Living in Sin: Legal Integration Under the EC-Turkey Customs Union

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The EC and Turkey entered into a formal customs union agreement on December 31, 1995, in the form of Decision 1/95 of the EC- Turkey Association Council.[1] The Decision represents the culmination of thirty-two years of association between the EC and Turkey – the Community's longest ongoing association. It is also the EC's first substantial functioning customs union with a third state,[2] and is the EC's third attempt to 'share' some of its legal system with other states, following the European Economic Area (EEA) and plans for integration with Eastern Europe.[3] Inevitably, such legal intimacy without formal EC membership entails a complex decision-making and dispute-settlement structure that is bound to fall short of that available to members. One is tempted to suggest that the parties to such agreements are 'living in sin'.

Yet since Turkey is unlikely to 'marry' the EC for the forseeable future, it is essential that this structure is capable of ensuring continued legal integration. Borrowing from both of the EC's other liaisons, the Community and Turkey have negotiated a workable method of living together in the medium term. Nevertheless, it will be hard for the arrangement to ensure the level of integration that the relationship requires to succeed.

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1 OJ (1996) L 35/1. As established in Case C-192/89, *Sevince* v. *Staatssecretaris van Justitie*, [1990] ECR I-3461, Decisions of Association Councils have direct effect in the EC. See further Peers, *Trade Agreements of the European Union* (forthcoming: Oxford University Press, 1997).

2 The EC's Association Agreements with Greece, Cyprus and Malta (OJ (1963) L 293/63; OJ (1973) L 133; OJ (1971) L 61) all envision establishing customs unions. However, Greece joined the EC before establishing a customs union; Malta has deferred the customs union indefinitely (see OJ (1991) L 116); and the first phase of the Cyprus-EC union will be completed only in 1998, with a second phase to follow (see Protocol, OJ (1987) L 393/1). The EC has implemented customs unions with San Marino and Andorra (OJ (1992) L 359/14; OJ (1990) L 374/16).

3 See EEA, OJ (1994) L 1/1; OJ (1995) L 86/58 (extension to Liechtenstein); White Paper on Eastern Europe (COM (95) 163, 10 May 1995); and comparative analysis by Peers, 'An Ever Closer Waiting Room: the Case for Eastern European Membership of the EEA', 32 *CML Rev.* (1995) 187.

I. Background to EC-Turkey Customs Union

A. The Ankara Agreement

The initial Association Agreement between the EC and Turkey (the 'Ankara Agreement')[4] set the goal of establishing a customs union between the parties, with consideration of eventual Turkish membership of the EEC.[5] Free movement of workers, establishment and services (including transport) were to be introduced; capital was freed to the extent necessary to develop the relationship (beginning with current payments) and agricultural goods would be subject to 'special rules'.[6] The Association Council set up by the Agreement would take decisions on developing the relationship and would settle disputes; failing such settlement, disputes would be referred to the European Court of Justice (ECJ) or other court or tribunal.[7]

B. The 1970 Protocol

The Association did not gain any substantial form until 1970, when the EC and Turkey signed an Additional Protocol (the '1970 Protocol') that has largely governed their relations since.[8] The EC immediately dropped all tariffs and quotas on Turkish industrial goods, with a couple of exceptions,[9] and granted Turkey a long list of agricultural concessions.[10] Turkey was to respond by gradually dropping its tariffs and quotas on industrial goods over a period of twenty-two years,[11] and also agreed to offer the EC agricultural concessions later.[12] Finally, Turkey agreed to adopt the EC's Common Customs Tariff over the same period of twenty-two years, with no reference to the EC's preferential agreements (although these were quite limited in 1970).

4 OJ (1973) C 113/2.
5 Arts. 10 and 28.
6 Arts. 11-20.
7 Art. 22 (Association Council); Art. 25 (dispute settlement). The reference procedure has never been invoked (GATT Secretariat, *Trade Policy Review: Turkey 1994* (1994), 2:127 (henceforth '*Trade Policy Review: Turkey '94*'). Except for two *Greece v. Commission* Cases (204/86, [1988] ECR 5323; 30/88, [1989] ECR 3711) all the cases relating to EC-Turkey relations have resulted from references from national courts under Art. 177 EC, and all have concerned the free movement of individuals: see Peers, 'Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union', 33 *CML Rev.* (1996) 7.
8 OJ (1972) L 293. In the meantime, an Association Committee, a Parliamentary Committee, and a Customs Co-operation Committee were formed (see Decisions 3/64, 1/65 and 2/69, in EC Council, *EEC-Turkey Association Agreement and Protocols and Other Basic Texts* (1992). The Association Committee is formed of senior civil servants who discuss day-to-day issues and make reports to the Association Council.
9 Arts. 9 and 24, Annexes 1 and 2.
10 Annex 6.
11 Arts. 10-16, 21-23, 25-28.
12 Art. 17, Annex 6. Turkey began offering such concessions in 1993: see *Trade Policy Review: Turkey '94* 1:5.

Services and establishment were subject to a standstill, and there were limited provisions on Turkish workers.[13] The Association Council had to devise rules on Turkish workers' social security, procurement, non-discriminatory state monopolies, competition and state aid.[14] The EC could continue to operate its anti-dumping laws,[15] and there was a safeguard designed to protect against import surges.[16] Turkey was encouraged to harmonize its laws where necessary for the functioning of the association, and the parties agreed to hold talks on economic and trade policy and abolish discriminatory indirect taxes.[17] Finally, a separate agreement on coal and steel (ECSC products) contained no obligations, but committed the parties to further negotiations.[18]

C. Developments 1970-1995

The Community and Turkey implemented the Protocol with Association Council Decisions on administrative cooperation and rules of origin for agriculture, further substantive concessions for agriculture, and limited rights for Turkish workers.[19] Yet in 1976, Turkey invoked the safeguard clause to delay any further opening of its market.[20] For its own part, the Community imposed safeguards on Turkish textile and clothing exports in 1977, followed by 'voluntary restraint agreements' that continued until Decision 1/95 entered into force.[21] After a lengthy 'freeze' in the EC-Turkey relationship, Turkey applied to join the EC in 1987, but the EC rejected the application in 1990 and appears unwilling to consider it again.[22] As an alternative to accession, the Commission proposed that the EC and Turkey complete the customs union and (in parallel) resume financial and other cooperation and agree free trade in ECSC products.[23]

These parallel issues were settled in 1995, but the results are not yet fully ratified. At the March 1995 Association Council, when Decision 1/95 was agreed, the EC made a unilateral Declaration on resumption of financial aid[24] and the parties adopted a Resolution on development of the association.[25] This Resolution called for an ECSC agreement and new reciprocal agricultural concessions by the end of 1995. It also ex-

13 Arts. 36-37 and 41-42.
14 Art. 39 (social security); Art. 30 (state monopolies); Art. 57 (procurement); Art. 43 (competition and state aids).
15 Art. 47(4), following Art. 91 EC; See Order of 26 Aug. 1996 in Case T-75/96, *Söktas*.
16 Art. 60.
17 Arts. 6 and 48 (harmonization); 49-52 (economic policy); 53 (trade policy); 44 (tax).
18 OJ (1972) L 293/67; later accessions at OJ (1977) L 361/187; OJ (1987) L 250; OJ (1988) L 104.
19 See Decisions 4/72, 5/72, 1/73, 2/76, 1/77, 1/80 and 3/80 in EC Council, *EEC-Turkey Association: Collected Acts* (loose-leaf).
20 *Trade Policy Review: Turkey '94*, 1:31.
21 *Trade Policy Review: Turkey '94*, 1:4.
22 See Commission Opinion, SEC (89) 2290, 22 Dec. 1989; Council Decision of 5 Feb. 1990, Bulletin-EC1-2/90, 77-78. In the meantime, Turkey resumed (from 1988) tariff cuts and quota abolition under the 1970 Protocol (*Trade Policy Review: Turkey '94*, 1:31). The Protocol's 22-year deadline is calculated from 1973, the entry into force of the full Protocol, so technically the customs union was achieved 'on time'.
23 SEC (90) 1017, 12 Jun. 1990.
24 See proposed implementation in COM (95) 389, 26 Jul. 1995.
25 Press Release CE-TR 108/95, 3 Mar. 1995.

tended cooperation in a number of areas, suggested closer dialogue on justice and home affairs issues, and established a political dialogue between the parties. At time of writing, the agricultural negotiations were still ongoing and the ECSC-Turkey Free Trade Agreement had come into force recently; however the financial aid package was blocked because of political disputes between Greece and Turkey. In the meantime, the November 1995 Association Council had agreed to a system of regular meetings between the parties, to complement the provisions in Decision 1/95.[26]

II. Decision 1/95: Substantive Harmonization Requirements

A. Introduction

The new Decision is concerned *entirely* with the free movement of goods and related issues. It does not even mention free movement of persons or of services, establishment, or capital movements. These issues are still covered by the existing Agreements or Decisions with Turkey.[27]

A central feature of Decision 1/95 is Turkey's obligation to adopt legislation, to reach agreements, and to apply Treaty articles equivalent to provisions adopted by the EC. This is bolstered by the requirement to interpret any provisions of the Decision worded identically to the EC Treaty *in the same way that the Court of Justice has interpreted the EC Treaty.*[28] To ensure the free movement of goods, the parties had to abolish tariffs, quotas, and measures of equivalent effect to either, and also adopt subsidiary provisions on discriminatory taxation and intellectual property law – all of which mirror primary or secondary EC law. To implement the customs union, they had to agree and implement identical customs legislation and commercial policy. To make certain that neither the market nor the customs union became distorted, they had to agree a common competition and state aid rules system and the mechanisms to operate it. Finally, to avoid distortions resulting from divergent amendments to legislation or from divergent judicial interpretation, they had to develop an institutional structure to monitor continued legal integration.

26 Press Release CE-TR 133/95, 15 Nov. 1995; see *infra* for discussion. See OJ (1996) L 227/1 (ECSC-Turkey Free Trade Agreement) for present status of the financial aid, see *Agence Europe*, 27 Mar. 1996.

27 Proposals to expand services and establishment had been blocked in 1986. They were to be included in the customs union but several Member States blocked it (*Agence Europe*, 15 Feb. 1995).

28 Art. 66, Decision, Art. 6 EEA; see discussion in Section III.C and exception for intellectual property in Section II.F, *infra*. It could be argued that other applications of Art. 30 EC now apply to Turkish goods, notably the *Cassis de Dijon* rule, but in *Opinion 1/91*, [1991] ECR I-6097, the ECJ stated that notwithstanding Art. 6 EEA, it might *not* interpret similar provisions identically. There is no EEA jurisprudence from the ECJ or the Court of First Instance (CFI) yet to test this question. See Cremona, 'The "Dynamic and Homogeneous" EEA: Byzantine Structures and Variable Geometry', 19 *EL Rev.* (1994) 905. The judgement of the CFI in Case T-185/94, *Geotronics v. Commission* [1995] ECR II-2795 did not decide the point, but it is on appeal (Case C-395/95 P, OJ (1996) C 46/8).

B. Industrial Goods

Decision 1/95 completes the abolition of all quotas and tariffs on industrial goods between the parties and provides for free circulation, effectively copying Articles 9, 10, 12, 16, 30, 34 and 36 of the EC Treaty.[29] Turkey has five years to adopt EC standards on goods, under a mechanism to be adopted by the Association Council within a year. In the intervening five years, the EC must accept Turkish goods certified to meet EC requirements, and Turkey must accept EC goods made to EC requirements unless it invokes the protection of health, life, and property.[30] The wording of this clause is clear enough to confer direct effect within the EC.

C. Agricultural Goods

The parties must drop all *industrial* components of the tariffs on processed agriculture, and Turkey is further obliged to harmonise with EC policy: it must adopt the EC's Most-Favoured Nation (MFN) industrial components on processed food imported from third countries.[31] Free movement for other agricultural products will await Turkish adoption of the CAP, which is difficult to envision at present.[32]

Turkey has one obligation not matched by the EC: it must allow free entry of EC foodstuffs meeting EC standards, in the same manner that it allows industrial goods meeting EC conformity. However, it is not clear whether Turkey must invoke the requisite consultation procedure when it bars such products to protect health and safety.[33] Turkey is not required to harmonize with EC agricultural standards, and indeed the Decision does not even refer to veterinary and phyto-sanitary standards.[34]

29 Arts. 3-7. However, there is still a safeguard clause (Art. 63), continued unchanged from the 1970 Protocol.

30 Arts. 7-11. Compare with the Eastern Europe White Paper (supra, note 3), obliging the associates to adopt the EC's product standards *without* a guarantee that the EC would accept their certification. See Section III.B, *infra*, on the interim consultation procedure. Turkey is an associate member of CEN and CENELEC (EC standards organisations), has standards agreements with several Member States, and meets international standards on 80% of its exports (*Trade Policy Review: Turkey '94* 1:60).

31 Arts. 17-23. The *agricultural* component of tariffs on processed food remains unaffected. This is charged on the value of the processed food *before* processing, and is a post- Uruguay Round replacement for the EC's variable levies. Turkey has one to three years to introduce some of its reductions (see Annex 6).

32 Turkey has adopted the CAP for some fruit and vegetables: see *Trade Policy Review: Turkey '94*, 1:5.

33 Art. 10(4) refers to Arts. 10(1) and 10(2), not to Art. 10(3) on consultations; but exercise of Art. 10(3) is a *component* of Art. 10(2).

34 The Commission had proposed an agricultural standards agreement with its 1990 proposals (*supra*, note 23).

D. Common Commercial Policy

Of course, a customs union requires not just abolition of tariffs and quotas between the parties, but a common trade policy. As noted above, Turkey has met its obligations to charge the Common Customs Tariff on industrial goods (except for ECSC products) on an *MFN basis* from third countries – except for EFTA members, for which it has already adopted the EC's *preferential* policy. However, full adoption of EC trade policy is deferred for five years. In the meantime, Turkey may still exclude 5% of its 1967 imports from the requirement to charge the Common External Tariff, and must adopt the EC's autonomous tariff preferences and negotiate preferential agreements with third states matching the EC's over this period.[35] This includes the adoption of trade *restrictions* on textiles and clothing.[36]

Along with the requirement to conclude equivalent agreements, Turkey also has to apply identical trade defence and customs legislation to that of the EC.[37] The parties are encouraged to adopt joint trade defence actions, but are not compelled to do so.[38] Although the 1970 Protocol specified that the parties would reach agreement on a system for harmonizing commercial policy,[39] the Decision contains no such provision. Its institutions deal solely with cooperation on EC legislation.

E. Possible Abolition of Trade Defences

Turkey is given a further incentive to adopt EC legislation: the EC might drop anti-dumping, anti-subsidy, and 'trade barrier' actions against Turkey, 'provided that Turkey has implemented competition, state aids control and other relevant parts of the acquis communautaire which are related to the internal market'.[40] This was the *quid pro quo* of abolition of trade defence measures under the EEA,[41] although unfortunately the Decision provides only for a *review* of trade defence actions, rather than automatic suspension once the Association Council determines that the conditions are met.

F. Intellectual Property

Turkey is obliged to adopt a detailed list of EC legislation and international conventions on intellectual property rights (IPRs) and implement most rules of the TRIPs (Trade-

35 Arts. 15 and 16; *Trade Policy Review: Turkey '94* 1:33 (EFTA-Turkey agreement).
36 Art. 12(2). Turkey's implementing measures have not been published.
37 Respectively Arts. 12 and 28.
38 Arts. 45-46.
39 See note 17, *supra*.
40 Art. 44(1). It is not clear which other parts of the *acquis* are deemed to be relevant. According to Commission staff, there is no date pencilled in for examination of abolition, but the author submits that the trade weapons should be dropped as soon as Turkey has fully adopted the EC's state aids and competition policy (scheduled for two years' time at the latest: see Section II.F, *infra*).
41 See Art. 26 EEA and 'An Ever Closer Waiting Room', *supra* note 3, at 193-202.

Related Intellectual Property Rights) agreement within three years.[42] The Annex explicitly provides that it will not affect national rules on exhaustion of IPRs – a derogation from the requirement that the Decision must be interpreted in the same way as the EC Treaty.[43]

G. Competition and State Aid

Like many of the EC's other trading partners, Turkey is obliged to adopt the EC's competition and state aid rules. The EC now has three separate systems for 'external' application of these rules, each dealing differently with five central questions: (i) which law is to be followed (always the EC's, although possibly with exceptions or transitional derogations); (ii) which authority has jurisdiction; (iii) how the policy and legislation is to be enforced; (iv) how application of the law and policy are to remain consistent; and (v) how disputes over consistency, jurisdiction, interpretation or enforcement must be settled.[44]

The EEA adopted EC competition and state aids law without derogation (except for the exclusion of basic agriculture and fisheries products), including all legislation, Decisions, block exemptions, state aid frameworks and guidelines, and prior case law. It precludes parallel jurisdiction over competition law by adopting combined percentage of activity and *de minimis* tests to ascertain which authority should deal with a case.[45] An EFTA Surveillance Authority and EFTA Court were established, with powers over competition and state aid that match the EC Commission and Courts' powers.

The Europe Agreements (and now the new Euro-Mediterranean Agreements with Tunisia and Morocco)[46] state that restrictive practices, abuses of dominant positions, and distortions caused by state aid are 'incompatible' with the proper functioning of the Agreements to the extent that they affect trade.[47] Such practices will be 'assessed on the basis of criteria arising from application of the rules of Articles 85, 86 and 92' EC, and the parties must inform each other of state aids they are granting. The associates were thus initially not *explicitly* required to adopt EC legislation, case law, and policy, al-

42 Annex 8. Unlike the Eastern European states, Turkey is not obliged to accede to the European Patent Convention.

43 Annex 8, Art. 10(2); this was precisely the issue in Case 270/80, *Polydor v. Harlequin Record Shops*, [1982] ECR 329.

44 Points (iv) and (v) will be discussed in Sections III. B, C, and D, *infra*, along with similar issues relating to the entire customs union.

45 Arts. 53-64 and 108-110 EEA. See Blanchet, et. al., *The Agreement on a European Economic Area (EEA)* (1994), 151-244. State aid did not need a jurisdiction rule, as it is simply supervised by the authority overseeing the state granting the benefits.

46 Art. 65, EC-Poland Europe Agreement (OJ (1994) L 348). The system in the Euro- Mediterranean agreements (Tunisia, COM (95) 235, 31 May 1995; Morocco, COM (95) 740, 20 Dec. 1995) differs in detail from that in the Europe Agreements (time limits to adopt implementing measures, special restructuring funds, treatment of Article 90 EC) but follows the same model. The new EC-Israel competition rules (see Interim Agreement, OJ (1996) L 71) are similar, but lack any reference to the EC Treaty.

47 Basic agriculture and fish are again excluded from the state aid rules, but restrictive practices affecting such products will be assessed according to the EC Treaty and secondary legislation.

though (as discussed in Section 3.4, *infra*) they risked a trade defence measure if they did not.[48]

Each Association Council has three years to adopt implementing rules (and to ensure that the 'principles' of Article 90 EC are upheld), and in the meantime each party will apply the GATT Subsidies Code to assess state aid granted by the other. Yet simultaneously, aid granted by associates must be 'assessed' (for five years, capable of renewal) as if the associates were underdeveloped areas within the meaning of Article 92(3)(a) EC. Since the GATT Subsidies Code is quite differently structured from Article 92 EC, this might give rise to problems of interpretation.[49]

The Association Councils have now agreed virtually identical implementing rules under five of the Europe Agreements, although the rules leave many issues unresolved.[50] The rules also ignore state aids[51] and public undertakings, and provide for overlapping competence of the Commission and the associates' national authorities in competition cases, albeit with the possibility of requesting the other authority to take action and a right of each associate's authority to comment when affected by operation of the EC's Merger Regulation. They also establish that the EC's block exemptions must be applied in each of the associates, which was only implicit in the parent Agreements. In the long term, the Commission believes that a variant of the EFTA Surveillance Authority might possibly be established in Eastern Europe, but such a development seems some time away. For the time being, it would like the associates' national 'surveillance authorities' to assess state aids pursuant to the EC's rules and procedures.[52]

In contrast, Turkey's harmonization obligations are far more explicit.[53] Before entry into force of the Decision, it had to establish a competition law implementing Arts. 85 and 86 EC, and adapt textile aids to the EC state aids rules. It has a year to adopt EC block exemption regulations and the principles of Article 90 EC (including secondary legislation and case law). Finally, Turkey has two years to apply EC state aid rules to the remainder of its industry.[54]

48 However, they do have a separate obligation to harmonise with EC competition law (EC-Poland, Arts. 68-69). State aid rules are not mentioned, but the Commission is expecting that the associates will harmonise them ('Follow-up to Strategy Paper' on Eastern Europe (COM (94) 361, 27 July 1994), 6-7).

49 Heinz, 'Rules on State Aids with Hungary in the Europe Agreement', *ECLR* (1995) 2:116.

50 In force with Czech Republic and Poland : OJ (1996) L 31/21 and OJ (1996) L 208/24; proposed for Hungary, the Slovak Republic and Bulgaria; COM (94) 639, 15 Dec. 1994; COM (95) 156, 18 May 1995; COM (95) 528, 22 Nov. 1995. See van den Bossche, 'The Competition Provisions in the Europe Agreements: A Comparative and Critical Analysis', Third Ghent Colloquium on Relations Between the European Union and Central and Eastern Europe, 7-8 March 1996 (to be published).

51 Reportedly the Commission had drafted implementing rules for state aids by early 1996 (not yet published).

52 'Follow-up to Strategy Paper', *supra* note 48, 6-7.

53 Arts. 32-43 of Decision.

54 The competition and state aid obligations do not apply to basic agriculture and fisheries, services and ECSC products, as these are outside the scope of the Decision. However, the recent ECSC-Turkey agreement (*supra* note 26) contains similar competition and state aid provisions (Arts. 7-12).

Under the 1970 Protocol, Turkey had been classed as a 'developing area' under Article 92(3)(a) EC. Aid was considered *automatically* compatible with the Association if it did not 'alter the conditions of trade to an extent inconsistent with the mutual interests' of the parties.[55] This did not stop the EC from implementing an anti-subsidy action against Turkish exports, when the Commission and Council believed that trade was indeed so altered.[56]

Decision 1/95 has amended implementation of the EC Treaty's state aid rules to allow for a partial continuation of the previous derogation. First of all, aid to Turkey's *less developed regions* (rather than all of Turkey) is still automatically compatible with the customs union (in the sense of Article 92(2) EC), albeit for only a five year period which cannot be renewed and only to the extent that this does not 'adversely affect trading conditions between the Community and Turkey' contrary to the common interest.[57] Secondly, aid *may* be granted (in the sense of Article 92(3) EC) to promote development of poor areas of the customs union indefinitely and to assist in Turkey's structural adjustment for five years (which may be extended).[58] The latter clause is unique to the Decision, but the former clause incorporates Article 92(3)(a) EC again, albeit now without automatically approving all such aid (bar that affecting trade) or specifying that all of Turkey is considered poor relative to the EC. However, Article 92(3)(a) EC refers to areas which are poor relative to the EC average,[59] rather than a Member State average, a definition which would still allow aid to be granted to all of Turkey for the foreseeable future. Poorer *parts* of Member States (and thus of Turkey) can still receive aid under Article 92(3)(c) EC, also incorporated into the Decision.[60]

The implementing rules should be adopted within two years, but in the meantime each competition authority shall deal separately with disputes that affect both parties and state aids should be assessed in light of the GATT Subsidies Code – although the dispute settlement rules for state aids might have already settled the issue. Each party may request the other to review anti-competitive activities undertaken on its territory. There are also general information and consultation obligations. Decision 1/95 aims for a more intense level of integration than do the Europe Agreements (to date) but there are several problems with both the design of future harmonization and the method of dispute settlement (discussed *infra*, Sections III. C and D).

55 Art. 42(3), 1970 Protocol. Note that aid *actually* pursuant to Art. 92(3)(a) EC (or Art. 61(3)(a) EEA) is *not* automatically compatible with the Treaty, but subject to the approval of the Commission or EFTA Surveillance Authority.

56 Commission Reg. 1432/91, OJ (1991) L 137/8; Council Reg. 2833/91, OJ (1991) L 272/2; undertaking at OJ (1991) L 272/92.

57 Art. 34(2)(d). Art. 34(2)(a) to (c) repeats the automatic exemptions of Arts. 92(2)(a) to (c) EC (aid for consumers, natural disasters, and German division).

58 Arts. 34(3)(a) and 34(3)(c). Art. 34(3)(b) and (d)-(f) incorporates the remainder of Art. 92(3) EC (including items of common European interest, regional and sectoral aid, cultural aid, and approved new categories).

59 Case 730/79, *Philip Morris Holland v. Commission*, [1980] ECR 2671.

60 Art. 34(3)(d). This clause also allows aid to 'certain economic activities'.

III. Institutional Issues

Although the Decision provides access to the EC's customs union, rather than its internal market, the EC and Turkey faced the same four institutional issues that the EC and the EFTA states tried to solve in the EEA: consultation, decision-making, homogeneity, and dispute settlement.[61] Logically enough, the EEA has served as a model for the customs union, but with some modifications likely to detract from the effectiveness of the new agreement. Some of the most critical issues are not covered at all. In short, the Decision falls short of the institutional development that a customs union requires.

A. Institutional Structure

The customs union will be overseen by a new institution, the Customs Union Joint Committee (CUJC), identical in certain respects to the EEA Joint Committee.[62] Like the latter Committee, the CUJC will consist of members of the Contracting Parties, and will meet once a month as a general rule, indicating that the parties realize that the customs union will require close coordination and frequent contact to maintain.[63] It will consist of national representatives (presumably senior civil servants) and may establish sub-committees or working parties. *Unlike* the EEA Joint Committee, the CUJC is not empowered 'to take decisions in the cases provided for', but may only 'formulate recommendations to the Association Council and deliver opinions' to ensure the functioning of the customs union.

There are, however, four limited exceptions to this in the Decision: the Committee may grant a delay if Turkey is unable to adopt changes to the EC's Common Customs Tariff immediately;[64] it must establish a list of goods from the EC's FTA partners upon which Turkey may charge a compensatory levy pending its adoption of parallel preferential agreements;[65] it may amend or abolish a 'divergent implementation safeguard' adopted by either party;[66] and it must perform any IPR-related tasks assigned to it by the Association Council.[67] Outside these four fields and its general responsibility to oversee the functioning of the agreement, the Committee is to serve as a forum for consultation in certain specified cases.[68] The existing Customs Cooperation Council has

61 See analysis in Reymond, 'Institutions, Decision-Making Procedure and Settlement of Disputes in the European Economic Area', 30 (1993) *CML Rev.* 449.

62 Compare Arts. 52-53 of the Decision with Arts. 92-94 EEA.

63 Compare with the EC's other trade agreements, generally calling for yearly meetings of an Association or Cooperation Council. However, in lieu of separate monthly meetings, the Europe Agreement signatories are now invited to many meetings of the EC Council to help prepare them for accession (see 'An Ever Closer Waiting Room', *supra* note 3, 203-204).

64 Art. 14(2).

65 Art. 16(3)(b).

66 Art. 58(2); the CUJC may also determine that new Turkish legislation is not divergent with the customs union (Art. 57(1); see Section III.C, *infra*).

67 Annex 8, Art. 9.

68 See Art. 10(3), consultation on technical barriers; Art. 14(1), information on CCT changes; Art. 14(3), consultations on temporary suspension of the CCT on a good; Art. 23, consultations on the processed agricultural safeguard; Art. 38(1), consultation on a competition-related complaint; Art. 46, informa-

been assigned certain administrative tasks,[69] so the parties will need to be careful that it acts in harmony with the CUJC.

Above the EEA Joint Committee, the EEA Council was designed as a political institution, meeting at least twice a year, consisting of EC Council and Commission members and ministers in EFTA governments, which gives 'political impetus', takes 'political decisions', lays down 'general guidelines', and assesses 'the overall functioning and the development' of the EEA.[70] It was clearly modelled upon the EC's European Council, taking the most fundamental decisions and leaving all of the details to be worked out in the Joint Committee.

In contrast, the EC-Turkey Association Council, created by the Ankara Agreement, has bolstered its importance as the most powerful Council created by any EC trade agreement.[71] It retains many of the decision-making powers it was granted by the 1970 Protocol (either by reference, replacement with a similar provision, or implicit continuation), and has been granted several more by the Decision. It is entrusted with both the lengthy agenda for future development of the EC-Turkey relationship and the obligation to make pivotal decisions about operation of the customs union.

The Association Council must conduct negotiations on technical barriers and procurement;[72] lay down competition rules and a time-table for abolishing state monopolies;[73] grant derogations from the CCT, add to the list of permitted state aids, extend Turkey's 'developing region' status, and expand upon Turkey's IPR obligations;[74] establish the rules for Turkish involvement in EC committees;[75] recommend or extend harmonisation in any field;[76] decide whether to introduce free movement of agriculture or to abolish trade defences;[77] and revise the date of the Decision's entry into force.[78]

tion on anti-dumping duties against a good in free circulation; Arts. 55-60 (consultations on divergent legislation); Annex 8, Art. 9, monitoring IPR implementation.

69 See Art. 3(6), customs union; Art. 13, CCT; Art. 28(3), implementation of the EC's customs legislation; Art. 30, harmonisation of customs debt rules. See OJ (1996) L 208/31.

70 Arts. 89-91 EEA.

71 The Association Council consists of Commission members and Member State and Turkish ministers. The EC ministers act unanimously, except when deciding on a trade issue: see Implementation Agreement, OJ (1964) L 217.

72 Respectively Arts. 8(2) and 48 of the Decision; the latter power replaces Art. 57, 1970 Protocol.

73 Respectively Arts. 37(1) and 42 of the Decision, replacing Arts. 43(1) and 30(3), 1970 Protocol.

74 Respectively Arts. 15, 34(3)(f), 34(3)(c) and Annex 8, Art. 8 of the Decision. Arts. 15 and 34(3)(c) replace *and* implement Arts. 19(2) and 43(2) of the 1970 Protocol respectively.

75 Art. 60.

76 Arts. 51 and 54(2) of the Decision, replacing Art. 48, 1970 Protocol. With Art. 28 of the Decision, Art. 51 also replaces Art. 6 of the 1970 Protocol.

77 Respectively Arts. 27 and 44 of the Decision. Art. 27 replaces Art. 34(1), 1970 Protocol, and is also an exercise of Art. 34(3) of the Protocol. Under Art. 26 of the Decision, the Council may examine agricultural preferences granted between the parties; this may replace the two-year review and decision-making powers of Arts. 35(1) and 35(3), 1970 Protocol. The parties will also consult on their agricultural policies in the Association Council (Art. 25(3), replacing Art. 33(5), 1970 Protocol).

78 Arts. 65(3) and 65(5). Of course, these latter two provisions were *political statements*, rather than an actual conferral of powers, because the Association Council could not have exercised powers *pursuant to* the Decision *before* the Decision entered into force. The Decision must have been implemented pursuant to Art. 22(3) of the Ankara Agreement.

The powers which the Association Council retains from the 1970 Protocol are partly in fields unrelated to the customs union. They cover the implementation of free movement of workers, services (including transport) and establishment;[79] the approval of restrictions on capital transfer;[80] and a wide array of review, consultation and recommendation functions.[81] The Association Council also retains powers over dispute settlement and expansion of the scope of the association under the Ankara Agreement.[82] All other powers have apparently (but not explicitly) been subsumed by the provisions of the Decision.

B. Consultation and Decision-making

The customs union's consultation mechanisms have been taken in large part from the EEA.[83] The Decision begins by listing the areas which are of 'direct relevance' to the customs union and which Turkey must therefore harmonize with: commercial policy; commercial agreements with third countries; legislation on technical barriers, intellectual property, customs and competition.[84] When directly relevant new *legislation* is drawn up by the Community,[85] it must consult Turkish experts informally, send copies of the formal proposals to Turkey, and hold regular consultations in the CUJC during the Community's decision-making procedure.[86] Turkish experts must also be consulted when draft Commission regulations are laid before executive Committees or subsequently referred to the Council.[87] When legislation is finally adopted, the Community must inform Turkey to allow it to adopt corresponding legislation.[88] Turkey retains the

79 Arts. 36, 41(2) and 42, 1970 Protocol. The Council also presumably retains power to amend the social security rules under Art. 39 of the Protocol. Art. 42(2) grants specific power to negotiate air and sea transport agreements.

80 Art. 50(3), 1970 Protocol.

81 These relate to workers (Arts. 38 and 40); anti-dumping (Art. 47; referred to in Art. 42(2) of the Decision); economic policy coordination (Art. 49); commercial policy (Arts. 53 and 54); Turkish development policy (Art. 55); EC accessions (Art. 56); and the safeguard clause (Art. 60; referred to in Art. 63 of the Decision).

82 Respectively Arts. 25 and 22(3), Ankara Agreement. The latter provision is modelled upon Art. 235 EC.

83 The Europe Agreements have no formal consultation procedure, despite the harmonization obligations of the White Paper (*supra* note 3).

84 Arts. 54(1) and 54(3). This list may be extended by the Association Council.

85 There is no reference to new *agreements with third countries*, despite Turkey's obligation to harmonize with such agreements, but see the existing trade policy consultation mechanism in Art. 53 of the 1970 Protocol.

86 Art. 55. Compare with Art. 99 EEA, which required consulting EFTA experts 'on the same basis' as EC experts and which provides for more consultations. However, Turkey can convene consultations whenever it wishes.

87 Arts. 59 and 60; compare with Arts. 100 and 101 EEA; see implementation in Decision 5/95, OJ (1996) L 35/49. Turkey had requested consultation with more committees than Decision 1/95 had envisioned (see list in Annex 9 and various Statements by Turkey), but only the Textile Committee has been added to the list (see Decision 6/95, OJ (1996) L 35/50).

88 Art. 56. Compare with Art. 102(1) to 102(3) EEA, which sets out a procedure to amend the lists of legislation in the EEA Annexes whenever the EC adopts new legislation. There is no reference to amending the Decision to refer to new legislation.

right to amend its own legislation, subject to consultations in the CUJC to ensure that the amendments will not interfere with the customs union.[89]

If consultations on either of these tracks fail, the parties depart somewhat from the EEA procedure.[90] The CUJC may recommend methods of avoiding injury, while the EEA Joint Committee may take actions to maintain functioning of the agreement. If the discrepancies in legislation nevertheless result in 'impairment of the free movement of goods, deflections of trade, or economic problems' (under the customs union), or a failure to amend an Annex (under the EEA), a party may protect itself with a special form of safeguard.[91] There is also a special requirement to consult in the CUJC before Turkey invokes the equivalent of Article 36 EC.[92]

The EEA's decision-making provisions were widely criticized as inadequate when the Agreement was concluded. They were clearly designed to allow the EC full freedom to adopt legislation as it wished, while involving the EFTA states only in non-binding discussions and subsequent approval of the final product. It seems that the EC is willing to consult with non-Member States in certain circumstances, but is unwilling to give any non-members full access to its decision-making procedures. The flaws in the EEA provisions have been compounded by the failure to adjust them to reflect Turkey's involvement in the EC's trade policy. Turkey cannot affect the revision or negotiation of new trade agreements, and it is explicitly excluded from consultation when the EC adopts trade policy measures against third states – even though the Decision suggests that the EC and Turkey should attempt to act in tandem on such measures.[93]

The consultation structure of Decision 1/95 is supplemented by an agreed system of EC-Turkey meetings that is apparently based on the EC's integration program with Eastern Europe, rather than the EEA.[94] The March 1995 Association Council agreed on the modalities of implementing 'political dialogue' between the parties. There will be an annual summit between the Turkish President or Prime Minister and the Commission and European Council President; half-yearly meetings of Foreign Ministers (once in the Association Council and once as a Troika); meetings of senior officials twice a year; consultation in Common Foreign and Security Policy (CFSP) working parties; and regular information on the results of CFSP meetings.

The November 1995 Association Council agreed a similar consultation system for first and third pillar matters. In addition to the summit meetings and meetings with Foreign Ministers, Turkish ministers were granted meetings twice a year with Internal Market Ministers; (unspecified) ministerial meetings in other customs union areas; and 'regular' meetings with Home Affairs Ministers and the 'K.4 Committee' of senior officials preparing Home Affairs discussions. Senior officials in relevant sectors will also meet regularly.

89 Art. 57, corresponding to Art. 97 EEA.
90 Art. 58; compare with Art. 102(4) to (6) EEA.
91 See Sections III. C and D, *infra*.
92 Art. 10(3).
93 Art. 45.
94 See *supra*, notes 25 and 26.

These arrangements fall far short of the dozens of yearly meetings now held with the eastern associates. Twice-yearly meetings with Foreign Ministers are obviously insufficient to coordinate commercial policy, although Turkish ministers may have a greater impact in internal market meetings, which are held only four times a year. There is no agenda for the Home Affairs meetings yet, and no indication that there are plans to negotiate parallel Conventions to those agreed by the Union's Member States.

C. Homogeneity

Although the EC and Turkey adapted the EEA system for incorporating new *legislation*, they decided to truncate the EEA model for incorporating *case law*. As noted *supra*, Decision 1/95 contains a provision requiring identical interpretation of identical provisions of the EC Treaty.[95] This was obviously inspired by the EEA clause requiring identical interpretation of all Treaty articles and of all *legislation* mentioned in the Annexes and adopted *prior to* the date of signature.[96] The two obligations clearly differ substantially. Although Decision 1/95 does not list the bulk of EC legislation in massive sectoral Annexes, it does list customs, trade policy and intellectual property laws which Turkey must adopt.[97] Furthermore, it obliges Turkey to adopt the EC's secondary competition and state aid legislation (including the EC's competition block exemptions and the *case law* developed by EC authorities) as well as the principles of the secondary legislation and *case law* resulting from Article 90 EC.[98] It is hard to see how these obligations can function without a method of incorporating the case law (past and future) relating to such secondary legislation.

The other part of the EEA model is omitted entirely. As the EFTA states were unwilling to commit to incorporate all future case law of the ECJ, the EEA established a 'homogeneity procedure' under which the EC and the EFTA states examine the rulings of both the ECJ and the EFTA Court (which receives references from the courts of the EFTA states on interpretation of the EEA).[99] If the Courts' interpretations of legislation or the EC Treaty begin to diverge, the Joint Committee is to act 'to preserve the homogeneous interpretation of the Agreement', failing which the dispute settlement procedure is to be invoked. This procedure is bolstered by a system of exchanging information on EC law among the relevant courts, and the rights of intervention for all parties

95 Art. 66. There is no system under the Europe Agreements or the Euro-Mediterranean agreements for adopting or comparing case law, although reportedly the draft implementing rules for Europe Agreement state aids (*supra*, note 51) refer to ECJ and CFI case law.

96 Art. 6 EEA. However, although the Decision requires Turkey to adopt EC regulations and provide for legislation equivalent to directives, it does not specify the distinction to be made between the two when implementing them (see Art. 7 EEA). Nor does it require Turkey to introduce a 'supremacy clause' in its national law (see Protocol 35 EEA).

97 Arts. 28 and 12; Annex 8. See also Art. 16(2) on identical rules of origin in trade agreements. Harmonization of product standards (Art. 8(2)) may well require adoption of an Annex similar to those attached to the EEA.

98 Art. 39 (competition and state aids); Art. 41 (public undertakings).

99 Arts. 105-107 EEA; Art. 34 of EFTA Surveillance Authority/EFTA Court Agreement, annexed to *The Agreement on the European Economic Area*, *supra* note 45.

before the EFTA Court or the ECJ.[100] Even though Turkey has only committed itself to accept the case law relating to the EC Treaty, and it is apparently willing to accept the *future* case law of the ECJ on the Treaty, it is surely possible that the Turkish courts will begin to deliver divergent interpretations of Treaty articles, which might well distort the free movement of goods between the parties. It should also be possible for Turkey to express its view on relevant cases before the ECJ when its courts have an obligation to accept the ruling; or for the Commission's legal advisors to advise the Turkish courts on the ECJ's jurisprudence. Yet there is no mechanism to transmit judgments of each party's courts, for mutual intervention, or for the parties to act to preserve homogeneous interpretation of the agreement. The Community and Turkey have willed the end without providing the means.

D. Dispute Settlement and Safeguards

Like the consultation provisions, the parties have used an EEA model for dispute settlement.[101] The EEA allows the parties to bring a dispute on the interpretation or application of the EEA before the EEA Joint Committee. If the dispute involves a provision identical to one in the EC Treaty or secondary legislation (including a dispute over divergent case law), the parties may refer it to the ECJ for interpretation after three months of consultations.[102] After six months, if the dispute is neither referred to the ECJ nor settled, the parties can either apply the procedure for suspending an Annex to the EEA or take a safeguard measure. Safeguards can also be imposed when 'serious economic, societal or environmental difficulties of a sectorial or regional nature' arise. They must be proportionate and are subject to consultations before and after adoption with a view to avoiding them or ending them as soon as possible. When one party invokes a safeguard, the other may take a 'proportionate' balancing measure, again subject to consultations.[103]

In the event of a dispute between the EC Commission's and the EFTA Surveillance Authority's interpretation of state aid legislation, a party may adopt 'interim measures' (after two weeks' consultation), which could become definitive if the dispute could not be settled in continuing negotiations.[104] A party can also invoke arbitration *without* the

100 Art. 106 and Joint Declarations 27 & 28 EEA.

101 Art. 111 EEA. Contrast with other EC trade agreements, which usually allow either party to invoke an arbitration procedure to settle any question relating to the 'interpretation or application' of that agreement (for example, see EC-Poland Europe Agreement, Art. 105 (4)). Each party appoints an arbitrator; the two arbitrators jointly agree upon an umpire; the panel makes an award by majority vote. These arbitration procedures were apparently never used until mid-1995, when the EC and Poland invoked a panel which has not yet reached a decision (Press Release UE-PL 1404/95, 17 Jul. 1995).

102 This proviso is the consequence of Opinion 1/91, *supra* note 28, and was approved by the ECJ in *Opinion 1/92*, [1992] ECR I-2821.

103 Arts. 112-114 EEA.

104 Art. 64 EEA.

consent of the other party, but the arbitrators' jurisdiction is sharply limited.[105] They only have power to settle a dispute relating to the *scope or duration* of safeguard or rebalancing measures, and they may not settle a matter by ruling on interpretation of the EC Treaty or EC secondary legislation.

If Decision 1/95 and the Ankara Agreement are read together, customs union dispute settlement will be very similar – with the significant exceptions of competition, trade defences, and state aids. Economic safeguards will still be imposed where 'serious disturbances occur' in a sector of the EC or the Turkish economy, or where the 'external financial stability' of a party is prejudiced.[106] Where 'discrepancies' between EC and Turkish legislation or 'differences in implementation' (which presumably include *judicial* divergences) 'cause or threaten to cause impairment of the free movement of goods or deflection of trade' and a party believes that immediate action is necessary, it may take the 'necessary protective measures'.[107] Differences between the parties' adoption of trade defence measures against third states are dealt with separately. When the EC and Turkey do not act together, border actions can be taken to enforce the anti-dumping, anti-subsidy, or 'illicit practice' measure that one party applies.[108]

Finally, the parties have largely adopted the Europe Agreement model (now shared with the Euro-Mediterranean Agreements) for settling competition and state aid disputes. In the absence or the inadequacy of the implementing rules, if an action breaching the competition or state aid principles 'causes or threatens to cause serious prejudice to the interest of the other party or injury to its domestic industry', it could take 'appropriate measures'.[109] These must be taken pursuant to the GATT Subsidies Code (if the dispute concerns state aids), although it is not clear what measures could be taken for an infringement of competition rules. When the EC previously acted against a Turkish subsidy, it assessed the aid both in light of the Subsidies Code and in light of its compatibility with the 'under-developed area' classification,[110] but the new wording might justify an assessment of compatibility with the former only.[111]

The issue is complicated by both the general dispute mechanism and some specific rules for arbitration on state aids. The existing (unused) clauses of the Ankara Agreement will still allow for consultations between the parties on a disputed interpretation or

105 See also procedure in Protocol 33 EEA. The parties pick an arbitrator each, and if they cannot agree upon an umpire, they must pick from a list of seven maintained by the Joint Committee. The umpire cannot have the nationality of a party to the dispute.

106 Art. 60, 1970 Protocol, now continued by Art. 63 of Decision.

107 Art. 58(2) of Decision.

108 Arts. 45 and 46. However, it is possible that industry may be injured in one party but not in the other, so the divided application of trade defences is necessary under GATT rules as long as the parties have not instituted a method of assessing injury across the entire customs union.

109 Art. 38 of Decision; see Art. 63, EC-Poland Europe Agreement.

110 See note 56, *supra*; but it should be noted that the 1970 Protocol contains no reference to the GATT Subsidies Code because the first such Code was not agreed until 1979.

111 The wording in the Europe Agreements is slightly more ambiguous. A challenge to the EC's withdrawal of a trade preference under an FTA on state aid grounds is before the CFI in Case T-115/94, *General Motors v. Commission*, pending. However, the EC-Austria FTA (at issue in that case) was also agreed before the first GATT Subsidies Code, and so contains no reference to it. Furthermore, the FTA's incorporation of the EC's state aid rules is far less explicit than the Decision's.

application of the Decision, followed by a reference to the ECJ or other court or tribunal if the Association Council (rather than *one* of the parties) decides.[112] The Decision expands on this possibility by providing that Turkey may take a disputed state aid by a Member State to consultations in the Association Council, which may then refer the case to the ECJ after three months.[113] Additionally, the Decision sets up an arbitration procedure – a new feature in EC-Turkey relations.[114] A dispute over the scope or duration of the 'divergent implementation' safeguard, the economic safeguard, or rebalancing measures might be sent to arbitration under the same procedural rules as the EEA.[115] A dispute over a state aid granted by Turkey might also be sent to arbitration.[116]

Unlike the EEA, these provisions *do not preclude* settling a matter by ruling on interpretation of the EC Treaty or EC secondary legislation. Such a limitation seems redundant in arbitration over safeguards, given that an issue of EC Treaty or legislative interpretation is unlikely to be integral to the scope or duration of a safeguard (as opposed to the *existence* of a safeguard).[117] However, the state aid arbitration explicitly concerns itself with aid which 'the Community would have deemed *unlawful under EC law* had it been granted by a Member State' (emphasis added). When Turkey supplies the Community with information on adopting EC state aid rules, or plans to grant a state aid that would be notifiable under an EC rule (or falls outside EC rules but is greater than 12 million ECU), the EC may protest anything it deems to be a violation and either party may then invoke arbitration if the parties cannot resolve the dispute within thirty days.[118]

This is the most significant dispute-settlement innovation of the customs union agreement, with two significant *caveats*. First, as noted *supra*, the relationship between the assessment of state aid under EC law and the assessment under the GATT Subsidies Code is not clear. It is possible that the arbitrators might clear an aid under EC law, only have the EC impose a countervailing duty pursuant to the Subsidies Code.

Secondly, it is obviously questionable whether the procedure falls foul of the ECJ's objections to the initial draft of the EEA. The arbitrators would implicitly be called upon to interpret EC law, which in the view of the Court is a function *confined to the ECJ* (and presumably the CFI) by Article 164 EC.[119] The only aspect of the arbitrators'

112 Arts. 25(1) to 25(3), Ankara Agreement, continued by Art. 61 of the Decision. There is no three-month wait before a reference can be made. The clause refers to interpretation of the *agreement*, but all Decisions adopted pursuant to it must logically fall within the power of reference also.

113 Art. 39(5). There is no EEA equivalent.

114 Art. 25(4) of the Ankara Agreement provided for the Association Council to adopt one.

115 Arts. 61-62. This includes the six-month period for dispute settlement, the maintenance of a back-up list, and the nationality requirement.

116 Art. 39(4) (and Art. 18, recent ECSC-Turkey FTA (*supra*, note 26)). Again, there is no EEA equivalent.

117 The 'non-interpretation clause' was inserted into the EEA after *Opinion 1/91*, and was obviously included (despite its seeming redundancy) to increase the chances that the Court would approve the revised agreement.

118 Art. 39(4), referring to Art. 39(2), (c), (e) and (f).

119 *Opinion 1/91*, *supra* note 28.

power that might distinguish them from the impugned EEA Court is that their decision will only have explicit legal effect in Turkey; they will not be interpreting EC law *to be applied in the territory of the EC*. However, since the arbitrators' decision will likely have effects upon trade between the EC and Turkey, the Court of Justice might nonetheless be reluctant to uphold their powers.[120]

If arbitration on state aids can clear these two hurdles, then the procedure could have substantial practical effects. It could protect Turkey from any unjustified assault upon state aids it grants to industry in line with EC law. This would represent *de facto* application of the EEA's bar on anti-subsidy actions between the parties,[121] which could in any event be rescinded (with no recourse to arbitration) if a dispute over application of state aid rules could not be settled. Turkey appears to have been granted a right available to no other EC trading partners.

Apart from the distinct rules for state aids, both dispute settlement mechanisms share one central weakness. There seems no reason why arbitration should not be available to settle *any* issue of interpretation or application (bar interpretation of EC law), as it is with most other EC trade agreements. The GATT dispute settlement system (now upgraded and applied to all agreements overseen by the WTO) does not exclude *any* aspect of a WTO Member's obligations from arbitration. It seems highly questionable that an agreement concluded pursuant to GATT Article XXIV (allowing customs unions and free trade areas) should contain dispute settlement provisions weaker than those available to GATT parties.

On the same note, the safeguard mechanism is less liberal than the new GATT Safeguards Code – which sets a limit for expiry of the safeguard and requires liberalization of the measure in the meantime. At least the Decision shares this flaw with every other EC trade agreement; the EC and Turkey also missed the chance to upgrade the safeguard procedure to that of the EEA, requiring extended consultation before and after the measure is adopted. Given the previous extensive use of safeguards by both parties, this suggests a regrettable lack of desire to minimize future disruptions.

IV. Conclusions

Before their relationship becomes any more complicated, it would be best for the Community and Turkey to consolidate all of the 'constitutional' documents of the association into one agreement. It is not clear to the layman what the parties have agreed upon and which provisions are still in operation until one has researched the association at length. Perhaps the institutional complexity, proliferation of transitional provisions, and main-

120 Although the Decision has not been referred to the ECJ for an opinion on its compatibility with the EC Treaty, a Member State or affected company might test the validity of this clause by requesting the Commission to begin an anti-subsidy investigation against an aid cleared by the arbitrators. The Commission's refusal could be subject to an annulment action on the grounds that the arbitrators had no competence to make their determination.

121 Art. 26 EEA.

tenance of multiple agreements is designed to pay homage to the structure of the European Union!

In a way this is appropriate, for the EC-Turkey relationship is progressing in the same order as the development of the EC itself. First came the EC's customs union, followed by the lengthy completion of the commercial policy and the internal market (both foreseen in the agenda of future developments laid out in the EC-Turkey customs union). Foreign policy coordination and home affairs coordination developed gradually; they are paralleled by the incipient EU-Turkey political dialogue and meetings of Home Affairs ministers.

Nevertheless, the differences between the processes are striking. Apart from the far more limited liberalization of services, establishment, capital, and workers, the EC-Turkey relationship lacks both a provision for shared legal enforcement and interpretation and a provision for a 'guardian' to encourage development of the relationship and equal treatment of the parties in the form of the Commission.

Despite these inadequacies, the Decision should be seen in light of its apparent intentions. It is designed not only to provide a 'compensation prize' for Turkey in light of the EC's refusal to consider its accession application, but also to bind Turkey irrevocably to the Community. The customs union will thus fulfill the same function as the EC membership of Spain, Greece and Portugal did: to bolster democratic forces in a state in which they are not very firmly established, but which is nonetheless vital to the the EC for political and strategic reasons.

If Turkey *were* on course to EC membership in the foreseeable future, the flaws in the Customs Union Decision would not matter. Indeed, the Decision is an appropriate method of gradually preparing a country for EC membership in the medium term – better in many ways than the 'pre-accession strategy' now under way with Eastern Europe. In the author's view, the EEA is the best available vehicle for preparing a country for the obligations of EC membership.[122] If a state acceded to the EEA with appropriate derogations, that state could then adopt EC law gradually and begin to integrate ECJ and CFI case law into its legal system. The defects of the EEA's decision-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 Decision is, taken as a whole, a well-intentioned attempt to adapt the EEA to cover another portion of the *acquis* not covered by it originally.

However, the Decision is an inadequate mechanism for a long-term relationship between the Community and Turkey. Although its scope could (and should) be extended to cover the other aspects of the EEA,[123] its institutional structure will still remain deficient. Its inadequate provisions for adopting case law might eventually lead to

122 See the analysis in 'An Ever Closer Waiting Room', *supra* note 3.

123 Extensions to cover technical barriers on industrial goods, the free movement of agriculture, procurement, and the abolition of trade defences are provided for in the Decision. Agricultural standards, capital, establishment, services and improvement in the free movement of workers should be the parties' next priorities

a yawning gap between the Turkish and European Courts' analysis of legislation. It makes massive expectations of Turkey without allowing for any genuine role in decision-making. Its dispute settlement clauses are insufficient – bar the arbitration procedure for reviewing state aids, which is opaquely drafted and may breach the ECJ's prohibition on 'outsiders' interpreting EC law.

The EC's desire to bolster the pro-European forces in Turkey is laudable, and the resumption of 'normal' EC-Turkey relations is welcome, provided that the Community Continues to use its leverage to press for improvements in the Turkish human rights record. Yet the Decision does not provide all the tools necessary to ensure full legal integration, and without such integration, the customs union will not really be complete. In any event, there is bound to be a limit to Turkish leaders' willingness to stand with their noses pressed up against the glass as the EC institutions make decisions affecting their country's fate.