its current relationship with the EU by swapping it for a comprehensive FTA. From the outset, it should be clear that this option would result in an agreement touching on many different aspects: industrial goods, agriculture, services, TBTs, intellectual property rights, investment, competition, public procurement and highly evolved dispute settlement mechanisms will be in place. Opting for this possibility, would also mean that the problems of voting rights, being issues of sovereignty, will be solved. The problems of exclusion from the negotiations with third countries would also be lifted. Major adaptions to the Ankara Agreement would be required, either through a new decision of the Association Council or through a new Protocol. Yet, while solving many issues of sovereignty, it also is a step back. The CU has embedded Turkey in the European economic infrastructure and brought more benefits than a FTA ever could.[275] In essence, an FTA would mean backtracking in the achievement of the accession oriented CU,[276] and create transaction costs, seeing that rules of origin become necessary if the state can determine her own external tariff. Moreover, replacing the CU with an FTA could entail serious reduction in EU imports from Turkey, while Turkish imports from the EU could increase or decrease, depending on the rules of origin and the MFN tariffs of Turkey.[277]

d) EEA

While not considered to be an option in the impact assessment, Turkey's accession to the EEA might solve a lot of problems. EEA membership would facilitate commerce on one hand, and provide Turkey with the political and social benefits on the other hand.[278] Additionally, Turkey would be able to take better part in the decision-shaping mechanism, and would take over EU legislation while the EFTA court would be watching. This can be seen as a pre-accession vehicle, while enjoying all the benefits, without any impediment to free trade. The CU is hierarchically perceived lower, having copied many provisions of the EEA, but without the far-reaching character of the EEA. To this end, *'the defects of the*

[275] World Bank Report, 22-24.
[276] COMMISSION, Inception, 3.
[277] World Bank Report, 22.
[278] Trade and Investment, 42.

EEA's decisions –making and dispute-settlement system are not very grave when the states who bear the brunt of its flaws will shortly be joining the EC. The Customs Union, taken as a whole, is a well-intentioned attempt to adapt the EEA to cover another portion of the acquis not covered by it originally.'[279] However, this option will be seen as backtracking as well, as Turkey would be going into another waiting room, possibly making the situation permanent;[280]

[279] PEERS, Sin, 429.
[280] Trade and Investment, 43.

CONCLUSION

The CU was clearly perceived as a vehicle to integrate Turkey in Europe, with a view of accession one day. The ongoing integration through the CU brought many benefits to both parties, and led to trade creation, while firmly embedding Turkey in the European economy. Yet as the accession perspective failed to materialize, the constraints of partial integration have been fortified and put forward in a strong fashion. The lack of political integration and the lack of achieving the other freedoms of the Common Market have brought Turkey in a unprecedented situation, in which a third state remains an outsider for the political process, but is European for free movement of goods.

The main culprit of the many impediments of the CU, can be pointed to the institutional void as created by the Decision 1/95. The lack of decent decision-shaping mechanisms, while a veritable judicial control is missing out of the picture, leads to an integration subject to the political will of both parties. That is not the way to properly engage in a high degree of economic integration. Precisely this institutional void can lead to the disintegration of the CU, seeing that Turkey is feeling the detrimental impact of the trade policy, which it could not decide on. While the best thing is accession, the next best thing is involving Turkey as much as possible in the negotiating process, giving it an ability to safeguard its interests. Additionally, the visa requirement, road quotas and TDI do not serve any other purpose than impeding free movement of goods. While these should and can be solved, parties seem to be reluctant to give up on control of the flows from the other party.

It remains to be seen which options will be followed to guide the CU to its future. While it is clear that a revision and upgrade is necessary to include new areas and thus broaden its scope, the chosen bilateral relations will define the future between the parties. While the CU would necessitate Turkey to envision accession, FTAs and the EEA would offer a way out, at the cost of losing this ambition. Whatever the case, Turkey and the EU are bound together economically, and whatever the relationship, it is clear that many rewards are to be reaped in the liberalization of trade between both parties.

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