Happy Golden Anniversary, EU: Turkey Customs Union
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September 2013 marks the fiftieth anniversary of the signing of the European Union (EU) – Turkey customs union. While not the first of the early European Economic Community (EEC) Association agreements (the Greece Association was signed in 1961), it remains the only early Association agreement in force, neither superseded by EU accession nor by any later treaty. While updated by Decision 1/95, the original customs union plan governing bilateral trade in goods remains the primary treaty framework underpinning the substantial and complex economic relationship that has developed between Turkey and the EU. As time has moved along for both internal and external market developments, the customs union has remained a remarkably static legal entity, and the reality gap between this aged legal framework and the modern economy has increasingly sharpened the anomalies that have inevitably arisen in the legal relationship. Two of these come to mind, one ‘internal’ and one ‘external’.

The first is raised by the fact that the ‘new generation’ template used for the 1995 customs union update with Turkey is no longer ‘new’. On subjects of domestic regulation, the truly new agreements reach far more exhaustively into many more corners of national regulatory space, including among other subjects, intellectual property rights (IP), public procurement, competition policy, Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary measures (SPS) measures, trade in services and investment. Turkey and the EU have no treaty framework that binds market access services commitments, including those covering commercial presence (investment) or temporary movement of service
For public procurement, Decision 1/95 only pledged future negotiations and while Turkey is not a signatory to the World Trade Organization (WTO) Agreement on Government Procurement, it is not a beneficiary of the EU’s commitments under that regime. Intellectual property obligations are treated by Decision 1/95, except that the entire field of geographical indications (GIs) is absent, a subject notably present and accounted for in new EU trade agreements. Only competition policy and TBT / SPS measures surface as arguably ‘modern’ in approach. The competition policy section in Decision 1/95, which also followed the model of the new generation agreements, still appears robust when compared to newer EU agreements. TBT measures are dealt with by Turkey’s obligation to absorb Community law and the unusual ‘one-way’ mandatory recognition provision for EU products (including foodstuffs) that have been attested to be in conformity with EU directives. Finally, the bilateral dispute settlement mechanism, limited as it is to unanimous Association Council resolution and potential referral to the European Court of Justice, provides a museum quality example of EEC external relations antiquity.

Yet, while the treaty framework has remained static, Turkey’s actual alignment to EU internal market law has proceeded apace as a part of the accession process, even given the delays in opening new chapters for negotiation. As indicated by the Commission in its 2011 Progress Report, ‘Alignment is advanced in certain areas, such as free movement of goods, anti-trust policy and State aid, energy, economic and monetary policy, enterprise and industrial policy, consumer protection, statistics, Trans-European Networks, and science and research. This exposes the anomaly. The accession process is an alignment by Turkey with EU regulatory regimes that extends far beyond those regulatory obligations incurred by other EU trade partners while they, not on the accession path, secure EU commitments in their reciprocal agreements that go extensively beyond the framework of the EU-Turkey customs union. This is in part the result of the

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4 Articles 13 and 14 of the Ankara agreement indicate that the parties shall be guided the relevant EEC Treaty articles for the right of establishment and free movement of services. To the extent that Turkey or the EU grant new preferential treatment for a WTO GATS mode of supply, that treatment would be governed by GATS Art. 2 MFN in the absence of a notified GATS V agreement. Turkey appears to maintain bilateral investment treaties (BITs) with all members of the EU with the exception of Ireland. See, Turkish Ministry BIT map, available at www.economy.gov.tr/index.cfm?sayfa=trade agreements&bolum=bilateral.

5 Decision 1/95, Art. 48.

6 Decision 1/95, Annex 8.

7 Decision 1/95, Art. 10.

8 Ankara agreement, Art. 25. An arbitration procedure is designated for certain protective, safeguard and rebalancing measures in Decision 1/95, Art. 61.

9 EU, Enlargement Strategy Report 2010–2011, Conclusions on Turkey. Areas noted that are not advanced include environment, public procurement, freedom to provide services, social policy and employment and taxation.
structure of the customs union plan with its hints of accession process, reciprocal for trade in goods, but non reciprocal for Turkey’s alignment to EU law for other policies, such as trade in services. The accession process of alignment, also going beyond the customs union alignment provisions, is not itself a treaty law framework. It is not a ‘trade agreement’ and does not have the elements of reciprocity or a bilateral institutional arbitral device for interpreting alignment provisions or resolving disputes. One result of this is that while subjects may be highly aligned, the interpretations governing the EU internal market do not appear to be available to Turkey. Thus, advanced alignment – yes, internal market – no.

The second anomaly, this one external, is raised by the legal form of a customs union itself. Pledged to conform to General Agreement on Tariffs and Trade (GATT) Article XXIV’s requirement to apply ‘substantially the same’ duties and other regulations of commerce to the trade of non-members, Turkey obliges itself in the customs union treaty to align its commercial policy with the EU’s autonomous regimes (GSP) and preferential trade agreements, as in, ‘Turkey will take the necessary measures and negotiate agreements on mutually advantageous basis with the countries concerned’. One need not account for the entire list of recent EU free-trade areas now concluded, concluding or being negotiated to understand that Turkey’s task of maintaining external alignment with EU commercial policy is a daunting one. Even assuming that the Turkish trade ministry could handle the load (some have suggested that the Commission is having its own difficulties managing the load of negotiating mandates), how many of these new trade agreement parties will be receptive to Turkey’s request for negotiations on a mutually advantageous basis to conclude ‘substantially the same’ arrangements as those concluded with the EU? These new partners can calculate that Turkey may have to offer some or all of these new trade preferences without reciprocating as Turkey must satisfy its own customs union obligations. And, if such a mutually advantageous negotiation did occur, ‘substantially the same’ terms would require that Turkey and its new trade partner have similar interests in the same product lines and sectors in order to make the exchanges sufficient for Turkey’s EU external alignment.

10 See by analogy, Case C-547/10, 7 Mar. 2013, Swiss Confederation v. European Commission, et al., paras 78–80. Commenting on the consequences of the Swiss Federation non membership in the European Economic Area, ‘...by its refusal, the Swiss Confederation did not subscribe to the project of an economically integrated entity with a single market, based on common rules between its members, but chose the route of bilateral arrangements ...’.
11 Decision 1/95, Art. 16.
Like the EU, Turkey also does not have a static trade policy. It explores its own regional interests, somewhat divergent from the EU’s, and generates its own free-trade areas.\textsuperscript{13} The EU of course does not have any alignment obligation to Turkey’s agreements, but that does not nullify the application of GATT Article XXIV’s custom union requirements for a harmonized external regime.\textsuperscript{14}

The anomaly here is that while a customs union is considered to be a more advanced form of economic integration than a free-trade area for its potential to create internal free circulation and external institutional capacity, the form itself is incredibly inflexible for a longer term relationship between major trading partners, at least when they do not wish to represent a common negotiating presence. This of course would be resolved if Turkey were to join with the EU in its trade negotiations, similar perhaps to how South Africa maintains the South African Customs Union in its external agreements. But, as recently noted by the EU Ambassador to Ankara, ‘… it is “totally impossible” for a non-member to take part in negotiations with third countries’.\textsuperscript{15} Likewise, it is totally impossible for Turkey to unilaterally apply new EU negotiated preferences to the trading partner since this would trigger violations of the GATT (and the GATS) most-favoured nation obligation.

Turkey’s accession to the EU would resolve both of these outstanding anomalies. Internal market law would apply for the first one and Turkey would join the EU’s external trade agreements for the second. But if we consider that Turkey is now ‘in the meantime’, what does it mean if the ‘meantime’ becomes a ‘very long time’? At what point do the tensions raised by these anomalies either undermine the quality of free movement within the customs union or jeopardize its legal viability under WTO law? Does this perhaps suggest a new interim arrangement, notably membership by Turkey in the European Economic Area (EEA), which would also resolve both anomalies? Even though Iceland is in the process of acceding to the EU from the EEA, this step by candidate countries along the way to EU membership has been viewed more as a diversionary ‘stall’ rather than a step. Similarly, a GATS V services agreement, which resolves only one facet of the internal anomaly, is also likely to be perceived as more of a side track than a stop along the way.

One recognizes that the anomalies posed here are only about ‘economic integration’; that political and social developments in the EU and Turkey frame a larger context that truly drives this economic cart. But, if one acknowledges that

\textsuperscript{13} After the EU, Turkey’s major export markets are, Iraq, Russia, USA, UAE and Iran.

\textsuperscript{14} Ironically, the phrase ‘substantially the same duties and other regulations of commerce’ was the subject of interpretation by the Appellate Body in the \textit{Turkey – Textiles case} (WT/DS34/AB/R), there the AB noting at para. 50 that ‘… something closely approximating “sameness” is required…’

\textsuperscript{15} Financial Times, \textit{supra} n. 12.
strong economic institutions have served as one European means of resolving (or sidestepping) political and social history, then it can also be considered that ‘weak’ systems drifting past their sell-by date are not likely to contribute to that.

This brings us to the ‘do nothing’ option, the current and favoured course of least resistance and therefore, the viable one as long as accession remains Turkey’s goal. After all, the Ankara agreement has already had a fifty-year run. So, happy anniversary EU – Turkey customs union, and (apparently), best wishes for many more to come.

JHM,
August 2013.
Author Guide

[A] Aim of the Journal
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