THE ANKARA AGREEMENT: PRİNCİPLES AND I NTERPRETATİON

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Nature and Objectives

The Ankara Agreement is an association agreement in terms of Article 238 of the EEC Treaty, i.e. an agreement with a European country. It has been negotiated by the Community, signed by the parties and ratified by Turkey and the Community Member States in accordance with the procedure laid down in the above-mentioned article. According to its nature an association agreement is a **sui generis** international treaty and according to EC law it signifies less than admission to the Community but more than a mere trade agreement. This special characteristic will be seen more clearly in the light of the interpretation and application of the Ankara Agreement. However it is a regular international commitment binding the parties thereto, i.e. Turkey, on one hand and the Community as well as the Member States, on the other. In that respect it creates reciprocal rights and obligations within its own terms. However, unlike an accession treaty whose function is to admit a state to the Community it does not create automatically and directly rights and obligations applicable to private parties i.e. individuals and corporations. Therefore, its peculiarities apart, an association agreement is for all intents and purposes a treaty-contract in the classical sense of International Law.

In the sense of EC law the primary object of an association agreement is to create a customs union between the Community and the associated state. However, as we shall see later, the object of the Ankara Agreement is far more ambitious because, in addition to the customs union, it envisages several other areas of economic co-operation and serves as a preparatory stage to the membership of the Community.

According to article 2 (1) the aim of the Ankara Agreement is to "promote the continuous and balanced strengthening of trade and economic relations between the parties, while taking full account of the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and the living conditions of the Turkish people". This general

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aim underlines the uniqueness of the Agreement and, coupled with the specific provisions, makes this Agreement the most extensive of its kind.

The progressive and expanding nature of the Agreement is underlined by the provision of an orderly time-table whereby the relationship should develop by a preparatory stage, transitional stage and final stage spaced over a period of years [Art. 2 (3)]. Each stage comprises certain rights and obligations which the parties have accepted.

Thus "during the preparatory stage Turkey shall, with aid from the Community, strengthen its economy so as to enable it to fulfil the obligations which will devolve upon it during the transitional and final stages". [Art. 3 (1)] The preparatory stage shall last five years, unless it should be extended. The details of the preparatory stage, in particular those for aid from the Community, are set out in the Provisional Protocol and the Financial Protocol attached to the Agreement. It follows that the Community's obligations comprise the commitments laid down in detail in the aforesaid Protocols whilst Turkey's obligations consist of the adjustments of its economy with the Community's aid. Whilst Turkey has a contractual right to obtain aid, the Community has a reciprocal right to see the application of its aid to the objectives of the Agreement.

The change-over from the preparatory stage to the transitional stage shall be effected in accordance with article 1 of the Provisional Protocol which provides that "four years after the entry into force of the Agreement the Association Council will examine the economic situation of Turkey and may decide, by means of an additional protocol how to proceed to the next stage.

The transitional stage [Art. 4] entails "mutual and balanced obligations to establish progressively a customs union between Turkey and the Community and to align the economic policies of Turkey and the Community more closely in order to ensure the proper functioning of the Association and the progress of joint measures which this requires". The position is quite clear since in terms of reciprocal obligations each party ought to proceed to a customs disarmament leading to the free movement of goods as is the case between the Member States of the Community. In other words this means the elimination of customs duties and charges having equivalent effect as well as the elimination of quantitative restrictions and measures having equivalent effect in trade between Turkey and the Community. It entails legislation on both sides and the adaptation of customs law, both substantive and procedural, to ensure a free movement of goods in both directions.

This stage should last no more than twelve years [Art. 4(2)] though exceptions may be made by mutual agreement. However such exceptions must not impede the final establishment of the customs union within a reasonable period. This provision takes precautions against obstacles which may arise and points the way to their elimination. In the centre of the process is the continuing monitoring of the developments and negotiations to overcome the difficulties with the proviso that the stage should not last longer than is necessary.

The final stage which, if the scheduled progress had been maintained, should have been reached within seventeen years of the signing of the Agreement, i.e. in 1981 with a possible extension to cope with the difficulties encountered on the way. However the attainment of the final stage was conditional upon the accomplishment of the necessary tasks, i.e. the relevant legislation.

Two specific provisions give a particular impetus to the aims of the Agreement. First is the Association Council [Art. 6 and see below] which is central to the working of the Agreement and whose function is to take decisions to ensure the progressive implementation of its objectives. Second is the "solidarity principle" [Art. 7] which in identical terms to Article 5 of the EEC Treaty imposes a double duty upon the parties, i.e. to take appropriate measures to ensure the fulfilment of the obligations arising from the Agreement and to refrain from taking any measures liable to jeopardize the attainment of the objectives of the Agreement.

With such a beginning the Agreement could have failed only either because of some unexpected calamity or inaction of the parties. Like everything else in life, generally, and in relations between countries, especially, the fulfilment of plans and expectations depends primarily upon the will to succeed.

Implementation of the Transitional Stage

Article 8 imposes a certain duty upon the Council of Association urging it to act in order to implement the tasks of the transitional stage mentioned in Article 4. Thus, in accordance with the procedure laid down in Article 1 of the Provisional Protocol, the Council was bound to determine the conditions, rules and time-tables for the implementation of the provisions relating to the fields covered by the EEC Treaty and, in particular, to the fields specifically listed in the Agreement. This provision unmistakably points to the ultimate goal of the Agreement, i.e. preparation for the membership of the Community.

The EEC Treaty consists, inter alia, of economic policies which, when carried into effect will accomplish the first task of the Community i.e. the creation of the Common Market and lead from that base to an Economic Union in accordance with Article 2 of the Treaty. In the EEC every Member State is involved in the process. New members have to catch up as they are bound to accept unconditionally and unreservedly (subject only to a negotiated transitory regime) the obligations arising from the membership of the Community as it is at the time of their accession. It means the so-called **acquis communitaire** which entails adaptation of their legal, economic and social system to that demanded by the Community. They can only negotiate time for such adaptation though politically (i. e. as regards their constitutions and the political system) they have to be on the level with the existing members as a precondition of their admission.

However even during the implementation of the transitional stage Article 9 of the Agreement insists on the observance of one of the cardinal general duties of Member States in the Community. This is the duty of non-discrimination on the ground of nationality enshrined in Article 7 of the EEC Treaty. This duty is all-pervading as it applies to persons and things as well as the conduct of the Member States generally. This duty, as interpreted and applied by the Community court, is relevant not only to the creation and working of the Common Market but more generally to the integrative process leading eventually to a Europe of peoples as opposed to the Europe of states as it is at present.

The Customs Union

The elements of the Customs Union envisaged in the Agreement have been expressly laid down in Article 10. Thus it shall cover all trade in goods and shall involve:

> the prohibition between member states of the Community and Turkey, of customs duties on imports and exports and of all charges having equivalent effect, quantitative restrictions and all other measures having equivalent effect which are designed to protect national production in a manner contrary to the objectives of the Agreement, and the adoption by Turkey of the Common Customs Tariff of the Community in its trade with third countries, and an approximation to the other Community rules on external trade.

In brief the Customs Union rules cover both the internal and the external trade of the Community, i.e. the trade between the Member States and the trade between the Member States and non-Communtiy countries.

The field is wide and technical. In simple terms free access to the Common Market on a reciprocal basis carries the obligation of adjusting Turkey's customs law to that of the Member States in conformity with the EEC Treaty, Community legislation and case law [See Lasok, D, The Customs Law of the European Community, 2nd ed. 1990, p. 39-186]. The rules are mandatory and the only deviation permitted is the derogation on specific grounds enshrined in Article 36 of the EEC Treaty. These grounds comprise non-economic factors i.e. public morality, public policy, public security, the protection of health of humans, animals or plants, the protection of national treasures possessing artistic, historic or architectural value and the protection of intellectual property rights [Ibid. p. 78-105]. Being in the nature of exceptions to the general rule of free trade these grounds have to be interpreted restrictively and pleaded specifically if the Member States wish to impose restrictions on imports, exports or goods in transit in trade within the Common Market. Moreover they cannot constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. Such grounds cannot be relied on to protect national economic interests or to justify economic measures. Being of an ethical nature the derogations serve to protect values particularly cherished in society. Although not specifically mentioned derogations must apply to the rules of free trade since these are part of the EEC Treaty and constitute justified restrictions on trade. Under the principle of reciprocity Turkey would be entitled to apply these in the customs union on the same footing as the Member States of the Community.

The Community as a Customs Union developed gradually and, despite the end of the original transitory period on 1 July 1968, it is still developing. It follows that the Ankara Agreement envisaged a parallel development leading to the sophistication of the Turkish system necessary for admission to membership.

Article 10 also mentions external trade. The Common Market differs from a free trade area in so far as in the former the Member States no longer regulate their external trade. At the time of the signing of the Agreement the Community rules governing external trade were only rudimentary but they already comprised elements of the Common Customs Tariff and of the Common Commercial Policy. Here again Turkey was bound to adjust her external trade rules to the developing Community rules in that particular field. It

meant the adoption of rules on external trade agreements (i. e. agreements with non-Community countries), anti-dumping and protective measures as these developed gradually alongside the development of the Common Customs Tariff.

Agriculture

Article 11 makes a vague reference to agriculture and trade in agricultural products as it provides that the Association "shall likewise extend" to this field. However this "extension'" shall be subject to "special rules which shall take into account the common agricultural policy of the Community". However it should be borne in mind that at the time of the signing of the Agreement the CAP was not as yet defined though there was the Treaty framework [Art. 38-47] of the CAP and some rudimentary legislation in existence.

The opening words of Article 11 correspond to the opening words of Article 38 of the EEC Treaty and the definition of agricultural products was to be found in Annex II to the EEC Treaty.

It follows that the agricultural aspects of the association were to devolve in pace with the development of the CAP. It is not clear, though, to what extent was Turkey to benefit financially from the CAP as obviously the restructuring and modernization of Turkish agriculture had to take place in order to constitute a field covered by the Agreement. Evidently the gap was meant to be filled by the appropriate decisions of th Council of Association.

Other Economic Provisions

This title covers a number of "fields" or policies comprised in the EEC Treaty. In the fields of immediate concern to the Common Market the parties agreed to be "guided" by the relevant provisions of the EEC Treaty. The object was to "establish" the Community" for the purpose of progressively securing freedom of movement of workers" [Art. 12]; for the abolition of restrictions on freedom of establishment [Art. 13] and for the abolition of restrictions on freedom to provide services [Art. 14] between Turkey and the Community. "To be guided" clearly indicated the intention to provide a point of reference or a framework within which the Council of Association was to act in order to put flesh upon the bones of the Agreement. The provisions of the EEC Treaty and the implementing Community legislation were clearly the landmarks to be observed when charting the course for the development

of law and policy as well as the corresponding Community measures in order to approximate the Association to the Community. Positive measures regarding workers and the elimination of restrictions on the establishment of the professions and corporations or the provision of services would have served the same economic function for the Association as they did for the Community.

Article 15, providing for the extension to Turkey of the transport provisions of the EEC Treaty, reflects both verbally and in substance the same attitude as in the field of agriculture. Apart from Treaty provisions there was at that stage no Communitiy transport policy. Here again "extension" to Turkey meant the extension of the Common Transport Policy as it was taking shape.

Article 16 refers to competition [EEC Arts. 85–90], taxation [EEC Arts. 95-99] and the approximation of laws [EEC Arts. 100-102] which form essential ingredients of the Common Market and the Economic Union. However in these areas the Agreement simply "recognized" the need of applying the relevant EEC Treaty provisions to relations within the Association. Clearly the obligation to act in these areas was considered to be less urgent than in the fields earmarked for intense action. This is understandable because these objectives were more remote and the task made rather difficult by the technicalities and sensitivities of the issues involved. However it should be observed that Community competition rules were simply superimposed upon the existing fabric of national laws in the Community; taxation was affected merely by the introduction of the Value Added Tax; and the elimination of discriminatory taxes, through the judgments of the Community Court, was an adjunct to the elimination of the fiscal obstacles to the free movement of goods in the internal market. As for the approximation of laws the obligation consists in the participation of the legislative process of the Community and subsequent implementation of the results of that process within the national jurisdiction. An associated country, being interested in future membership, would have observed the process and would enact laws upon the Community pattern not only with an eye upon the ultimate objectives but also with a view to facilitate commercial relations (e.g. as regards competition and mobility of companies and corporate providers of services).

Article 17 (1) is an almost exact replica of Article 104 of the EEC Treaty as it refers to the residual state competence "to pursue the economic policy needed to ensure the equilibrium of its overall balance of payments and to maintain confidence in its currency, while taking care to ensure a continuous, balanced growth of its economy in conjunction with stable prices".

The only difference lies in the last line of this provision as the EEC Treaty also refers to "high level of employment and a stable level of prices".

According to Article 17 (2), each party to the Agreement shall pursue a conjunctural policy, in particular a financial and monetary policy, which furthers the balance of payments and stable economy. Similarily each party, according to Article 18, shall pursue its policy with regard to rates of exchanges which ensures that the objectives of the Association can be attained.

In the Community the Member States should benefit from the judicial remedy available to courts by virtue of Article 177 of the EEC Treaty. This enables the national courts or tribunals to seek authoritative interpretation of Community law in question from the Community Court of Justice by virtue of reference for a preliminary ruling. Such remedy is not available to Turkish administration of justice and the litigants are deprived of an extremely valuable procedural advantage. There is, therefore, an unbridgeable gap between Turkish law implementing the Ankara Agreement and the Community/ national law implementing the same Agreement. This can be remedied only by an amendment to the dispute solving procedure envisaged by Article 25.

Parliamentary Co-operation

The Europen Community is based on the notion of parliamentary democracy as practised in the Member States. Whilst the national systems differ in certain nuances, e.g. some countries are republics, others constitutional monarchies, there is a general consensus on the meaning of the elected governments and the predominance of parliaments whilst autocracies, whether by individuals or political parties, are implicitly unacceptable. This factor, inter alia, has retarded the admission of Greece, Spain and Portugal to the Community.

Modern Turkey is a parliamentary democracy but of a relatively recent vintage if compared with the old-established democracies of Western Europe. The theory that "new democracies" will flourish better when in company with "old democracies" was advanced at the time of admission of Spain and Portugal and seems fully justified. Since the Community is a "democratic club" it is justified in carefully scrutinising the democratic credentials of applicants. This does not imply interference with the national affairs of sovereign states or a patronising attitude to applicants (though such attitude was manifested in certain quarters in relation to the British application for admis-

sion to the Community) but rather a healthy concern that the development of the Community is not hampered and that, indeed, the Community paves the way for democracy in Europe as a whole.

Another point should be mentioned in this context and this is the ultimate objective of the Community which is a "Europe of peoples" rather than a "Europe of states". In this process parliaments have a special role since they represent the peoples directly.

In view of the aforesaid article 27 of the Association Agreement provides a link with Turkey and the democratic assumptions of the Community as it charges the Association Council to take steps to promote the necessary co-operation and contacts between the European Parliament, the Economic and Social Committee and other organs of the Community, on the one hand, and the Turkish Parliament and the corresponding organs in Turkey, on the other. However during the preparatory stage these contacts were to be limited to relations between the European Parliament and the Turkish Parliament.

Decision-Making and Resolution Of Disputes

The Agreement provides a machinery for the decision-making process and a procedure for the resolution of disputes. These matters are within the power of the Council of Association.

The Council of Association consists of members of the Governments of the Member States and members of the Council and of the Commission of the Community on one side and of members of the Turkish Government, on the other. However to redress the balance of numbers decisions must be taken unanimously [Art. 23]. The sovereign equality reflects the international character of the Agreement. Like in the Community the office of President of the Council is held for the term of six months by a representative of the Community and of Turkey alternately. It is clear that, like in the Community, the Presidency ought to provide leadership for the Council and to that end it ought to prepare an agenda for the meetings in accordance with the Council's rules of procedure. The Council may also set up committees to assist in the performance of its tasks and to lay down the terms of reference of these committees [Art. 24].

Any dispute relating to the application or interpretation of the Agreement which concerns the Community, a Member State or Turkey has to submit to the Council, the right to seek resolution to be exercised by the parties

to the Agreement[Art. 25 (1)]. Thus complaints by private parties or other states or organizations are implicitly excluded.

The Council may resolve the dispute by decision which shall be binding upon the parties concerned since each party is required to take the measures necessary to comply with such decisions. The Council may also decide to submit the dispute to the Community Court or "any other existing court or tribunal" [Art. 25 (2), (3)]. Thus judicial settlement is to be the ultimate recourse.

However whilst the reference to the Community Court is clear the reference to "any other existing court or tribunal" lacks clarity unless the parties to the Agreement have contemplated the setting up of a special court for the purpose. The possibility of referring the dispute to the International Court of Justice is not excluded though that forum seems inappropriate bearing in mind the intimate nature and objectives of this Association Agreement.

The Agreement provides for a situation where the dispute cannot be resolved as aforesaid. In such a case the Council shall determine in accordance with Article 8 or this Agreement (reference to the Provisional Protocol which provided for the modalities of the implementation of the Agreement), the Council determining the detailed rules for arbitration or for any other judicial procedure to which the parties may resort during the transitional and final stages of the Agreement [Art. 25 (4)]. It is interesting to note that the Agreement envisages a judicial rather than diplomatic resolution of disputes if the Council cannot solve such disputes within the decision making process. However the efficacy of these provisions has not been tested to date.

Leading up to the Membership of the Community

As mentioned earlier there is no automatic progression or transition from the status of an associated state to the membership of the Community. Each status arises from a political decision and is governed by separate rules laid down in the EEC Treaty as well as the ECSC and Euratom Treaties since accession to the former entails accession to all three Communities.

However it was an express intention of the contracting parties to use the Accession Agreement as a stepping stone to accession. This intention is expressed in the terms of Article 28 which gives no guarantee but merely a prospect of admission. It provides that "as soon as the operation of the Agreement has advanced far enough to justify envisaging full acceptance by

Turkey of the obligations arising out of the Treaty establishing the Community, the contracting parties shall examine the possibility of the accession of Turkey to the Community".

The wording is somewhat tentative as the intention is expressed cautiously creating only an expectation. This expectation is based on the assumption that, in the course of the operation of the Agreement, conditions favourable not to the admission but to the **examination of the possibility** of accession will arise. This can hardly be interpreted as an automatic transmission on the completion of the time-table laid down by the Agreement or a guarantee of admission even if the fulfilment of the conditions becomes evident. However it does not tie the parties down either to a specific time-table or operational progress. True, the Agreement lays down specific preiods and modalities within which the stages of the association ought to be completed but this does not preclude an earlier application for admission.However, what is crucial to the admission is the progress of the implementation of the Agreement in substance, because in this respect the burden of proof has been laid squarely upon Turkey to advance "far enough" to justify the obligations arising not only from the Ankara Agreement but also from the EEC Treaty. Only then the parties (and in this context the Member States), shall **examine the possibility of accession.** Whilst, therefore, the Community is obligated only to the examination of the possibility of accession, Turkey has to submit a convincing case. Admission to the club is governed unilaterally by the club rules. It follows that disappointment with the unfavourable opinion of the application by the Commission has to be directed to a sober assessment of the balance sheet of the Ankara Agreement and there is no room for resentment if the Agreement has not fulfilled its purpose.

INTERPRETATION OF COMMUNITY TREATIES

The key to the interpretation and application of the Ankara Agreement is the distinction between certain fundamental concepts, i.e.:

> treaty-contract and treaty-law;
> self-executing and non self-executing treaty; and directly applicable and indirectly applicable rules.

The former two concepts reflect the well established theories of International Law embodied in the Community legal order. The third concept reflects legal systems generally since the nature and the efficacy of a rule of

law depends on the intention of the law giver or legislator as expressed in the words in which the given rule is couched. This notion has achieved a particular meaning in the Community legal order.

In principle every international treaty, convention or agreement is expressed in contractual terms as it conveys a reciprocal obligation. However, the parties as the law-makers between themselves can make, by treaty, binding rules creating rights and obligations transcending purely contractual arrangements. The Treaties founding the European Communities fall into the latter category since they have not only established supra national institutions but also created a legal order defining rights and obligations for themselves as well as for their citizens.

Depending upon the intention of the parties international treaties are either self-executing, which means that they come into operation automatically or non-self-executing providing only a framework for future action or a set of rules which become operative upon their implementation by the parties. The founding Treaties are self-executing.

Accession Treaties are both treaty-laws and self-executing but in principle, association agreements are neither. Therefore the latter have to be implemented and only then may they generate rights enforceable by individuals. Rights and obligations vested in the parties are subject to the implementing and enforcement process laid down by the given association agreement itself.

However the parties to an association agreement are not precluded from either creating rules of law or making any of provisions self-executing, i.e. binding without implementation. This depends on the intention of the parties as expressed in the text of the agreement.

The EEC Treaty is a mixture of directly and indirectly applicable rules. The former take effect independently of implementation [e.g. Art. 12. See case 26/62, Van Gend v Nederlandse Administratie der Belastingen (1963) ECR 1] the latter, being in the nature of programmes or framework provisions [e.g. Arts. 74-84 on Transport Policy; See Case 13/83: European Parliament v EC Council (1985) ECR 1513] do not create enforceable rights unless implemented. The same distinction applies to Community legislation. Thus regulations are, by definition, directly applicable [EEC Art. 189 (2); See e.g. Case 93/71: Leonesio v. Italian Ministry of Agriculture (1972) ECR 287 at 295] whereas directives [EEC Art. 189 (3)], being addressed to the Member States, are directly applicable only to the addressees. Whether or not they are

directly applicable to individuals depends upon the scope of the given directive expressed in clear and unequivocal language [See e.g. Case 41/74: Van Duyn v Home Office (1974) ECR 1337; as for the criteria of direct applicability see Case 28/67: Mölkerei Zentrale v HZA Paderborn (1968) ECR 143 at 152]. Though incapable of forcing the Member State to implement a directive, an individual may rely on a directive in defence against prosecution under national law which should have been amended in accordance with the directive in question [See e.g. Case 148/781 Pubblico Ministero v Ratti (1979) ECR 1629] assuming, of course, that the time for implementation has expired.

In the light of a recent judgement of the ECJ a Member State may be liable to compensate an individual for any loss sustained as a result of the failure to implement a directive [joined Cases C-6/90 and C- 9/90; Francovich and others v Italian Republic, The Times 20 November 1991]

In the literature [Winter, J. Direct Applicability and Direct Effect, (1972) CMLRev. p. 425] a distinction is made between "direct applicability" and "direct effect" in Community law [See further Lasok, D. and Bridge, J.W. Law and Institutions of the European Communities, 5th ed. 1991, p. 178 **et seq**] but these terms are considered interchangeable in the case law of the Community Court. They characterise, however, Community rules under which an individual may seek rights enforceable at the national level.

Turning now to the interpretation of association agreements in general and the Ankara Agreement in particular, we have to emphazise the non-self-executing nature of these instruments of international co-operation and their subordinate position in the EC legal order. Thus treaties made by the Community, even if containing similar textual provisions to the provisions of the EEC Treaty, do not necessarily create directly enforceable individual rights. To have that effect the former have to be not only directly applicable but also must have intended to create individual rights. Thus the ECJ [Cases 21-24/72: International Fruit Co v Produktschap voor Groenten en Fruit (1972) 2ECR 1219] ruled that, although the EEC was bound by GATT, article XI of GATT was not capable of conferring on Community citizens rights which could be invoked in order to annul a Community regulation restricting importation of a product from a third country.

Subsequent cases reflect the application of the same principle but with a greater emphasis on the interpretation of the text. Four cases, arising from the now defunct EEC-Greece association agreement, illustrate the position.

Although the agreement instituted a customs union between the parties it enabled them to take protective measures to deal with deflections of trade or other economic difficulties. In order to protect the tomato processing industry in Italy the Community issued a regulation subjecting the imports of the product to a licensing system coupled with the imposition of a minimum price. A German importer [Case 40/72: Schröder ve Germany (1973) ECR 139] challenged the regulation as incompatible with the agreement but failed as the ECJ held the regulation justified within the terms of the agreement. In the second case [59/72: Wünsche v Commission (1973) ECR 791] the ECJ ruled that the various protective measures mentioned in the agreement could be used to control imports of certain Greek agricultural products. In the third case [181/73: Haegeman v Belgium (1979) ECR 419] a Belgian importer claimed unsuccessfully reimbursement of a countervailing charge imposed by the Belgian authorities because the free access to the Common Market did not exempt levies designed to eliminate disturbance of the market. In the fourth case [17/81: Papst and Richarz K.G. v HZA Oldenburg (1982) ECR 1331] the ECJ held that a provision of the association agreement prohibiting discriminatory taxation had the same effect as Article 95 of the EEC Treaty since it was indispensable for the creation of the customs union and its purpose was to prepare the entry of Greece into the Community.

The Yaoundé (later Lomé) Convention too was judicially considered from the point of view of individual rights. The ECJ interpreted the provisions relating to trade (which have been implemented to form a customs union) in the light of the analogous rules of the EEC Treaty applicable to trade between the Member States. Thus a French importer of bananas [Case 48/74: Charmasson v Minister for Economic Affairs (1979) ECR 1975] was able to rely on the Convention not only to engineer a reference to the ECJ for a preliminary ruling under Article 177 of the EEC Treaty but also to defeat the national licensing system which preferred bananas from former French colonies to bananas from former British colonies. The same Convention enabled an Italian importer of hide [Case 87/75: Bresciani v Amministrazione delle Finanze (1976) ECR 129] from Senegal to claim, succesfully,protection from health inspection charges imposed by Italian law because, by expressly referring to the EEC Treaty, the Convention imposed the same obligation to abolish charges equivalent to customs duties upon the Community as it did upon the associated states. Less fortunate was a Madagascan lawyer [Case 65/77: Re Jean Razanatsimba (1977) ECR 2229] with French professional qualifications who was unable to practise law at the Paris Bar because, although the Lomé Convention provided for non-discrimination in respect of the right of

establishment, the relevant provision was not directly applicable and, therefore, did not impose upon the parties the obligation to provide free access to the professions.

Interpretation of the free trade agreement with Portugal signals a warning against identical construction of verbally similar text of the agreement with the corresponding provisions of the EEC Treaty. Thus in a case [Case 270/80: Polydor Ltd.v Harlequin Record ShopsLtd. (1982) ECR 329] involving a breach of the United Kingdom copyright law a defence based on the agreement foundered. The ECJ, citing its own judgment in the Terrapin case [119/75: Terrapin v Terranova (1976) ECR 1039 at 1061] held that the enforcement by the owner of the copyright protected by national law was justified within the terms of the agreement which, like Article 36 of the EEC Treaty, provided for the protection of intellectual property rights.. Since Article 36 applied to trade between Member States and, Portugal was not at the time within the Community, its interpretation could not be transposed by strict analogy to the relevant provision of the agreement which applied to trade between the Community and a non-Community country. The ECJ [Case 104/81: HZA Mainz v Kupferberg, Re Port Wine (1982) ECR 3641 at 3662] also refused to apply by simple analogy the interpretation given to Article 95 of the EEC Treaty to Article 21 of the EEC-Portugal Agreement which, like the aforementioned Article 95, prohibited discriminatory taxation. The same reasoning was followed in case 253/83 [Kupferberg v HZA Mainz, Re Sherry Wine (1987) 1 CMLR 36 at 55] where the ECJ interpreted Article 3 of the EEC-Spain Trade Agreement (corresponding to Article 21 of the EEC-Portugal Agreement) in respect of the levy on imports into Germany of monopoly equalization duty on drinking spirits. Citing its own decision in the Polydor case, the ECJ observed that the EEC Treaty and the free trade agreement pursued different aims and, therefore, Article 95 of the former and Article 3 of the latter (corresponding to Article 21 of the EEC-Portugal Agreement) had to be interpreted and applied in their own context. Since there was no tax equivalent in Germany the German spirits monopoly duty was validly imposed. This ruling can be reconciled with that in case 17/81 (above)because it was given in the context of a free trade agreement which, unlike the EEC or the association agreement with Greece, does not provide for a customs union.

Finally, in case 174/84 [Bulk Oil (Zug) v Sun International No. 2 (1985) 2CLMR 732] the free trade agreement with Israel was considered incapable of preventing a Member State from applying its own export policy in relation

to oil destined for Israel. Thus Articles 34 and 85 (concerning exports and restrictive practices, respectively) could not be applied since the trade involved was not a trade between Member States.

In conclusion Community Treaties, in general, and Trade Agreements, in particular, have to be seen as a manifestation of the Community external policy. Each has to be construed in accordance with its own aims and terms and those within the scope of the Common Commercial Policy as an aspect of the Community Customs Law.

Turning now to cases decided under the Ankara Agreement:

Apart from complaints of discrimination against Turkish products, certain unsatisfactory events regarding the freedom of movement of persons came to light. In 1981 Germany imposed unilaterally a visa requirement upon entry of Turkish citizens and France and the Benelux countries followed suit. Not to be out of step the other Member States applied the same rule. This restriction is not only discriminatory but also hardly consonant with Articles 12 and 13 of the Agreement which provide that the parties will be guided by the corresponding provisions of the EEC Treaty regarding the movement of workers and the right of establishment and of the provision of services.

The German justification of the measure that there were too many applicants for political asylum (not only Turkish citizens) appears to be specious. However it was never challenged, as it should have been in the Council of Association.

In case 12/86 [Meryem Demirel v Germany (1989) 1 CMLR 421] the wife of a Turkish worker in Germany was served with an expulsion order because her visa had expired.She joined her husband under a visitor's visa as she could not come to Germany under the family re-unification scheme. The rules for family re-unification were narrowed down by Germany in 1982 and 1984 to the effect that the period of three years residence in Germany which enabled a Turkish worker to bring his family there, was raised to eight years. This too was not challenged in the Council of Association. As Mr Demirel was resident in Germany only since 1979 he could not bring his wife under the scheme. Since his wife was not a "worker" her position was precarious.

Mrs. Demirel's appeal against expulsion was referred to the ECJ which held that, although the provisions of an association agreement were directly applicable where they imposed a clear and precise obligation, the agreement

in question was characterized by the fact that, in general terms, it specified the objectives of the association and laid down the guidelines for their attainment, without laying down any specific rules to that end. Article 36 of the additional protocol was directly applicable to workers but conferred exclusively on the Council of Association the power to lay down specific rules for securing by stages the freedom of movement of workers. The only decisions adopted by the Council was decision 2/76 followed by decision 1/80 which prohibited the imposition of any new restrictions on the access to employment. Neither referred to family re-unification or to the right of residence. Therefore, concluded the Court, the provisions which merely imposed upon the contracting parties a general duty to co-operate with a view to achieving the objectives of the agreement, could not directly confer on individuals rights not already conferred upon them by other provisions of the agreement.

The Court did not address itself to the question whether Germany could take restrictive unilateral measures without reference to the Council of Association and did not comment on the provision that freedom of movement of workers must be implemented within twenty-two years i.e. by 1986 since these points were not raised in the pleadings. It referred to the solidarity principle enshrined in article 7 of the Agreement which, like article 5 of the EEC Treaty obliges the parties to do what is necessary to fulfil their obligations and to refrain from any measures liable to jeopardise the attainment of the objectives of the agreement. However it thought that the imposition of fresh restrictions on the re-unification of families did not infringe the principle. It is not clear why though it is clear that a breach of the Agreement does not confer a right upon an individual if such right was not created either by the Agreement or a decision of the Council of Association.

A somewhat different light was thrown upon the right of Turkish nationals to reside in the Community by case 192/89 [Sevince v Staatsecretaris van Justitie, Judgment of 20 September 1990 (unreported)]. Here a Turkish citizen acquired a residence permit in the Netherlands by marrying a compatriot who was already established in that country. His residence permit was granted conditionally upon the marriage. However the marriage lasted only a short period and when it came to an end the Dutch authorities refused to renew his residence permit. Protracted litigation, involving appeals, ensued and eventually the Council of State referred the matter to the European Community Court for a preliminary ruling on points of Community law involved. In the meantime the applicant was granted a labour permit pending the determination of his case.

Since some relevant aspects of this case have already been considered in the Demirel case it will suffice to focus attention on the questions submitted to the ECJ. The first question was whether a court of a Member State was competent to refer to the ECJ questions concerning the interpretation of the decisions of the Council of Association. If the answer is in the affirmative, whether the relevant provisions of decision 2/76 and decision 1/80 have a direct effect and if the answer is in the affirmative what is the meaning of the term "regular employment" (ordnungsgemässe Beschäftigung in the German version of the judgment). The Council of State further amplified the last question by asking whether it is to be understood as referring to employment while the person concerned was in possession of a residence permit in compliance with the law relating to aliens or whether, more broadly, it includes employment which that person may have had while he was waiting for the decision concerning his residence permit to become final, or solely to employment which may be regarded as lawful employment (rechtlich erlaubt in the German version) within the terms of the legislation governing the employment of aliens.

Since the first two questions were answered in the affirmative (the ECJ citing its own decisions in cases which have arisen under the EEC-Greece Agreement and EEC-Portugal Agreement and which were mentioned above) the decision turned upon the answer to the third question. It is interesting to note, though, that the ECJ, pointing to the preamble to decision 2/76, regarded the decisions under the Ankara Agreement as being in the nature of "programmes" (Programmcharakter) having nevertheless a "direct effect" as far as the specific points of the Agreement were concerned (para. 21). This means, in the language of the Community law, that they have created rights for the benefit of the individual. However the Court qualified its statement by saying that, although the decisions of the Council of Association can have a direct effect, there is nothing against these decisions providing that the rights accorded to Turkish workers will be determined by the provisions of the individual Member States (para. 22). This had an ominous ring as regards the third question which was crucial to the position of the applicant.

In substance decisions 2/76 and 1/80 regulated the right to work, not the right to residence, the former providing that after five years of regular work in a Member State the worker shall enjoy free access in that country to any paid employment of his choice. Decision 1/80 reduced the period to four years. Yet it is common ground that without a residence permit the right to work is of no practical value. The ECJ noted that these two rights are inter-

twined (para. 29). It necessarily implies that the Turkish worker has a residence permit at least to the point of time when he enjoys the right to work, otherwise the right to work would be completely ineffective.

Although the exercise of a regular employment during a specified period of time leads to the acquisition of a residence permit it is, however, unacceptable that a Turkish worker could by himself obtain this right because he is allowed to stay temporarily and work in the country until the legal process following the refusal of his residence permit comes to an end (para 31). Therefore, concluded the Court, the concept of "regular employment" cannot include the case of a Turkish worker in which he is allowed to work only until his application for a residence permit has been decided (para. 32)

Unlike the Demirel case the Sevince case was argued vigourously and cogently but, in the light of decisions 2/76 and 1/80, it is difficult to disagree with the outcome. The position is, however, unsatisfactory since these decisions are concerned only with the right to work but leave to the discretion of the host State the question of the residence permit on which the right to work depends. This further demonstrates the weakness of the Ankara Agreement and inaction if not impotence of the Council of Association on whose decisions the implementation of the Agreement depends.

Whilst considering the relations between Turkey and the European Community we have to observe also the Greek efforts to sour these relations by means of the Community judicial process. In case 204/86 [Greece v EC Council, re Aid for Turkey (1990) 1 CMLR 481] the ECJ clarified the budgetary position of Community aid to Turkey. The question raised by Greece concerned the classification of the aids for the purpose of the Community budget and this, in turn, raised the question of the budgetary procedure or, to be more precise, the involvement (if any) of the European Parliament which has control over the non-compulsory part of the budget which deals with the functioning of the Community institutions. The ECJ ruled that a unilateral grant to a non-member state was initially not compulsory but became compulsory when the recipient state accepted it as part of international negotiations and the undertaking to pay became internationally binding. The object of the action was either to block the grant or to move the matter to the European Parliament where it could have been blocked or at least delayed, but it failed.

In case 30/88 [Greece v EC Commission, (1991) 2 CMLR 169] Greece applied for a declaration that the decisions of 17 November 1987 and 10 De-

cember 1987 approving the financing of projects, i.e.: infringement of article 205 of the EEC Treaty (concerned with the implementation of the Community budget), and infringement of essential procedural requirements in so far as they were adopted by analogy to articles 6 and 8 of Council regulation 3973/86 even though that regulation does not concern Turkey. Moreover, the application alleged an abuse of the procedure despite the fact that there is a special procedure for the approval of the financing of projects in the context of the special aid to Turkey which has already been used for the allocation of the greater part of the aid.

Unlike Advocate General Tesauro (who seems to have been distracted by the relative strength of the Commission argument) the Court dismissed Greece's application as unfounded. Following its own decision in case 204/86 the Court held that there has been no abuse of the procedure and that the decision lawfully taken by the Council of the Association to authorize and regulate certain acts (in casu the grant of aid) forms an integral part of the Community system. It is binding upon the parties concerned. Therefore the funds under the Fourth Financial Protocol of 1981, which were frozen as a result of the military take-over in Turkey, could be released to finance the three special projects (i. e. an EEC-Turkey business week project, anti-malaria programme in the eastern Mediterranean coastal region and a project for the exploitation of geo-thermal energy in western Anatolia) which were duly authorized.

The judgment is important because not only does it confirm the framework character of the Association Agreement but also stresses the vital role of the Council of Association since the efficacy of the Agreement depends entirely upon the action or inaction of the Council. The Agreement is a charter of expectations which only the decisions of the Council can turn into legal obligations. Had appropriate decisions been taken in relation to Turkish nationals in the Community the judgments in the Demirel and Sevince cases would have been different.

CONCLUSION

The interpretation of treaties to which the European Communiy is a party follows the rules of International Law which means that, in principle, only the signatories of treaties are the bearers of rights and duties arising therefrom. Individuals are only exceptionally the direct beneficiaries of international treaties. Their position depends on the type of the treaty and the intention of the signatories expressed in the terms of the treaty. It follows that

association agreements, which are treaties between the European Community and the Member States on one side and the associated third country on the other, are binding upon the parties thereto but the rights of individuals, unless expressly granted by clear and unequivocal provisions, depend upon the implementation of the terms of the agreement.

The implementation of the terms of the Ankara Agreement is in the hands of the Council of Association whose decisions are binding upon the signatories i.e. the Community, the Member States and Turkey. Thus the Council gives life to the Agreement by transforming its provisions into binding rules of law. Without that transformation the Agreement remains only an expression of expectations or a programme of action. The decisions of the Council, as confirmed by the Community Court, have a binding force and, as demonstrated in the cases in which Greece attempted to paralyse the financial arrangements, will be given effect. Therein lies the strength of the Agreement but also the source of disappointment if the decision-making process has proved ineffective.

The Agreement lays down a procedure for the resolution of disputes arising from its application or interpretation. Here again the Council plays a crucial role since such conflicts have to be referred to it in the first place. Thus the Council plays a dual role: as a legislator and an arbitrator of conflicts between the parties. If the conciliation within the Council fails the Council may refer the dispute to the Community Court.

In the final analysis the Agreement reveals a great potential as a framework agreement for a fruitful association leading to full membership. It is a pity that the good intentions contained therein have not been carried into effect.