

# The European Union— Turkey Controversy over Cyprus or a Tale of Two Treaty Declarations

Stefan Talmon\*

## Abstract

When the European Council in 2004 decided to open accession negotiations with Turkey, it linked Turkey's accession process with the Cyprus problem and made the signature of an Additional Protocol to the EC-Turkey Customs Union Agreement extending this Agreement to the ten new Member States of the Union, including the Republic of Cyprus, a precondition for the start of accession negotiations. Not having been recognizing the Republic of Cyprus since 1963, Turkey had to avoid everything that could be interpreted as a recognition of the Republic of Cyprus when concluding the Additional Protocol. This led Turkey in September 2005 to make a "Declaration on Cyprus" when signing the Protocol which, in turn, triggered a counter declaration by the European Community and its Member States. The two declarations do not qualify as reservations but are general statements of policy or, at best, interpretative declarations that do not have any effect on the substance of the Protocol and that are not binding upon the parties.

On 1 May 2004, the Republic of Cyprus joined the European Union (EU) as one of ten new Member States. According to UN Secretary-General, Kofi Annan, Cyprus was "unique among European Union candidate countries as a standing item on the Security Council agenda and emerging from a context of conflict".<sup>1</sup> The Republic of Cyprus attained independence in August 1960 and has had a troubled history ever since. The partnership government of Greek and Turkish Cypriots under the Cypriot constitution came to an end in December 1963 in the wake of civil war-like hostilities between the two communities, which led the UN Security Council to establish the United Nations Force in Cyprus

\* Member of the Board of Editors; University Lecturer in Public International Law, University of Oxford and Fellow, St. Anne's College, Oxford (email: stefan.talmon@law.ox.ac.uk). This paper was completed on 31 May 2006.

1 Report of the Secretary-General on his mission of good offices in Cyprus, UN Document S/2003/398, 1.4.2003, 8, para. 31.

(UNFICYP). Despite the absence of Turkish Cypriots from the government, the international community, with the sole exception of Turkey, continued to recognize the Greek Cypriot rump government as the Government of the Republic of Cyprus. The Turkish Cypriots who withdrew during the hostilities to fortified enclaves, which made up some three per cent of the territory of Cyprus, established their own governmental structures: first, the Temporary Turkish Cypriot Administration and, later, the Turkish Cypriot Administration. Matters came to a head in July 1974 when, in response to a violent *coup d'état* instigated by Greece and aimed at uniting the island with the Greek motherland, Turkish armed forces landed in northern Cyprus in order to protect Turkish Cypriots. The Turkish intervention led to the *de facto* partitioning of the island and a large scale population transfer across the ceasefire line. On 13 February 1975, a Turkish Federated State of Cyprus was declared in the 36.4 per cent of the island occupied by some 35,000 Turkish troops. This new Federated State was intended to form the Turkish Cypriot wing of a Federal Republic of Cyprus, which would consist of both communities. However, this did not materialize. On 15 November 1983, the Turkish Cypriots declared the establishment of the Turkish Republic of Northern Cyprus as a sovereign independent State. The new State was recognized by Turkey on the same day. The international community, on the other hand, rejected this unilateral declaration of independence and continued to recognize the Republic of Cyprus as the only State in Cyprus and its Greek Cypriot-controlled government as the government of the whole island, despite the fact that this government had not exercised any control over northern Cyprus since 1974. Several attempts aimed at solving the Cyprus conflict and achieving a reunified State on the island have failed. On 24 April 2004, simultaneous referenda were held in both parts of the island on UN Secretary-General Kofi Annan's plan for a Comprehensive Settlement of the Cyprus Problem. While 64.91 per cent of Turkish Cypriots approved the so-called Annan Plan, 75.83 per cent of Greek Cypriots rejected it.<sup>2</sup>

With the entry of a divided Cyprus into the EU, the Member States imported the Cyprus conflict into the Union. To make matters worse, when the European Council decided at its meeting in Brussels on 17 December 2004 to open accession negotiations with Turkey on 3 October 2005, it linked Turkey's accession process with the Cyprus problem. Accession negotiations with candidate countries are held in the framework of an inter-governmental conference consisting of all Member States of the EU, including the Republic of Cyprus. One of the principal obstacles that Turkey must overcome on its way to Europe thus concerns its non-recognition of the Republic of Cyprus. As the EU High Representative for Foreign and Security Policy, Javier Solana, pointed out: "If you want to become a part of a family, you have to recognize all members of that family, otherwise you cannot become a member of that family".<sup>3</sup>

2 On the history of the Cyprus conflict, see Stefan Talmon, *Kollektive Nichtanerkennung Illegalen Staaten* (2006), 11–82; Kypros Chrysostomides, *The Republic of Cyprus. A Study in International Law* (1999), 17–279; Zaim N. Necatigil, *The Cyprus Question and the Turkish Position in International Law*, (2nd rev. edn. 1998), 1–423; Anne Klebes-Pelissier, *La Déclaration d'Indépendance de Chypre du Nord et les Perspectives de Règlement du Conflit Chypriote* (doctoral dissertation, University of Strasbourg, 1992), 1–45.

3 Cyprus Press and Information Office: *Turkish Press and Other Media*, No. 242/04, 17.12.2004, [4]. All news items of the Cyprus Press and Information Office are available at [www.hri.org/news/cyprus/tcpr/](http://www.hri.org/news/cyprus/tcpr/).

## I. Turkey’s way to Europe and the Cyprus problem

### I.A. EU–Turkey relations

Turkey’s relationship with the EU began in July 1959 when the government of Turkey lodged an application to join what was then the European Economic Community (EEC). The EEC’s response to this first application was to propose the creation of an association between the EEC and Turkey until such time as circumstances permitted Turkey’s membership. This association was established with the signing of an Association Agreement between the EEC and Turkey (Ankara Agreement) in September 1963.<sup>4</sup> The Ankara Agreement envisaged the progressive establishment of a customs union which would bring the two sides closer together in economic and trade matters. It was supplemented by an Additional Protocol, signed in November 1970, which set out a timetable for the abolition of tariffs and quotas on goods circulating between Turkey and the EEC.<sup>5</sup> There was a temporary freeze in Turkish–EEC relations as a result of the military *coup d’état* in Turkey in September 1980. Following the multi-party elections of 1983, relations were re-established and Turkey applied for full membership on 14 April 1987. The European Commission’s opinion on Turkish membership, endorsed by the European Council in February 1990, confirmed Turkey’s general eligibility for membership but deferred an in-depth analysis of its application. On 31 December 1995, the customs union between the European Community (EC) and Turkey, which had been envisaged for more than thirty-two years, finally entered into force.<sup>6</sup> In November 1998, the European Commission submitted the first of its regular annual reports on Turkey’s progress towards accession.<sup>7</sup> At the Helsinki European Council of December 1999, Turkey was officially recognized as a “candidate State destined to join the Union on the basis of the same criteria as applied to the other candidate States”.<sup>8</sup> In March 2001, the European Council adopted the EU–Turkey Accession Partnership in which it identified as a short-term priority that Turkey should strongly support the UN Secretary General’s efforts to bring to a successful conclusion the process of finding a comprehensive settlement to the Cyprus problem.<sup>9</sup> In December 2002, the Copenhagen European Council

4 Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963, OJ No. L 217, 29.12.1964, 3687; English version in OJ No. C 113, 24.12.1973, 2.

5 Additional Protocol and Financial Protocol signed at Brussels on 23 November 1970, annexed to the Agreement establishing the Association between the European Economic Community and Turkey and on measures to be taken for their entry into force, OJ No. L 293, 29.12.1972, 4; English version in C 113, 24.12.1973, 18.

6 See Article 65(1) of Decision No. 1/95 of the EC–Turkey Association Council of 22 December 1995 on implementing the final phase of the customs union (96/142/EC), OJ No. L 35, 13.2.1996, 1. On the EC–Turkey relations leading up to the customs union and Decision No. 1/95, see Steve Peers, *Living in Sin: Legal Integration Under the EC–Turkey Customs Union*, 7 *EJIL* (1996), 411–30.

7 The reports are available at <http://ec.europa.eu/comm/enlargement/turkey/docs.htm>.

8 Helsinki European Council, 10 and 11 December 1999, Presidency Conclusions, Council Press Release 300/99, 12 December 1999, para. 12.

9 See para. 4.1. of Council Decision of 8 March 2001 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Republic of Turkey (2001/235/EC), OJ No. L 85, 24.3.2001, 13.

resolved that if in December 2004, on the basis of a report and a recommendation from the Commission, the European Council was to decide that Turkey fulfilled the Copenhagen political criteria, the EU would open accession negotiations with Turkey.<sup>10</sup> A revised Accession Partnership for Turkey was adopted by the European Council in May 2003 which, again, identified strong support for a comprehensive settlement of the Cyprus problem as one of Turkey's priorities for 2003/2004.<sup>11</sup> On 17 December 2004, the Brussels European Council decided to open accession negotiations with Turkey on 3 October 2005, provided Turkey fulfilled certain conditions.<sup>12</sup> The European Council agreed that accession negotiations with Turkey would be based on a framework for negotiations, and that the negotiations would be conducted in an inter-governmental conference with the participation of all Member States and Turkey. The Council, acting unanimously on a proposal by the Commission, would lay down benchmarks for the provisional closure and, where appropriate, for the opening of each chapter of the negotiations; depending on the chapter concerned, these benchmarks would refer to legislative alignment and a satisfactory track record of implementation of the *acquis communautaire* as well as obligations deriving from contractual relations with the EU. The European Council further stressed that "these negotiations are an open-ended process, the outcome of which cannot be guaranteed beforehand", thus leaving the question of whether Turkey would ever achieve full membership open.<sup>13</sup> On 29 June 2005, the European Commission presented to EU Member States its "rigorous negotiating framework" for accession negotiations with Turkey, in which it emphasized that support for efforts to achieve a comprehensive settlement of the Cyprus problem within the UN framework and fulfilment of the obligations under the customs union would be required of Turkey.<sup>14</sup> After Turkey had fulfilled all the conditions laid down at the Brussels European Council meeting, the accession process was formally started on 3 October 2005.

### **I.B. Turkish non-recognition of the Republic of Cyprus**

A major hurdle in the accession process is Turkey's non-recognition of the Republic of Cyprus. With the break-up of the partnership government in December 1963, Turkey ceased to recognize the Republic of Cyprus.<sup>15</sup> In an interview on 1 January 2005, Turkish Foreign Minister Abdullah Gül said: "There is an EU member that we do not recognize".<sup>16</sup> On another occasion he stated: "Direct or indirect recognition of the Cyprus Republic is out of the question for

10 Copenhagen European Council, 12 and 13 December 2002, Presidency Conclusions, Council Document 15917/02, 29.1.2003, 5, para. 19.

11 See para. 4 of Council Decision of 19 May 2003 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with Turkey (2003/398/EC), OJ No. L 145, 12.6.2003, 40.

12 Brussels European Council, 16 and 17 December 2004, Presidency Conclusions, Council Document 16238/1/04/REV.1, 1.2.2005, paras. 17–22.

13 *Ibid.*, para. 23.

14 See Commission presents a rigorous draft framework for accession negotiations with Turkey, IP/05/807, 28.6.2005.

15 See the oral argument of Turkey before the European Commission of Human Rights in *Cyprus v. Turkey*, Application No. 8007/77, Decision of 10 July 1978, Decision and Reports, vol. 13, 85 at 138.

16 Cyprus Press and Information Office: Turkish Press and Other Media, No. 1/06, 31.12.2005, 01–02.01.2006, [4].

Turkey”.<sup>17</sup> These statements have caused some confusion. Commentators have claimed that certain actions to be taken by Turkey in the cause of the accession process would imply its political, diplomatic or *de facto* recognition of the Republic of Cyprus. For example, it was said that sitting at the conference table with the twenty-five EU countries, including the Republic of Cyprus, would imply *de facto* recognition of the Greek Cypriot State;<sup>18</sup> the opening of Turkish ports to Greek Cypriot ships and aircraft would mean the *de facto* recognition of the Greek Cypriot government;<sup>19</sup> or signing an Additional Protocol to the Ankara Agreement extending the customs union to the Republic of Cyprus would signify *de facto* recognition of the Greek Cypriot Administration.<sup>20</sup> In order to assess the effect of any such action on the question of recognition, it is important to establish what exactly Turkey does not recognize. Turkey does not deny the statehood of the entity controlled by the Greek Cypriots, or the status of the Greek Cypriot-controlled government as the government of this State in southern Cyprus.<sup>21</sup> However, Turkey does object to the claim of the Greek Cypriot-led government to be the government of the original “Republic of Cyprus”, which comprised the entire territory of the island and which represented the whole of Cyprus, including the Turkish Cypriots. This becomes clear in a statement by the Turkish Ministry of Foreign Affairs on the accession of the Republic of Cyprus to the EU. It reads, in part:

9. The Greek Cypriots, who will join the EU on 1 May 2004, have no authority to represent the whole of Cyprus or the Turkish Cypriots. They cannot claim authority, jurisdiction or sovereignty over the Turkish Cypriots, who have equal status, or over the entire Island of Cyprus. They cannot impose the ‘Republic of Cyprus’ on the Turkish Cypriots. Thus, the Greek Cypriots who organized themselves under their own constitutional order and within their boundaries cannot be the legitimate government representing the whole of Cyprus and the Turkish Cypriots.

10. Turkish Cypriots, as a people who organized themselves under their constitutional order within their territorial boundaries, exercise governmental authority, jurisdiction and sovereignty. Turkey’s recognition of the Turkish Republic of Northern Cyprus will remain unchanged. [. . .].<sup>22</sup>

17 Cyprus Press and Information Office: Turkish Press and Other Media, No. 242/04, 17.12.2004, [7].

18 “Time Is Running Out”, Turkish Daily News, 2 October 2005. In an unpublished opinion, presented to COREPER on 31 August 2005, the Council Legal Service apparently said that “the beginning of the negotiations constituted unavoidably a *de facto* recognition of the Cyprus Republic from Turkey”; quoted in Defence & Foreign Affairs Special Analysis, 12 September 2005. All references to Turkish Daily News and the other news sources referred to in this article are available at LexisNexis.

19 “Turkish and Greek Prime Ministers Meet for a Chat in Thessaloniki”, Turkish Daily News, 14 May 2006.

20 “Cabinet Prepares for Debate over Customs Union Protocol”, Turkish Daily News, 10 October 2005.

21 In a statement presented to the Turkish State Security Court on 22 February 1992, the Turkish Prime Minister declared: “The Republic of Turkey is not in a state of war with any country, Southern Cyprus included.” In its judgment of 12 March 1993, the State Security Court referred to the “Greek Cypriot State”. See the decision of the European Court of Human Rights in Islamic Republic of Iran Shipping Lines v. Turkey, Application No. 40998/98, 10.4.2003, transcript, 6.

22 Ministry of Foreign Affairs of Turkey, Press Release Regarding the EU Enlargement, 1 May 2004, reproduced in UN Document CD/1738, 18.8.2004, Annex, 3.

In contrast to the international community and the EU Member States, Turkey thus recognizes the existence of two sovereign independent States in Cyprus: a Greek Cypriot State in the south and the Turkish Republic of Northern Cyprus in the north. It maintains friendly and full diplomatic relations only with the latter. Relations with the Greek Cypriot State, which acts internationally as the Republic of Cyprus, are either non-existent or rather unfriendly. The two States do not maintain diplomatic relations and have not concluded any bilateral treaty since 1963. Turkey has blocked by veto the participation of the Republic of Cyprus in international organizations, conferences and multi-lateral treaties, where membership requires the consent of all existing members.<sup>23</sup> This policy has caused problems for NATO–EU relations and the development of the European Security and Defence Policy.<sup>24</sup> Turkey's opposition to membership of the Republic of Cyprus of the Wassenaar arrangement on the Code of Conduct on Arms Exports and on Dual Use Goods has hampered the functioning of the single market for the types of products covered by the arrangement.<sup>25</sup> The Republic of Cyprus has responded on its part by blocking Turkey's membership where it has a veto.<sup>26</sup> Turkey has also closed its ports to vessels flying the flag of the Republic of Cyprus and to vessels approaching from harbours in southern Cyprus, and has denied the air carriers of the Republic of Cyprus rights of overflight and landing rights at Turkish airports. For almost forty years, Greek Cypriots, with the exception of Greek Cypriot officials attending international conferences, were not allowed to visit Turkey because Turkey did not recognize their Republic of Cyprus passports. It was only on 22 May 2003 that Turkey opened its borders to Greek Cypriot travellers.<sup>27</sup> Passports of the "Greek Cypriot Administrative Region" are still not stamped; Turkish immigration officials stamp a separate visa form. Most of these restrictions are not a consequence of Turkey's non-recognition of the Republic of Cyprus' claim to be the only State in

23 Turkey has blocked membership of the Republic of Cyprus in the following organizations and treaties: Missile Technology Control Regime (MTCR), Wassenaar Arrangement, Open Skies Treaty, Organization of the Black Sea Economic Cooperation, Organization for Economic Cooperation and Development (OECD), EU-NATO Cooperation ("Berlin plus" arrangements), European Centre for Medium Range Weather Forecasts, European Conference of Ministers of Transport (ECMT) and Conference on Disarmament. See Republic of Cyprus, Ministry of Foreign Affairs, Spokesman lists organizations blocked to Cyprus by Turkey, 8 December 2005 ([www.mfa.gov.cy/](http://www.mfa.gov.cy/)). On the question of membership of international organizations and arrangements, see also Negotiating Framework for Turkey, 3.10.2005, para. 7: "In the period up to accession, Turkey will be required to progressively align its policies towards third countries and its positions within international organizations (including in relation to the membership by all EU Member States of those organizations and arrangements) with the policies and positions adopted by the Union and its Member States" ([http://europa.eu.int/comm/enlargement/docs/pdf/st20002\\_en05\\_TR\\_framedoc.pdf](http://europa.eu.int/comm/enlargement/docs/pdf/st20002_en05_TR_framedoc.pdf)).

24 Cyprus Press and Information Office: Turkish Press and Other Media, No. 229/05, 30.11.2005 [8]. See also the European Parliament resolution on the Commission's 2005 enlargement strategy paper, 16.3.2006, P6\_TA(2006)0096, para. 31. The problem is partly mitigated by holding two "informal meetings" annually between the Foreign Ministers of NATO and the EU, including the Foreign Minister of the Republic of Cyprus. The first such meeting took place on 7 December 2005.

25 European Commission, Turkey 2005 Progress Report, SEC(2005) 1426, 9.11.2005, 40 and 128.

26 The Republic of Cyprus blocked the Agreement on Administrative Arrangements negotiated between Turkey and the European Defence Agency (EDA). See 44th meeting of the EC-Turkey Association Council, 26 April 2005, Document CE-TR 107/05, 21.6.2005, 14.

27 Turkey opens borders to Greek Cypriots in goodwill gesture, Agence France Presse, English, 17 May 2003.

Cyprus, but are taken in response to the restrictions imposed by the Greek Cypriot-led Government of the Republic of Cyprus on the Turkish Cypriots.<sup>28</sup> None of these restrictions would be compatible with full Turkish membership of the EU.

## II. The inclusion of the Republic of Cyprus in the EC-Turkey customs union

Decision No. 1/95 of the EC-Turkey Association Council of 22 December 1995 on the completion of the customs union between the EC and Turkey within the framework of the Ankara Agreement and the Additional Protocol of 1970 provides that the customs territory of the customs union shall comprise the customs territory of Turkey on the one hand and the customs territory of the Community on the other.<sup>29</sup> The question of the inclusion of the Republic of Cyprus in the EC–Turkey customs union arose with its accession to the EU on 1 May 2004. To maintain its legal position on the Cyprus conflict, it has been necessary for Turkey to avoid anything that implies its recognition of the Republic of Cyprus as the only State in Cyprus and of its Greek Cypriot-led government as the government of the whole island.

### II.A. Domestic Turkish legislation

In May 2004, Turkey published a decree extending the benefits of the EC-Turkey customs union to all new EU Member States except the Republic of Cyprus.<sup>30</sup> Upon protests by the European Commission over this discriminatory treatment, Turkish Foreign Minister Abdullah Gül, in a letter dated 10 June 2004, informed Günter Verheugen, the Member of the European Commission responsible for Enlargement, that on the issue of including the “Greek Cypriot Authorities” in the customs union, sincere and serious work was being carried out and that technical work was under way in that direction.<sup>31</sup> On 2 October 2004, the Turkish Council of Ministers adopted a new decree adding “Cyprus” to the list of countries to which the customs union regime applies.<sup>32</sup> In a press release, the Turkish Foreign Ministry explained the decision as follows:

[. . .] In view of the accession of 10 new Member States (*Cyprus*, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia) to the

28 As one of the consequences of its non-recognition, Turkey may not recognize passports issued to Turkish Cypriots by the Republic of Cyprus, as this would imply recognition of the Turkish Cypriots’ citizenship of the Republic of Cyprus, and thus the right of the Government of the Republic of Cyprus to exercise personal sovereignty over the holder of the passport. The question arose only in May 2003 when Turkey started to accept Republic of Cyprus passports. See “The July 31 Secret Circular”, Turkish Daily News, 12 August 2003.

29 Article 3 of Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the customs union (96/142/EC), OJ No. L 35, 13.2.1996, 1–47.

30 European Commission, 2004 Regular Report on Turkey’s progress towards accession, SEC(2004) 1201, 6.10.2004, 52.

31 Cyprus Press and Information Office: Turkish Press and Other Media, No. 135/04, 17–19.7.2004 [6].

32 European Commission, Turkey 2005 Progress Report, SEC(2005) 1426, 9.11.2005, 124 (“In October 2004 Turkey amended the communiqué on rules of origin in free movement of goods between Turkey and the EU, and the name of ‘Cyprus’ was inserted into the list of the EU Member States”).

EU on 1 May 2004, the Turkish Government has decided to include all new EU members in the scope of the Council of Ministers Decree No. 2002/4616 of 3 September 2002 which specifies, as far as Turkey's internal legislation is concerned, the countries to which the Turkey-EU Customs Union applies. This decision makes it possible for goods imported to Turkey from the new Member States to be treated under the Customs Union regime.

This decision is an administrative act emanating from our relations with the EU as well as reciprocal legal obligations under the Customs Union. Our views and position as outlined in our press statement issued on 1 May 2004 and forwarded through official channels to the EU and its member states remain valid. The amendment of our internal legislation as such does not imply in any way the recognition of the *Greek Cypriot administration* by Turkey. [. . .].<sup>33</sup>

Both the Turkish Council of Ministers' decree and the press release simply refer to "Cyprus", and not to the "Republic of Cyprus", in order to avoid any recognition. This was also made clear by the Turkish government in a letter to the Turkish Union of Chambers and Stock Exchanges in which it stressed that the name "Cyprus" should be used in the customs declarations for exports and imports to and from the island. Any other name would not be accepted.<sup>34</sup> The use of the word "Cyprus" instead of "Republic of Cyprus" must be seen as a precautionary measure to avoid any implication of recognition of the Republic of Cyprus' claim to the entire island of Cyprus.

## II.B. Extension of the Ankara Agreement to the Republic of Cyprus

The European Council of 17 and 18 June 2004 invited Turkey "to conclude negotiations with the Commission on behalf of the Community and its 25 Member States on the *adaptation* of the Ankara Agreement to take account of the accession of the new Member States".<sup>35</sup> In July 2004, the Commission transmitted a first draft of an Additional Protocol on the necessary adaptations to the Turkish government.<sup>36</sup> Such protocols to the Ankara Agreement, taking into account the accession of new Member States, had been concluded with Turkey before.<sup>37</sup> Although not all of these protocols had been ratified and no

33 Press Release No. 128. Regarding Turkish Government's Decision to Include All New EU Members in the Scope of the Council of Ministers Decree No. 2002/4616 of 3 September 2002, which specifies the countries to which the Turkey-EU Customs Union applies, 2 October 2004 ([www.mfa.gov.tr/MFA/](http://www.mfa.gov.tr/MFA/)) (italics added). The press release noted that "in essence, the Greek Cypriot administration has abrogated all restrictions against goods from Turkey through a decree published on 11 December 1998. The EU Commission has given written confirmation that the Greek Cypriot administration is accepting the free circulation under the Customs union of goods from Turkey as of 1 May 2004".

34 Cyprus Press and Information Office: Turkish Press and Other Media, No. 234/04, 7.12.2004 [1].

35 Brussels European Council, 17–18 June 2004, Presidency Conclusions, Council Document 10679/04, 18.6.2004, 6, para. 29 (emphasis added).

36 Communication from the Commission to the Council and the European Parliament, Recommendation of the European Commission on Turkey's progress towards accession, COM(2004) 656 final, 6.10.2004, 4.

37 See Supplementary Protocol to the Association Agreement between the European Economic Community and Turkey consequent on the accession of new Member States [Denmark, Ireland, United Kingdom] to the Community, done at Ankara on 30 June 1973 (OJ No. L 361, 31.12.1977, 2); Protocol to the Association Agreement



adaptation protocols had been signed when Austria, Finland and Sweden joined the EU on 1 January 1995, there was nevertheless “a *de facto* and *de jure* association between these States and Turkey”.<sup>38</sup> Besides extending the Ankara Agreement to the ten new Member States that joined the Union on 1 May 2004, it seems that the Protocol was also to rectify the situation with regard to those Member States to which the Ankara Agreement was applied without any formal legal basis. In order to avoid another legal lacunae, the Act of Accession 2003 expressly provided for the accession of the new Member States to existing agreements of the Community and its Member States with third countries “by the conclusion of a protocol to such agreements”.<sup>39</sup> The European Council’s invitation to Turkey to conclude an Additional Protocol on the adaptation of the Ankara Agreement with the EC and the twenty-five Member States, including the Republic of Cyprus, raised the question of whether and how Turkey could conclude such an international treaty without thereby recognizing the Republic of Cyprus.

### *II.B.i. Treaty relations between Turkey and the Republic of Cyprus*

Turkey has not concluded any bilateral agreement with the Republic of Cyprus since the end of the partnership government of the Greek and Turkish Cypriots in December 1963.<sup>40</sup> In addition, Turkey has repeatedly disputed the power of the “Greek Cypriot Administration” to conclude multilateral treaties in the name of the “Republic of Cyprus” as it does not recognize the Greek Cypriot Administration as the Government of the Republic of Cyprus. In December 1975, the Turkish government attached the following declaration to its ratification of eight Council of Europe conventions:

The Government of Turkey, while ratifying the agreement (convention, protocol [...]), declares that it does not consider itself bound to carry out the provisions of the said agreement (convention, protocol) in relation to the Greek Cypriot

between the European Economic Community and Turkey consequent on the accession of the Hellenic Republic to the Community, done at Brussels on 20 April 1988 (COM(1987) 140 final, 9.4.1987; OJ No. C 115, 30.4.1987, 8—not in force); Protocol to the Association Agreement between the European Economic Community and the Republic of Turkey consequent on the accession to the Community of the Kingdom of Spain and the Portuguese Republic, done at Brussels on 23 July 1987 (COM (1987) 99 final, 10.3.1987—not in force).

38 European Commission, Proposal for a Council Decision on the conclusion of the Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey following the enlargement of the European Union, COM(2005) 191, final, 13.5.2005, 2. See also second “considering” of the Additional Protocol to the Agreement, establishing an Association between the European Economic Community and Turkey following the enlargement of the European Union, done at Brussels on 29 July 2005, OJ No. L 254, 30.9.2005, 58.

39 See Article 6(2) and (6) of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic, and the adjustments to the Treaties on which the European Union is founded [hereinafter Act of Accession 2003], OJ No. L 236, 23.9.2003, 33.

40 Prior to December 1963, the two parties had concluded an Agreement on the Abolition of Visa Requirement in Nicosia on 31 October 1961—suspended on 13 February 1964—and a Trade Agreement in Nicosia on 9 November 1963 ([www.mfa.gov.cy/](http://www.mfa.gov.cy/)).

Administration, which is not *constitutionally* entitled to represent alone the Republic of Cyprus.<sup>41</sup>

The Secretary-General of the Council of Europe, in accordance with the practice of the Secretary-General of the United Nations, confined himself to publishing and transmitting these declarations to the other parties to the treaties.<sup>42</sup> A parliamentary question on the legal significance and effects of these declarations put to the Committee of Ministers of the Council of Europe went unanswered.<sup>43</sup> The ministers simply noted that the registration of the Turkish instruments of ratification did not in any way affect the status of the Government of the Republic of Cyprus within the Committee of Ministers.<sup>44</sup>

The effect of the declarations attached by Turkey to its instruments of ratification depends on their legal status. The declarations seem to be more than a mere restatement of Turkey's legal position on the Cyprus issue. They are not just an expression of Turkey's refusal to recognize the Greek Cypriot Administration's claim to sole representation of the Republic of Cyprus. Rather, Turkey wants to exclude any contractual relationship with the Greek Cypriot Administration. The declarations also do not qualify as interpretative declarations as their aim is not to *interpret* the terms of the treaty, but to exclude their application in the relations between two parties thereto.<sup>45</sup> It is disputed whether such declarations may qualify as reservations as stipulated in the Vienna Convention on the Law of Treaties (VCLT).<sup>46</sup> Such declarations have been referred to as "reservations relating to non-recognition". There are several reasons for not categorizing a statement of non-recognition as a reservation, even if it purports to exclude the application of the treaty in the relations between the State formulating it and the non-recognized entity.<sup>47</sup> Such a declaration is not compatible with the letter of the definition of the term "reservation" in Article 2(1)(d) VCLT. According to this definition, a reservation is a "unilateral statement [...] made by a State [...] whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that

41 Council of Europe, Assembly, Documents, 28th Ordinary Session (Third Part), Document 3880, 15.10.1976, 1 (emphasis added).

42 On the practice of the UN Secretary-General, see United Nations, Office of Legal Affairs, Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (1999), 53, paras. 182–183.

43 Council of Europe, Assembly, Documents, 28th Ordinary Session (Third Part), Document 3880, 15.10.1976, 2 (Question No. 189). No answer to this question could be found in the records of the Parliamentary Assembly.

44 See the six-monthly Report of the German Government on the Activities of the Council of Europe and the Western European Union for the period from 1 October 1975 to 31 March 1976: BT-Drs. 7/4985, 7.4.1976, 3. On the representation of Republic of Cyprus in the Committee of Ministers, see Stefan Talmon, *Kollektive Nichtanerkennung illegaler Staaten* (2006), 567–568.

45 On interpretative declarations, see United Nations, Office of Legal Affairs, Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (1999), 63, para. 217.

46 Articles 19–23 of the Vienna Convention on the Law of Treaties of 23 May 1969 (1155 UNTS 331). See also Rolf Kühner, *Vorbehalte zu Multilateralen Völkerrechtlichen Verträgen* (1986), 45–47.

47 See the Commentary on Guideline 1.4.3 [1.1.7] on "Statements of non-recognition" of the Draft Guidelines on Reservations to Treaties provisionally adopted by the International Law Commission on first reading [hereinafter *Draft Guidelines on Treaty Reservations*]: UN Document A/54/10 (1999), 277–279 and ILC Yb. (1999) II/2, 115–116.

State”. The declaration in question does not relate to the *exclusion of the legal effect of certain provisions of the treaty* but to the *exclusion of a party to the treaty*. It also seems very difficult to apply the provisions in Article 20 VCLT on the acceptance of and objection to reservations to such a declaration. In practice, such declarations have, however, been treated like reservations.<sup>48</sup> Their legal effect thus depends on the individual treaty and, in particular, on whether the statement excluding the application of the treaty in relation to the non-recognized entity is incompatible with the object and purpose of the treaty.<sup>49</sup> In the case of most multilateral treaties, it is not a precondition of the treaty that it uniformly applies between all the parties.<sup>50</sup> Reservations *ratione personae* are not excluded *per se*. The declarations made by Turkey may thus, in principle, prevent the entry into force of the treaties between it and the Republic of Cyprus. That the Turkish declarations were not without legal effect may be seen by the fact that Article 8 of the Draft Treaty between Cyprus, Greece, Turkey and the United Kingdom on Matters Related to the New State of Affairs in Cyprus expressly provided that “the parties to this Treaty shall withdraw or rectify any declarations or reservations which they have made to international treaties in so far as such declaration or reservations arose out of their position regarding the Cyprus problem”.<sup>51</sup> This Draft Treaty would have been concluded if the Annan Plan for “The Comprehensive Settlement of the Cyprus Problem” had been adopted in the referendum on 24 April 2004 by both the Turkish and Greek Cypriot communities. A provision on the withdrawal or rectification of such declarations would be superfluous if they were without any legal effect.

The Turkish position on the treaty-making competence of the Government of the Republic of Cyprus is not uniform. When signing the International Telecommunication Convention on 11 November 1985, the Turkish representative simply declared that “it is the view of the Turkish Government that the present Greek Cypriot Administration represents only the Southern part of the island of Cyprus”.<sup>52</sup> It is not entirely clear whether this statement was to exclude any treaty relations between Turkey and the Republic of Cyprus, or whether it was only to limit the power of representation of the Government of the Republic of Cyprus and thus the territorial scope of application of the treaty to the southern part of the island. Other declarations by Turkey point in the latter direction. On 23 July 1991, Turkey declared

48 See United Nations, Office of Legal Affairs, Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (ST/LEG/7/Rev. 1) (1999), 53, paras. 182–183.

49 See Article 19 (c) VCLT.

50 An objection to a reservation, accompanied by a clearly worded refusal to be bound by a treaty with respect to the reserving State, can prevent the entry into force of the treaty between the objecting and the reserving State; see Article 20(4) (b) VCLT. See also Jochen Abr. Frowein, *Das de facto-Regime im Völkerrecht* (1968), 117–118, 151.

51 The Draft Treaty between Cyprus, Greece, Turkey and the United Kingdom on Matters Related to the New State of Affairs in Cyprus may be found in Annex C of the Annan Plan on “The Comprehensive Settlement of the Cyprus Problem” of 31 March 2004 ([www.cyprus-un-plan.org/](http://www.cyprus-un-plan.org/)).

52 International Telecommunication Convention, with Final Protocol, Additional Protocols I to VII and Optional Additional Protocol, signed in Nairobi on 6 November 1982, *Bundesgesetzblatt [German Federal Law Gazette]* 1985, Part II, 522; United Kingdom Treaty Series 1985, No. 33.

with reference to the ratification by the Republic of Cyprus of the Convention Against Torture<sup>53</sup> that:

'The Republic of Cyprus' which was established, in accordance with international treaties, on the basis of a partnership between the two peoples of the island, has ceased to exist as such after its constitution was unilaterally and unlawfully abrogated in 1963 by the Greek Cypriot side by the use of force, despite the protestations and the resistance of the Turkish Cypriot side. The Greek Cypriot Administration has ever since represented exclusively the Greek Cypriots and their interests. As a guarantor power under the 1960 Treaty of Guarantee, Turkey does not recognize this Administration or any of its illegitimate claims.

There is no single authority which, in fact or in law, jointly represents or is competent to represent the Turkish Cypriots and the Greek Cypriots, and consequently Cyprus as a whole. [. . .].

The Turkish Cypriot people are represented by the Government of the Turkish Republic of Northern Cyprus which was recognized by Turkey in 1983.

Therefore, the instrument of ratification deposited on behalf of the so-called Government of Cyprus is, in fact, the instrument of ratification of only the Greek Cypriot Administration and is devoid of any legal basis as regards its applicability to Cyprus in its entirety.<sup>54</sup>

Unlike most Arab States, in the case of Israel,<sup>55</sup> Turkey has not consistently made such declarations with regard to the Republic of Cyprus. On the contrary, in the majority of treaties Turkey has remained silent. In the absence of an express declaration purporting to exclude the application of the treaty from relations between the two States, treaty relations between Turkey and the Republic of Cyprus have come into existence.<sup>56</sup> As a result, Libananco Holdings Company Ltd., an investment firm registered in the Republic of Cyprus and domiciled in Nicosia, was able, on 19 April 2006, to institute investment arbitration proceedings against Turkey before the World Bank's International Centre for

53 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 39/46, 10.12.1984 (1465 UNTS 85).

54 UN Documents CAT/C/2/Rev.5, 22.1.1998, 31–32; CAT/C/2/Rev.4, 8.2.1996, 28–29; CAT/C/2/Rev.3, 7.3.1994, 26. See also the Turkish statement with regard to the declaration made by the Republic of Cyprus upon ratification of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in Vienna on 20 December 1988 (UN Document E/CONF.82/15, Corr.1 and Corr.2): "[S]ince December 1963, there has been no single political authority in Cyprus representing both communities and legitimately [sic] empowered to act on behalf of the whole island. The Greek Cypriot side does not possess the right or authority to become party to international instruments on behalf of Cyprus as a whole. The ratification of this Convention by Turkey shall in no way imply the recognition of the 'Republic of Cyprus' by Turkey and her accession to this Convention should not signify any obligation on the part of Turkey to enter into any dealings with the 'Republic of Cyprus' as are regulated by this Convention". (<http://untreaty.un.org/>).

55 The Arab States usually make the following statement: "The participation of [...] in this Convention does not mean in any way recognition of Israel by the State of [...] and that, furthermore, no treaty relations will arise between the State of [...] and Israel". (<http://untreaty.un.org/>).

56 See Jochen Abr. Frowein, *Das de facto-Regime im Völkerrecht* (1968), p. 118, 150–151.

Settlement of Investment Disputes (ICSID) under the ICSID Convention<sup>57</sup> and the Energy Charter Treaty (ECT),<sup>58</sup> claiming unlawful expropriation of its assets in Turkey.<sup>59</sup> According to Article 26(2)(c) and (4)(a)(i) ECT, an investor of a contracting party may submit a dispute with another contracting party relating to an investment in the latter to ICSID if the contracting party of the investor and the contracting party which is party to the dispute are both parties to the ICSID Convention. Article 1(7)(a)(ii) ECT defines an “Investor” of a contracting party as a “company [. . .] organized in accordance with the law applicable in that Contracting Party”. Both the Republic of Cyprus and Turkey have ratified the two treaties without making any declarations or reservations.<sup>60</sup> Consequently, Libananco, as a company organized in accordance with the laws of the Republic of Cyprus, could institute proceedings against Turkey. General policy statements of non-recognition do not qualify as reservations and cannot have any effect on the application of a treaty.<sup>61</sup> Such statements do not fulfil the formal requirements for reservations which “must be formulated in writing and communicated to the contracting States”.<sup>62</sup> If such general policy statements did in fact qualify as a kind of “standing reservation”, the special declarations made, on occasion, by Turkey would be superfluous. It may thus be concluded that Turkey does not generally deny the treaty-making power of the Government of the Republic of Cyprus, but that it wants that power to be limited to the southern part of the island.

### *II.B.ii. The Additional Protocol to the Ankara Agreement*

When concluding an Additional Protocol to the Ankara Agreement with the EC and its twenty-five Member States, including the Republic of Cyprus, in order to take account of the accession of the ten new Member States, Turkey had to avoid everything that could be interpreted as recognition on its part of the treaty-making power of the Government of the Republic of Cyprus over the whole island. This section examines what effect, if any, the Turkish position had, both on the procedure for concluding the Additional Protocol and on its content.

*II.B.ii.a. Signature of the Protocol as a prerequisite for the start of accession negotiations.* When by the end of November 2004 the Turkish government had made no move to sign the Additional Protocol, the European Council linked the matter with the opening of

57 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington on 18 March 1965 (575 UNTS 159).

58 Energy Charter Treaty, with annexes, final act of the European Energy Charter conference, and decisions, done at Lisbon on 17 December 1994 (34 ILM (1995), 373).

59 For details, see *Libananco Holdings Co. Limited v. The Republic of Turkey*, Request for Arbitration, submitted on 23 February 2006 (ICSID Case No. ARB/06/8), at [www.crowell.com/](http://www.crowell.com/).

60 Article 46 ECT expressly rules out any reservations.

61 See Commentary on Guideline 1.4.3 [1.1.7] on “Statements of non-recognition” of the Draft Guidelines on Treaty Reservations: ILC Yb. (1999), II/2, 115.

62 Article 23(1) VCLT .

accession negotiations with Turkey.<sup>63</sup> On 8 December 2004, Atzo Nicolai, State Secretary for European Affairs of the Netherlands, explained the EU Presidency's expectations of Turkey:

What we have proposed is that Turkey accept the Republic of Cyprus as one of the 25 members of the EU. This is required for the start of the accession talks. However this does not mean a recognition that the Cyprus government in the south represents the whole island. This will only be an acceptance that Cyprus is one of the member countries of the EU. What we expect is that Turkey sign the protocol that extends the Ankara Treaty to the 25 member countries.<sup>64</sup>

This statement showed the way forward: Turkey was to sign the Protocol extending the Ankara Agreement to all new Member States, including the Republic of Cyprus, but this was not to constitute recognition of the "Cyprus government in the south" as representing the whole island. The EU thereby accommodated Turkey's position that "direct or indirect recognition of the Cyprus Republic is out of the question".<sup>65</sup>

The EU initially expected Turkey to sign, or at least to initial, the Additional Protocol at the European Council meeting on 16–17 December 2004, as a condition for the opening of accession negotiations on 3 October 2005. This led to a tense stand-off during the meeting, hanging largely on the question of the recognition of the Greek Cypriot government, which was not resolved until late in the afternoon of 17 December. The Draft Council Conclusions on Turkey initially read:

19. The European Council welcomed Turkey's decision to sign the protocol regarding the adaptation of the Ankara Agreement, taking account of the accession of the 10 new Member States. In this connection it referred to the Presidency's declaration at Annex I. [...]

#### ANNEX I

##### PRESIDENCY DECLARATION

[...] The Presidency welcomes on behalf of the European Union *the initialling on 17 December 2004* by the Commission and Turkey of the *Protocol extending the Ankara Agreement to all 25 Member States* and it confirms, with reference to paragraph 19 of the conclusions of the European Council its intention to sign with Turkey the said Protocol before the actual opening of the accession negotiations.

63 Cf. the Presidency's first draft of the conclusions to be arrived at by the European Council at its meeting on 16–17 December 2004: Council Document 15337/04, 29.11.2004, para. 19. See also the 4th draft conclusions: Council Document 15938/04, 10.12.2004, para. 19. See also the statement of President of the European Council, Dutch Prime Minister Jan Peter Balkenende, at a press conference on 17 December 2004: "It is important for me to emphasize that this agreement must be signed before the negotiations can begin on 3 October 2005". ([www.eu2004.nl/](http://www.eu2004.nl/)).

64 Cyprus Press and Information Office: Turkish Press and Other Media, No. 236/04, 9.12.2004 [1].

65 See the statement of Turkish Foreign Minister, Abdullah Gül: Cyprus PIO: Turkish Press and Other Media, No. 242/04, 17.12.2004 [7].

The European Council hopes that these developments will facilitate and foster the improvement of the relations between Turkey and all Member States of the Union.<sup>66</sup>

The Presidency Declaration which spoke of “extending the Ankara Agreement to all 25 Member States” was problematic because it could be interpreted as extending the Agreement to the Republic of Cyprus, including the northern part of the island. This was unacceptable for Turkey, as it could have been interpreted as recognition of the claim of the Government of the Republic of Cyprus to represent the whole of Cyprus. For the same reason, Turkish Prime Minister Erdogan also refused to initial the draft Protocol that had originally been submitted by the Commission in July 2004. For Turkey, the question was not one simply of *extension* but of *adaptation* of the Ankara Agreement. The original draft Protocol consequently required re-negotiating and re-drafting, as becomes clear from the final Presidency Conclusions on Turkey, which state:

19. The European Council welcomed Turkey’s decision to sign the Protocol regarding the adaptation of the Ankara Agreement, taking account of the accession of the ten new Member States.

In this light, it welcomed the declaration of Turkey that ‘the Turkish Government confirms that it is ready to sign the Protocol on the adaptation of the Ankara Agreement prior to the actual start of accession negotiations and *after reaching agreement on and finalising the adaptations which are necessary in view of the current membership of the European Union*’.<sup>67</sup>

The Turkish Minister of State Besir Atalay had earlier sent a letter to the Presidency in which he had confirmed the Turkish government’s willingness to sign the Protocol adapting the Ankara Agreement to the ten new EU members before the start of the accession negotiations.<sup>68</sup> The fact that the letter was signed by the Minister of State and not, as would normally be the case, by the Turkish Prime Minister or Foreign Minister shows the political sensitivities involved. Turkey’s request to incorporate a passage in paragraph 19 of the Presidency Conclusions stating expressly that the signing of the Protocol did not amount to recognition of the Greek Cypriot Administration’s claim to represent the Turkish Cypriots was rejected.<sup>69</sup> European leaders made it clear at their post-summit press conferences that signature of the Protocol did not amount to “formal legal recognition” of the Greek Cypriot-led Government of the Republic of Cyprus.<sup>70</sup>

66 [www.abhaber.com/rapor/17aralik/turkkarari.asp](http://www.abhaber.com/rapor/17aralik/turkkarari.asp) (emphasis added).

67 Brussels European Council, 16–17 December 2004, Presidency Conclusions, Council Document 16238/1/04/REV.1, 1.2.2005, 5, para. 19 (emphasis added).

68 Cyprus Press and Information Office: Turkish Press and Other Media, No. 243/04, 20.12.2004 [8].

69 Turkey had suggested adding the following passage: “Turkey maintains that it will make no changes whatsoever to its legal and political standpoint on Cyprus. It notes that this does not amount to recognition. It is clear that the Greek Cypriot administration cannot represent the Turkish Cypriots” (Cyprus Press and Information Office: Turkish Press and Other Media, No. 246/04, 23.12.2004 [1]).

70 For the statement of British Prime Minister Tony Blair, see [www.number10.gov.uk/output/Page6807.asp](http://www.number10.gov.uk/output/Page6807.asp). British Foreign Secretary Jack Straw also said signing the protocol “does not involve formal or informal

*II.B.ii.b. Procedure for signing the Protocol.* Following negotiations with the European Commission on the exact wording of the Protocol, on 28 March 2005 the Turkish government sent a letter to the Commission stating that it agreed with the text of the Additional Protocol—a step equivalent to initialling the Protocol.<sup>71</sup> The signing of the Protocol, however, proved more problematic. After the European Council meeting in December 2004, Turkish Foreign Minister Abdullah Gül had declared that “Turkey will not get together with Cyprus, that is with the Greek Cypriot administration of south Cyprus, and sign an agreement or a protocol with it. In other words, there is no question of Turkey and the Greek Cypriot administration of south Cyprus sitting at either end of a table”.<sup>72</sup> This proviso was motivated more by political than by legal considerations. No conclusions as to the powers of representation of a government or the territorial scope of its sovereign authority can be drawn from the joint signing of an international agreement alone. Turkey’s political concerns did not prove an insurmountable obstacle. In its explanatory memorandum to a Proposal for Council Decisions on the signature and conclusion of the Additional Protocol, the European Commission pointed out that the Act of Accession 2003 provided for a simplified procedure for the accession of the new Member States to, among others, the Ankara Agreement. According to Article 6(2) and (6) of the Act of Accession 2003, the Protocol was to be concluded by “the Council, acting unanimously on behalf of the Member States”.<sup>73</sup> On 13 June 2005, the Council authorized its President “to designate the person(s) empowered to sign, on behalf of the European Community and its Member States, [...] the Additional Protocol” with Turkey.<sup>74</sup> In order to take account of Turkish sensitivities and to downplay further the signing of the Additional Protocol, no signing ceremony took place. Instead, the signing of the Protocol between the Member States and the EC on the one part and the Republic of Turkey on the other part took place by an exchange of letters. The British Ambassador to the EU, John Grant, signed the Protocol “for the Member States” and “for the European Community” before sending it on to the Permanent Representative of Turkey to the EU, Oguz Demiralp, who signed the Protocol “for the Republic of Turkey” and three-and-a-half hours later returned it to the British Ambassador. In addition, Olli Rehn, the member of the Commission responsible for enlargement

recognition of the government of Cyprus, and we have been trying to reassure the Turkish government about that”. (“Historic Compromise”, *Turkish Daily News*, 18 December 2004). Dutch Prime Minister Jan Peter Balkenende, whose country held the EU presidency, said: “It is not what you can call a formal legal recognition, but it is a step that can lead to progress in this field”. (“EU-Turkey Deal Hailed as a Bridge Builder”, *Turkish Daily News*, 19 December 2004).

71 See 44th meeting of the EC-Turkey Association Council, 26 April 2005, CE-TR 107/05, 21.6.2005, 7.

72 Cyprus Press and Information Office: *Turkish Press and Other Media*, No. 243/04, 20.12.2004 [2].

73 See European Commission, *Proposals for Council Decisions on the signature and conclusion of the Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey, following the enlargement of the European Union*, COM(2005) 191 final, 13.5.2005, 2.

74 Council Decision of 13 June 2005 on the signature of the Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey, following the enlargement of the European Union (2005/672/EC), OJ No. L 254, 30.9.2005, 57.



signed for the EC.<sup>75</sup> This treaty-making by proxy avoided any formal contact between representatives of Turkey and the Republic of Cyprus and the signature of both countries on the same document.

*II.B.ii.c. Content of the Protocol.* While the signing procedure was mainly due to political sensitivities, the content of the Additional Protocol, and particularly its provision on the territorial scope of the Ankara Agreement, was of crucial importance to the question of recognition, as the territorial scope of a treaty allows conclusions to be drawn on the parties' claims to territorial sovereignty. The Additional Protocol provided that "the Ankara Agreement shall be applicable to Turkey and to all Member States of the European Union as enlarged" through the Treaty of Accession.<sup>76</sup> This provision, however, left open the exact territorial scope of application of the Ankara Agreement. Originally, the Ankara Agreement itself provided in Article 29(1) that "this Agreement shall apply to the European territories [of the six original Member States] on the one hand and to the territory of the Turkish Republic on the other". When Denmark, Ireland and the United Kingdom joined the European Economic Community on 1 January 1973, the Supplementary Protocol to the Ankara Agreement simply extended the territorial scope of the Ankara Agreement to the "European territories" of the new Member States.<sup>77</sup> The same procedure was followed in the accession of other new Member States to the Ankara Agreement.<sup>78</sup> The approach of extending the Ankara Agreement to the "European territories" of the Republic of Cyprus, however, would not have been possible without, at least implicitly, recognizing the claim of the Government of the Republic of Cyprus to represent the whole island and thus making the Ankara Agreement also applicable to northern Cyprus. Article 1(3) of the Additional Protocol therefore replaced Article 29 of the Ankara Agreement with the following text: "This Agreement shall apply to the *territory to which the Treaty establishing the European Community applies*, under the conditions set out in that Treaty, and to the territory of the Republic of Turkey".<sup>79</sup> This formula allowed Turkey to avoid any implicit recognition of the Government of the Republic of Cyprus' claim to act for the northern part of the island, as the Treaty establishing the European Community (TEC) does not, in fact, *apply* there. According to Article 1(1) of Protocol No. 10 on Cyprus to the Act of Accession 2003, "the application of the *acquis* shall be

75 See Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey, following the enlargement of the European Union, done at Brussels on 29 July 2005, OJ No. L 254, 30.9.2005, 58–68 at 68. See also Cyprus Press and Information Office: Turkish Press and Other Media, No. 144/05, 1.8.2005 [1].

76 Preamble, para. 3, of the Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey, following the enlargement of the European Union, done at Brussels on 29 July 2005, OJ No. L 254, 30.9.2005, 58–68 at 59.

77 See Article 5 of the Supplementary Protocol to the Association Agreement between the European Economic Community and Turkey consequent on the accession of new Member States [Denmark, Ireland, United Kingdom] to the Community, done at Ankara on 30 June 1973, OJ No. L 361, 31.12.1977, 2.

78 See, e.g. Article 3 of the Protocol to the Association Agreement between the European Economic Community and Turkey consequent on the accession of the Hellenic Republic to the Community, done at Brussels on 20 April 1988, COM(1987) 140 final, 9.4.1987.

79 Emphasis added.

suspended in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control".<sup>80</sup> The *acquis communautaire*, of course, includes the TEC. The suspension of the *acquis* is to last until a solution to the Cyprus problem has been found, i.e. until the reunification of the island under a unified government.<sup>81</sup> The Ankara Agreement consequently applies for the time being only to the areas in which the Government of the Republic of Cyprus exercises effective control, i.e. in the southern part of the island. Turkey can thus argue that the Government of the Republic of Cyprus acted only for South Cyprus when concluding the Additional Protocol to the Ankara Agreement—no recognition of the Government of the Republic of Cyprus' claim to represent the whole island can be inferred from the conclusion of the treaty between the parties. The territorial scope of application of the Ankara Agreement may be contrasted with that of the TEC. When concluding the TEC, the Government of the Republic of Cyprus acted for the whole island. The Act of Accession 2003 amended Article 299(1) of the TEC, providing that "this Treaty [establishing the European Community] shall apply to [...] the Republic of Cyprus".<sup>82</sup> The reference to the Member States in Article 299(1) of the TEC is generally understood as referring to their territory in accordance with international law.<sup>83</sup> As no proviso has been added to Article 299(1), the TEC applies in principle to the entire island of Cyprus. This is also shown by the fact that the contracting parties felt it necessary to suspend the *acquis communautaire* in northern Cyprus. Suspension, however, presupposes application. It would thus not be possible for Turkey to accede to the TEC without, at least implicitly, recognizing the Republic of Cyprus' claim to the whole island.

*II.B.ii.d. Turkish declaration and EU counter-declaration.* In December 2004, Turkey indicated that, upon signature of the Additional Protocol, it would set out its position on the Cyprus problem in a declaration, making clear that it did not recognize the Republic of Cyprus.<sup>84</sup> The content of this declaration was discussed in July 2005 by Turkey, the British EU term Presidency and the European Commission.<sup>85</sup> During these discussions, the British Prime Minister, Tony Blair, "re-stated very clearly" the EU's position "that the signing of the Ankara Protocol does not involve the recognition of Cyprus".<sup>86</sup> Despite all assurances, Turkey felt it necessary to make a declaration. When, on 29 July

80 Protocol No. 10 on Cyprus to the Act of Accession 2003, OJ No. L 236, 23.9.2003, 955.

81 See preambular para. 4 of Protocol No. 10 on Cyprus.

82 Article 19 of the Act of Accession 2003, OJ No. L 236, 23.9.2003, 33.

83 See, e.g. Juliane Kokott, Article 299, in: Rudolf Streinz (ed.), EUV/EGV (2003), MN.4; Ulrich Becker, Article 299, in: Jürgen Schwarze (ed.), EU-Kommentar (2000), MN. 4.

84 See Cyprus Press and Information Office: Turkish Press and Other Media, No. 246/04, 23.12.2004 [1].

85 While there was general agreement between the EU and Turkey that the signing of the Protocol did not amount to recognition of the Government of the Republic of Cyprus, no consensus existed as to whether the Protocol obliged Turkey to open its ports and airports to ships and planes registered in the Republic of Cyprus. The EU made it clear to Turkey that a reference to the issue of ports and airports in the declaration was not welcome ("Protocol Negotiations at Full Speed After London Talks", Turkish Daily News, 29 July 2005).

86 Prime Minister Blair made the statement during a press conference with his Turkish counterpart in London on 27 July 2005 ([www.number10.gov.uk/output/Page8005.asp](http://www.number10.gov.uk/output/Page8005.asp)).

2005, Turkey signed the Protocol through an exchange of letters, the Turkish Ambassador to the EU did not just return the signed Protocol but three pieces: the cover, the Protocol and the declaration. On the cover it said: “We are sending the attached protocol; our thoughts on the matter are contained within the declaration”.<sup>87</sup> The “Declaration by Turkey on Cyprus”, which also bears the signature of the Turkish Ambassador to the EU, reads as follows:

1. Turkey remains committed to finding a political settlement of the Cyprus issue and has clearly demonstrated its resolve in this regard. Accordingly, Turkey will continue to support the efforts of the UN Secretary-General towards achieving a comprehensive settlement which will lead to the establishment of a new bi-zonal partnership State. A just and lasting settlement would greatly contribute to peace, stability and harmonious relations in the region.
2. The Republic of Cyprus referred to in the Protocol is not the original partnership State established in 1960.
3. Turkey will thus continue to regard the Greek Cypriot authorities as exercising authority, control and jurisdiction only in the territory south of the buffer zone, as is currently the case, and as not representing the Turkish Cypriot people and will treat the acts performed by them accordingly.
4. Turkey declares that signature, ratification and implementation of this Protocol neither amount to any form of recognition of the Republic of Cyprus referred to in the Protocol; nor prejudice Turkey’s rights and obligations emanating from the Treaty of Guarantee, the Treaty of Alliance, and the Treaty of Establishment of 1960.
5. Turkey reaffirms that its existing relationship with the Turkish Republic of Northern Cyprus remains unchanged by becoming a party to the Protocol.
6. Pending a comprehensive settlement, the position of Turkey on Cyprus will remain unchanged. Turkey expresses its readiness to establish relations with the new partnership State which will emerge following a comprehensive settlement in Cyprus.<sup>88</sup>

According to Foreign Minister Abdullah Gül, the Turkish side “put a lot of care and attention into both content and style so as to leave no room for misunderstandings”; it considered the protocol and the declaration as “a single unit”.<sup>89</sup> This was echoed in a press statement from the Turkish Foreign Ministry which said that the “official declaration [. . .] legally constitutes an integral part of our signature and letter”.<sup>90</sup>

At its extraordinary meeting on 25 July 2005, the Council’s Committee of Permanent Representatives (COREPER) had already decided that “the Presidency will react to any declaration by Turkey by a Presidency statement using established EU language, also making it clear that the Council will consider any formal counter-declaration later”.<sup>91</sup>

87 Cyprus Press and Information Office: Turkish Press and Other Media, No. 144/05, 1.8.2005 [3].

88 Turkish Ministry of Foreign Affairs, Press Statement No. 123. Regarding the Additional Protocol to Extend the Ankara Agreement to All EU Members, 29 July 2005 ([www.mfa.gov.tr/mfa](http://www.mfa.gov.tr/mfa)).

89 Cyprus Press and Information Office: Turkish Press and Other Media, No. 144/05, 1.8.2005 [3].

90 Turkish Ministry of Foreign Affairs, Press Statement No. 123, para. 2.

91 Council Document 12179/05, 12.9.2005, 4.

Upon receipt of the Turkish declaration, the British EU term Presidency therefore issued the following statement:

The Presidency welcomes Turkey's signature earlier today of the Ankara Agreement Protocol in accordance with the conclusions of the European Council of December 2004.

It also notes that Turkey has issued a declaration reaffirming, for its part, its long-standing policy on Cyprus. The Presidency recalls that the Government of the Republic of Cyprus signed the Accession Treaty on 16 April 2003 and the Republic of Cyprus became a Member State of the European Union on 1 May 2004, and that the established position of the European Union is that it recognises the Republic of Cyprus, only, as a subject of international law.

The Presidency welcomes Turkey's continuing commitment, in its declaration, to support the efforts of the UN Secretary General to bring about a comprehensive settlement of the Cyprus problem. The Presidency agrees that a just and lasting settlement, in line with the principles on which the Union is founded, will contribute to peace, stability and harmonious relations in the region.

The Council of the European Union will examine the terms of the Turkish declaration in due course with a view to agreeing any further EU response.<sup>92</sup>

The Government of the Republic of Cyprus was not satisfied with the EU Presidency's statement. In a written statement on the Turkish declaration, the government spokesman of the Republic of Cyprus noted, *inter alia*, that: "It is incomprehensible for the Turkish Government to insist and state that it does not recognise the Republic of Cyprus, one of the member states of the European Union, to which it aspires to accede. The legal and political reality is that the Republic of Cyprus is the sole state in Cyprus, recognised by the international community, and the Government is one of the 25 with which Turkey will be negotiating its accession at the Intergovernmental Conference".<sup>93</sup> The statement carried an unveiled threat that the Republic of Cyprus might block the start of Turkey's accession negotiations scheduled for 3 October 2005 if the Turkish government did not, without any further delay, recognize the Republic of Cyprus as the only state in Cyprus. The statement also indicated that the Republic of Cyprus might raise the question of recognition in the context of the final discussions on the EU's negotiating framework with Turkey. The negotiating framework, which is prepared by the European Commission and must be adopted unanimously by the Council, lays down the guiding principles and procedures for the accession negotiations. It serves as a basis from which the Member States can conduct the negotiations with Turkey. The Greek Cypriots gained unexpected support from France, which had grown wary about Turkish EU membership after French voters overwhelmingly rejected the Treaty establishing a Constitution for Europe in a referendum in May 2005. French Prime Minister Dominique

92 Presidency statement on Turkey's signature of the Ankara Agreement Protocol, 29 July 2005 ([www.eu2005.gov.uk/](http://www.eu2005.gov.uk/)).

93 Ministry of Foreign Affairs of the Republic of Cyprus, Statement by Government Spokesman on Turkish Declaration, 3 August 2005 ([www.mfa.gov.cy/mfa](http://www.mfa.gov.cy/mfa)).

de Villepin declared: “The EU accession process cannot start with a country that does not recognize each one of its members. France will make this clear to Turkey and to other EU countries at the next meeting”.<sup>94</sup> Turkey immediately rejected any “new conditions” for the start of accession negotiations, receiving backing from the European Commission which stated that recognition is not a condition for the start of accession talks. The Commission spokesperson pointed out that “the right place to discuss the recognition of Cyprus is the United Nations, rather than the EU”.<sup>95</sup> This view, however, was not shared by the Republic of Cyprus which, for a long time, had tried to make its recognition by Turkey an issue of the accession process.

On 24 August 2005, the Foreign Minister of the Republic of Cyprus, Georgios Iakovou, declared: “we must obtain an EU counterstatement which will overturn the Turkish declaration and will not leave anything unanswered and there must be improvements of the EU–Turkey negotiating framework”.<sup>96</sup> One week later, COREPER agreed in principle to respond to the Turkish declaration by releasing a counter-declaration. On 1–2 September 2005, at an informal EU Foreign Ministers’ meeting (Gymnich) in Newport, Wales, the British EU Presidency circulated elements for the text of such a counter-declaration.<sup>97</sup> Although the foreign ministers largely agreed on the elements of the counter-declaration, they failed to reach the required unanimity. The major issue of contention was the recognition of the Republic of Cyprus by Turkey. The wording suggested by the British

94 “Recognise Cyprus, de Villepin tells Turkey”, *Financial Times*, 3 August 2005, 9. A statement by the Greek Foreign Ministry said: “We consider the non-recognition of a EU member state by a candidate country to be a paradox and an institutional contradiction – foreign to the European rationale.” (*Associated Press Worldstream*, 2 August 2005).

95 “Ankara: ‘Be True to Your Own Signature’”, *Turkish Weekly*, 4 August 2005 ([www.turkishweekly.net/news.php?id=16766#](http://www.turkishweekly.net/news.php?id=16766#)).

96 BBC Monitoring International Reports, 25 August 2005.

97 The “Elements for a Declaration by the European Community and its Member States” provided:

- Acknowledge signature by Turkey of the Ankara Agreement Protocol. Regret that Turkey felt it necessary to make a declaration regarding the Republic of Cyprus at the time of signature.
- Make clear that this declaration is unilateral, does not form part of the Protocol and has no legal effect on Turkey’s obligations.
- EU expects full, non-discriminatory implementation of the Additional Protocol, and the removal of all obstacles to the free movement of goods, including restrictions on means of transport. Turkey must apply the Protocol fully to all EU Member States. The EU will monitor this closely and evaluate full implementation in 2006.
- Recalls that, as long as Turkey has not implemented its contractual obligations with the EU, negotiations on the relevant chapters cannot be opened.
- Recall that the Republic of Cyprus became a Member State of the European Union on 1st May 2004. Underlines that the EU recognizes the Republic of Cyprus, only, as a subject of international law.
- EU underlines the importance it attaches to the de jure normalisation of relations between Turkey and all EU Member States, as soon as can be achieved.
- Notes Turkey’s continuing commitment, in its declaration, to support the efforts of the UN Secretary General to bring about a comprehensive settlement of the Cyprus problem. Agrees that a just and lasting settlement will contribute to peace, stability and harmonious relations in the region.
- The EU will remain seized of all the issues outlined above and will review them in 2006, through the Commission’s reports submitted during the accession process”. (*European Report*, No. 2985, 3.9.2005).

Presidency that the “EU underlines the importance it attaches to the *de jure* normalization of relations between Turkey and all EU Member States, as soon as can be achieved” was considered unsatisfactory by the Republic of Cyprus, supported by Greece, France, Austria, Ireland, Luxembourg and Slovakia. First, “*de jure* normalization of relations” with the Republic of Cyprus was not the same as “recognition” of the Republic of Cyprus as the only State in Cyprus. Relations as such, even full diplomatic relations, do not say anything about the territorial sovereignty of the country with which such relations are maintained. Secondly, the wording “as soon as can be achieved” did not set a specific deadline by which Turkey had to act. The Republic of Cyprus thus insisted on the term “recognition” being included in the counter-declaration and wanted a specific deadline for recognition during the accession negotiations. The text of the counter-declaration was next discussed at the COREPER meeting on 7 September 2005 but, again, no agreement could be reached.<sup>98</sup> At the meeting of COREPER on 14 September 2005, the United Kingdom and France presented a joint draft declaration. The paragraph on “*de jure* normalization of relations” was replaced by the formula that “prior recognition of all Member States is a *necessary component of accession*. Accordingly, the EU underlines the importance it attaches to the normalization of relations between Turkey and all EU Member States, as soon as possible”.<sup>99</sup> This wording would have meant that Turkey must recognize the Republic of Cyprus only by the time it *actually accedes* to the EU, which might be 10–15 years away. This was basically stating the obvious, as the Government of the Republic of Cyprus cannot be expected to ratify an accession treaty with a country which disputes its claim to be the government of the whole of Cyprus—a claim recognized by the other 24 Member States. It is not surprising that this did not satisfy the Permanent Representative of the Republic of Cyprus, who argued for a specific deadline for recognition during the entry talks. The timing of recognition was addressed in extraordinary COREPER meetings on 16 and 19 September 2005, at which the final declaration was hammered out.<sup>100</sup> Last minute objections on “procedural grounds” by the Republic of Cyprus, which tried to establish a link between the counter-declaration and the ongoing talks on the proposed framework for the negotiations with Turkey, prevented the formal adoption at ministerial level at the Agriculture and Fisheries Council meeting on 20 September 2005, the last meeting of EU ministers before the planned start of accession negotiations on 3 October 2005. After five postponements and four different drafts, the counter-declaration was finally adopted by written procedure on 21 September 2005. It reads:

1. The European Community and its Member States acknowledge the signature by Turkey of the Additional Protocol to the Agreement establishing an Association between the European Community and its Member States on the one part and

98 “EU States Fight War of Language over Cyprus at Key Meeting”, *Turkish Daily News*, 8 September 2005.

99 “EU Fails Again to Break Deadlock on Turkey Declaration”, *Turkish Daily News*, 15 September 2005 (emphasis added).

100 See Enlargement: Turkey—Draft Declaration by the European Community and its Member States, Council. Document 12407/05, 19.9.2005.

- Turkey on the other, in accordance with the conclusions of the European Council of December 2004. They regret that Turkey felt it necessary to make a declaration regarding the Republic of Cyprus at the time of signature.
2. The European Community and its Member States make clear that this declaration by Turkey is unilateral, does not form part of the Protocol and has no legal effect on Turkey's obligations under the Protocol.
  3. The European Community and its Member States expect full, non-discriminatory implementation of the Additional Protocol, and the removal of all obstacles to the free movement of goods, including restrictions on means of transport. Turkey must apply the Protocol fully to all EU Member States. The EU will monitor this closely and evaluate full implementation in 2006. The European Community and its Member States stress that the opening of negotiations on the relevant chapters depends on Turkey's implementation of its contractual obligations to all Member States. Failure to implement its obligations in full will affect the overall progress in the negotiations.
  4. The European Community and its Member States recall that the Republic of Cyprus became a Member State of the European Union on 1st May 2004. They underline that they recognise only the Republic of Cyprus as a subject of international law.
  5. Recognition of all Member States is a necessary component of the accession process. Accordingly, the EU underlines the importance it attaches to the normalisation of relations between Turkey and all EU Member States, as soon as possible.
  6. The Council will ensure a follow-up on the progress made on all these issues in 2006.
  7. In the context of this declaration, the European Community and its Member States agree on the importance of supporting the efforts of the UN Secretary General to bring about a comprehensive settlement of the Cyprus problem in line with relevant UNSCRs and the principles on which the EU is founded, and that a just and lasting settlement will contribute to peace, stability and harmonious relations in the region."<sup>101</sup>

The Republic of Cyprus largely succeeded in getting the EC and the other Member States to adopt its position.<sup>102</sup> For the first time, the word "recognition" was used in a document related to Turkey's accession to the EU. The question of recognition of the Republic of Cyprus was, other than in the Turkish declaration, dissociated from the comprehensive settlement of the Cyprus problem. Although not a condition for the start of accession negotiations, recognition of the Republic of Cyprus is now coupled with the "accession

101 Enlargement: Turkey—Declaration by the European Community and its Member States, Council Document 12541/05 (Presse 243), 21.9.2005.

102 In a statement issued on 20 September 2005, the Greek Ministry of Foreign Affairs spokesman declared with regard to the EU counter-declaration: "It is a text of particular significance which includes all the declared aims of Greece and Cyprus. This text renders Turkey's obligation to fully implement the Protocol on Customs Union towards the Republic of Cyprus as an EU Member-State clear and imperative. The EU's counter-statement constitutes a kind of birth certificate of the *de facto* recognition of the Republic of Cyprus by Turkey. At the same time, firm foundations have also been laid for its *de jure* recognition as well. These are developments of evident importance which were inconceivable a few years ago. As a matter of fact, they also place the issue of Cyprus in a new and more favourable framework". (Athens News Agency, 20 September 2005).

process” and not just with the actual “accession” to the Union, as provided for in earlier drafts of the counter-declaration. The exact date of such recognition is, however, left open.<sup>103</sup> It may be argued that the accession process comes to an end with the signature of the Treaty of Accession between the Member States and Turkey, which marks the starting point of the ratification process.<sup>104</sup> Otherwise, the question of recognition may be postponed right up to the deposit of the last instrument of ratification. This would be contrary to the intention of the Member States that Turkey must recognize the Republic of Cyprus before it actually accedes to the Union. While paragraph 5 of the counter-declaration thus does not require Turkey to recognize the Republic of Cyprus immediately or even in the near future, it may provide the Republic of Cyprus with a justification for exercising its veto at any time during the accession process, and thus gives it a powerful bargaining tool in the negotiations on the comprehensive settlement of the Cyprus problem. The reference in paragraph 3 to “the removal of all obstacles to the free movement of goods, including restrictions on means of transport” sets out the EU’s understanding that the Ankara Agreement requires Turkey to open its ports and airports to ships and planes registered in the Republic of Cyprus. This provision further strengthens the Republic of Cyprus’ position, as it introduces a linkage between the issue of opening ports and airports and the opening of negotiations on the relevant chapters—or subject areas—of the *acquis communautaire*, as well as Turkey’s “overall progress” in the accession negotiations. This linkage affords the Republic of Cyprus even more opportunities to veto Turkey’s accession process, as unanimous decisions are required for the opening and closing of all thirty-five chapters of the talks and for wrapping up the negotiations overall. By having a review clause included in the counter-declaration, committing the EU to evaluate Turkey’s “full implementation” of its obligations in 2006, the Republic of Cyprus managed to exert further pressure on Turkey both with regard to the question of recognition and the opening of ports issue. Finally, at the instigation of the Republic of Cyprus, the counter-declaration speaks of a comprehensive settlement of the Cyprus problem “in line with relevant UNSCRs [UN Security Council Resolutions] and the principles on which the EU is founded”. This is in marked contrast to Turkey’s vision of “a new bi-zonal partnership State” as envisaged in the Annan Plan.<sup>105</sup> In particular, the requirement that any settlement has to be “in line with the principles on which the EU is founded” favours the future negotiating position of the Greek Cypriots in the inter-communal negotiations on a comprehensive settlement of the Cyprus problem.<sup>106</sup> Several of the Turkish Cypriots’ positions in the inter-communal negotiations, which found their way into the Annan Plan, are difficult to reconcile with the *acquis*

103 See the statement by the British Minister for Europe, Douglas Alexander, in the House of Commons: “Despite press reports to the contrary over the last week, the EU presidency has not set a deadline for Turkey to recognize the Republic of Cyprus”. (UK, House of Commons, Debates, vol. 443, col. 1025W: 3.3.2006).

104 The Republic of Cyprus takes the view that Turkey must extend recognition before the end of the accession process, “namely before all negotiations on the 35 *acquis* chapters are completed and the ratification process begins”. (Defence & Foreign Affairs Strategic Policy, October 2005, p. 14).

105 See the Turkish Declaration, above n. 88, para. 1.

106 See Stefan Talmon, *Kollektive Nichtanerkennung illegaler Staaten* (2006), 415–417.



*communautaire*. For example, the Turkish Cypriots demanded restrictions on the right of Greek and Greek Cypriot nationals to move freely, establish themselves and acquire property in the Turkish Cypriot part of the “United Cyprus Republic”.<sup>107</sup> In future negotiations, the Greek Cypriots will be able to reject such Turkish Cypriot proposals simply on the ground that they are incompatible with the *acquis*. This is already foreshadowed in a letter to the UN Secretary General, dated 7 June 2004, in which the leader of the Greek Cypriot community, Tassos Papadopoulos, justified the rejection of the Annan Plan on the basis of serious doubts as to its compatibility with the *acquis*.<sup>108</sup> In a statement in November 2005, Papadopoulos declared that any future “settlement plan for Cyprus must be in line with the principles and rules of the EU”.<sup>109</sup>

According to the EC and its Member States, the Turkish declaration “is unilateral, does not form part of the Protocol and has no legal effect on Turkey’s obligations under the Protocol”. Turkey, on the other hand, takes the view that the European counter-declaration is “of unilateral and political nature”.<sup>110</sup> This raises the question as to the legal character of the two declarations. The unilateral statements of the two sides could qualify as a reservation and an objection to it, as simple or conditional interpretative declarations, or as mere general statements of policy. The name for the statement chosen by its author is irrelevant for its qualification. In order to establish the legal character of a statement, one must look behind the title given to it and seek to establish its substantive content. The statement is to be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms, in the light of the treaty to which it refers. The decisive criterion for drawing a distinction between the various statements is the legal effect their authors intend to produce.<sup>111</sup> Both reservations and conditional interpretative declarations seek to produce a legal effect on the treaty or certain of its provisions. By making a reservation, a State purports to exclude or modify the legal effect upon it of certain provisions of the treaty or certain specific aspects of the treaty as a whole.<sup>112</sup> By making a conditional interpretative declaration, a State seeks to make a specific interpretation of a treaty provision a condition for its consent to be bound by the treaty, and thus seeks to impose its interpretation on the

107 See Jean-François Drevet, *Chypre en Europe* (2000), 267–268; Jürgen Reuter, *Der UNO-Zypernplan — Eine Politische und Rechtliche Analyse*, KAS-AI 2/2003, 4–41 at 19.

108 UN Document A/58/835-S/2004/464, 8.6.2004, Annex, p. 6: “In addition, we maintain serious doubts on whether the final Plan is compatible with the *acquis communautaire*. As it is well known the European Commission did *not*, in any case, examine one by one the provisions of the final Plan. The Commission simply examined Annan I, not subsequent versions. Thus, it would be interesting to know what the legal and jurisdictional organs of the EU have to say on the final Annan plan”. See also the Memorandum of the Government of the Republic of Cyprus of 22.2.2005, Point G: “future negotiation [...] should aim at making the necessary changes in the Annan plan, to make it functional and workable and in line with the EU *acquis communautaire*.” (UK, House of Commons, Foreign Affairs Committee, Written Evidence (2005), Annex I).

109 *Zypern Nachrichten*, Vol. 11, No. 11 (2005), 1.

110 Statement of Mr. Namik Tan, the Spokesman of the Ministry of Foreign Affairs, on the EU Counter Declaration, 22 September 2005 ([www.mfa.gov.tr/MFA/](http://www.mfa.gov.tr/MFA/)).

111 See the Draft Guidelines on Treaty Reservations, ILC Yb. (1999), II/2, 107–109.

112 See Article 2(1)(d) VCLT and Draft Guidelines on Treaty Reservations, ILC Yb. (1998), II/2, 99.

other contracting parties. In both cases, the object of the statement is to limit or eliminate an obligation which otherwise would be incumbent on the declarant under the treaty.

In paragraph 3 of its declaration, Turkey states that it “will continue to regard the Greek Cypriot authorities as exercising authority, control and jurisdiction only in the territory south of the buffer zone [...] and will treat the acts performed by them accordingly”. This is reminiscent of a reservation having territorial scope (reservation *ratione loci*), purporting to limit the effect of the Additional Protocol, i.e. the application of the Ankara Agreement, to the territory south of the buffer zone. According to Article 1(3) of the Additional Protocol, however, the Ankara Agreement applies only to the southern part of the island. The Turkish declaration thus does not exclude the application of the Ankara Agreement to a territory (i.e. the territory north of the buffer zone) to which it would be applicable in the absence of such a declaration. Consequently, the declaration by Turkey does not produce any legal effect on the territorial scope of the treaty. In fact, the text of the declaration does not purport to limit or eliminate any obligation under the Ankara Agreement. In response to the EU counter-declaration, Turkey expressly confirmed that “it would fulfil all commitments emanating from the Ankara Agreement and the Additional Protocol to all EU Member States in a non-discriminatory fashion”.<sup>113</sup>

To the extent that paragraph 3 clarifies Turkey’s position on the meaning of the term “Republic of Cyprus”, the declaration may be qualified as a simple interpretative declaration.<sup>114</sup> Turkey’s interpretation of this term is not binding on the other parties to the treaty and co-exists with the interpretation offered by the EC and its Member States in paragraph 4 of their counter-declaration. In the case of a dispute between the contracting parties as to the meaning of “Republic of Cyprus”, it will be for the tribunal called upon to settle the dispute to establish the meaning of the term in accordance with Article 31, 32 VCLT. The Turkish declaration and the EU counter-declaration qualify as part of the context of the terms of the treaty and may be taken into account in accordance with Article 31(2)(b) VCLT as instruments related to the treaty. The requirement that the instrument was “*accepted* by the other parties” does not mean that the parties have to agree on the substance of the instrument, but that they accept its connection with the treaty.<sup>115</sup>

The rest of the Turkish declaration simply reaffirms Turkey’s long-standing position on the Cyprus problem.<sup>116</sup> Turkish Prime Minister Erdogan described the declaration as “an

113 Statement of Mr. Namik Tan, the Spokesman of the Ministry of Foreign Affairs, on the EU Counter Declaration, 22 September 2005 ([www.mfa.gov.tr/MFA/](http://www.mfa.gov.tr/MFA/)).

114 Cf. Guideline 1.2 on “Definition of interpretative declarations” of the Draft Guidelines on Treaty Reservations, ILC Yb. (1999), II/2, 97–103.

115 Cf. Rolf Kühner, *Vorbehalte zu Multilateralen Völkerrechtlichen Verträgen* (1986), 36–37; Helmut Steinberger, *Völkerrechtliche Aspekte des Deutsch-Sowjetischen Vertragswerks vom 12 August 1970*, 31 *ZaöRV* (1971), 63–161 at 113, n. 110. The declaration and the counter-declaration do not form part of the “preparatory work” in the sense of Article 32 VCLT, as they were not part of the drafting and negotiating process resulting in the text of the Additional Protocol.

116 See the EU Presidency Statement on Turkey’s signature of the Ankara Agreement Protocol, 29 July 2005 ([www.eu2005.gov.uk/](http://www.eu2005.gov.uk/)) and the statement of Douglas Alexander, President-in-Office of the Council in debate of the European Parliament on 28 September 2005, P6\_CRE (2005), 09–28, 5 ([www.europarl.europa.eu/](http://www.europarl.europa.eu/)).

announcement of what is already known”.<sup>117</sup> While the declaration relates to the Additional Protocol and the Ankara Agreement, it does not purport to produce any legal effect on these agreements. In particular, the statements of non-recognition and non-prejudice in paragraph 4 are simply a “precautionary step”,<sup>118</sup> a means to safeguard Turkish rights and interests with regard to matters outside the treaty. In this respect, the Turkish declaration is comparable to the declaration made by the Federal Republic of Germany upon signature of the Treaty of 12 August 1970 between the Federal Republic of Germany and the Union of Soviet Socialist Republics (Moscow Treaty).<sup>119</sup> Turkey’s declaration may be characterized as a general statement of policy that does not have any legal effect on its obligations under the treaties concerned.<sup>120</sup>

The situation would have been different if Turkey had included in its declaration a reference to the contentious issue of whether the Ankara Agreement requires the opening of Turkish ports and airports to ships and aircraft registered in the Republic of Cyprus. According to Turkey “ports and airports are in the services sector”, and are thus not covered by the Ankara Agreement.<sup>121</sup> Such a statement would have amounted to an interpretative declaration, in the same way as the statement of the EC and its Member States in paragraph 3 of their counter-declaration that the full, non-discriminatory implementation of the Additional Protocol requires “the removal of all obstacles to the free movement of goods, including restrictions on means of transport”.

In the same way that the Turkish declaration is not binding on the Community and its Member States, the EU’s interpretative counter-declaration is not binding on Turkey. Apart from paragraph 2 of the EU counter-declaration which, it is submitted, is a correct assessment of the legal effect of the Turkish declaration, all other paragraphs of the counter-declaration are essentially general statements of policy that do not have any effect on the substance of the Additional Protocol or the Ankara Agreement. It may thus be concluded that the Turkish declaration is mainly a political declaration that required a political answer in the form of the EU counter-declaration. While not binding on Turkey, the EU counter-declaration is binding on the EC and its Member States and may be relied upon by the Republic of Cyprus against the European institutions and the other Member States.

117 “Protocol Negotiations at Full Speed After London Talks”, *Turkish Daily News*, 29 July 2005.

118 Guideline 1.4.3 [1.1.7] on “Statements of non-recognition” of the Draft Guidelines on Treaty Reservations, *ILC Yb.* (1999), II/2, 115, para. 2.

119 On the occasion of the signature of the Treaty, the German government delivered a “Letter on German Unity” to the Soviet Foreign Ministry, which stated: “In connection with today’s signature of the Treaty between the Federal Republic of Germany and the Union of Soviet Socialist Republics the Government of the Federal Republic of Germany has the honour to state that this Treaty does not conflict with the political objective of the Federal Republic of Germany to work for a state of peace in Europe in which the German nation will recover its unity in free self-determination”. (9 *ILM* (1970), 1027).

120 See the statement of EU Enlargement Commissioner Olli Rhen: “Our preliminary assessment is that the declaration does not call into question Turkey’s commitment to implement the protocol”. (“Declaration Gets Initial EU Thumbs-Up”, *Turkish Daily News*, 2 August 2005).

121 EU/Turkey: Foreign Ministers Make Headway on ‘Counter-Declaration’, *European Report No.* 2985, 3.9.2005.

*II.B.ii.e. Ratification of the Protocol.* The start of accession negotiations with Turkey on 3 October 2005 was dependent only upon signing, not ratifying, the Additional Protocol. No timeframe for ratification was set out in the Presidency Conclusions of the December 2004 European Council meeting. By the end of May 2006, neither Turkey nor the EC and its Member States had even started the ratification process. In a press statement dated 29 July 2005 regarding the signature of the Additional Protocol, the Turkish Ministry of Foreign Affairs declared that “the Protocol signed through this exchange of letters, together with the related documents, will be submitted to the Turkish Grand National Assembly for ratification”.<sup>122</sup> However, in February 2006, the speaker of the Turkish Parliament stated that the Additional Protocol would not be brought before the Turkish Grand National Assembly for ratification until the international isolation of the Turkish Cypriot people had been eased.<sup>123</sup> The statement that the Turkish declaration would form part of the ratification process in the Turkish Parliament, *inter alia*, led the European Parliament to postpone the vote on 28 September 2005 on its approval of the Additional Protocol.<sup>124</sup> In a resolution on the opening of negotiations with Turkey, the European Parliament reminded the Commission “to provide Parliament with an answer from the Turkish Government as to whether the unilateral declaration is part of the ratification process in the Turkish Parliament” and stressed that “this unilateral declaration by Turkey does not form part of the Protocol and has no legal effect on Turkey’s obligations under the Protocol, and should not be sent to the Grand National Assembly for ratification”.<sup>125</sup> The European Parliament’s decision to postpone the vote was motivated by fear that the Turkish declaration, by being part of the ratification process, would gain legal force.<sup>126</sup> Such fear is, however, unfounded. The Turkish declaration constitutes a political declaration, and, in part, a simple interpretative declaration, which does not have any legal effect on the Treaty.<sup>127</sup> Such a declaration may be made at any time. Thus, nothing prevents Turkey from repeating or confirming its unilateral declaration when expressing its final consent to be bound by the Additional Protocol.<sup>128</sup> The fact that the declaration was made a part of the domestic ratification process cannot alter its character or its effect on the Treaty under international law.<sup>129</sup>

122 Turkish Ministry of Foreign Affairs, Press Statement No. 123. Regarding the Additional Protocol to Extend the Ankara Agreement to All EU Members, 29 July 2005 ([www.mfa.gov.tr/mfa](http://www.mfa.gov.tr/mfa)).

123 Cyprus Press and Information Office: Turkish Press and Other Media, No. 24/06, 3.2.2006 [6].

124 See Article 300(3), 310 TEC.

125 European Parliament resolution on the opening of negotiations with Turkey, 28 September 2005, P6\_TA(2005)0350, paras. 2, 3.

126 See the European Parliament resolution on the Commission’s 2005 enlargement strategy paper, 16 March 2006, P6\_TA(2006)0096, para. 28 (“calls on the Turkish government to state clearly that the above-mentioned unilateral Declaration is not part of the ratification process in the Turkish Grand National Assembly, thereby enabling the European Parliament to ratify the above-mentioned Additional Protocol”).

127 See section II.B.ii.d in this article.

128 See Report of the International Law Commission, Fifty-third session, UN Document A/56/10 (2001), 502, para. 4.

129 In particular, no conclusion may be drawn regarding its legal character as a reservation. National constitutional practice regarding reservations and interpretative declarations varies from country to country; see Paul Reuter, *Introduction to the Law of Treaties* (1995), 93, n. 133.

The example of the Moscow Treaty of 12 August 1970 is instructive in this respect.<sup>130</sup> On the occasion of the signature of the Treaty, the German government had delivered a “Letter on German Unity” to the Soviet Foreign Ministry in which the German government stated that, in its view, the Treaty did not conflict with its “political objective” of German reunification.<sup>131</sup> This statement was to be seen against the background of Article 3 of the Treaty, which provided that the parties “undertake to respect without restriction the territorial integrity of all States in Europe within their present frontiers” and that they “regard today and shall in future regard the frontiers of all States in Europe as inviolable such as they are on the date of signature of the present Treaty, including the Oder-Neisse line which forms the western frontier of the People’s Republic of Poland and the frontier between the Federal Republic of Germany and the German Democratic Republic”. The Act of the German Parliament that gave effect to the Treaty covered not only the Moscow Treaty itself, but also the “Letter on German Unity” and notes exchanged between the federal government and the governments of the three western powers before signature of the Treaty. All these documents were published along with the Act and the text of the Moscow Treaty in the Federal Law Gazette.<sup>132</sup> The German instrument of ratification handed to the Soviet government on 3 June 1972 explicitly referred to this Act by the German Parliament. The Supreme Soviet’s assent to the Moscow Treaty, on the other hand, was confined to the reproduction of the Treaty text, without mentioning the Letter on German Unity or the notes exchanged between the Federal Republic of Germany and the three western powers. Neither the declarations of the German government nor their incorporation into the Act of Parliament had any legal effect on the Treaty.<sup>133</sup> While these declarations also safeguarded German rights and interests at the international level with regard to matters outside the scope of the Treaty, they were mainly made for domestic, political and legal reasons. One reason for including the Letter on German Unity and the other documents in the national law-making process was to secure a majority in Parliament for the Treaty.<sup>134</sup> Another objective of the declaration was to protect the German government against legal proceedings for violating the German constitution,<sup>135</sup> and, in particular, the precept spelled out in the preamble of the Basic Law that “the entire German people are called upon to achieve in free self-determination the unity and freedom of Germany”. Similarly to the German declaration, the Turkish

130 For the text of the Treaty and the Notes sent to the embassies of France, United Kingdom and United States in Moscow, concerning the rights of the four powers with regard to Germany as a whole, see 9 ILM (1970), 1026–1027.

131 For the text of the letter see above n. 119.

132 Bundesgesetzblatt [German Federal Law Gazette] (1972), Part II, 353.

133 See Alfred Verdross/Bruno Simma, *Universelles Völkerrecht*, 3rd edn., (1984), mn 737; Georg Dahm/Jost Delbrück/Rüdiger Wolfrum, I/3, *Völkerrecht*, 2nd edn., (2002), 578.

134 See Claus Arndt, *Die Verträge von Moskau und Warschau. Politische, verfassungsrechtliche und völkerrechtliche Aspekte* (1973), 27.

135 See the decision of the German Constitutional Court on the Eastern Treaties (“Ostverträge”) of 7 July 1975, 1 BvR 274/72 et al., 40 BVerfGE [Reports of the German Federal Constitutional Court] 141. See also Daniel Colard, *Considérations sur Les «Traités de Normalisation» signés par la R.F.A. avec l’U.R.S.S. et la Pologne*, 16 AFDI (1970), 333–355 at 342–343; Philippe Bretton, *Le Traité Germano-Soviétique du 12 Août 1970*, 75 RGDIP (1971), 125–43 at 140; Albert Bleckmann, *Grundgesetz und Völkerrecht* (1975), 115–116.

declaration regarding the Additional Protocol seems to be motivated mainly by domestic political considerations.

## II.C. Implementation of the extended Ankara Agreement

The Additional Protocol will enter into force on the first day of the first month following the date of the deposit of the last instrument of ratification or approval.<sup>136</sup> Considering that the Protocol requires the consent of the national Parliaments of most Member States and of the Turkish Grand National Assembly, as well as the approval of the European Parliament, it may take years before the Protocol actually enters into force, even without the uncertainties created by the Turkish declaration. It is for this reason that Article 14 provided that the Protocol “shall apply as of 1 May 2004”. This means that the Protocol and, consequently, the Ankara Agreement, has been applied provisionally by the parties pending its entry into force.<sup>137</sup> Since 1 May 2004, Turkey has been under a treaty obligation to implement the Ankara Agreement with regard to all Member States, including the Republic of Cyprus.

### *II.C.i. Turkish restrictions on ships and aircraft registered in the Republic of Cyprus*

The question of implementation of the extended Ankara Agreement mainly revolves around the lifting of existing Turkish restrictions against vessels registered in the Republic of Cyprus and vessels approaching from harbours in southern Cyprus, in the form of denial of access to Turkish ports, and against air carriers of the Republic of Cyprus, by denying them the right of overflight and landing rights at Turkish airports.<sup>138</sup>

Both Turkey and the Republic of Cyprus are parties to the Chicago Convention<sup>139</sup> and the Chicago Agreement.<sup>140</sup> In these treaties, the contracting States grant the civil aircraft of other contracting States, whether engaged in scheduled or non-scheduled international air services, the right or privilege to fly across their territory without landing and to land for non-traffic purposes such as refuelling.<sup>141</sup> The right to operate international commercial air services as a rule requires an international air services agreement between the States concerned. In the absence of such an agreement between Turkey and the Republic of

136 Article 14 of the Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey following the enlargement of the European Union, done at Brussels on 29 July 2005, OJ No. L 254, 30.9.2005, 58.

137 See Article 25(1) VCLT. On provisional application of treaties, see also Anthony Aust, *Modern Treaty Law and Practice* (2000), 139–141.

138 See European Parliament resolution on the opening of negotiations with Turkey, 28 September 2005, P6\_TA(2005)0350, preambular para. 1 and para. 4. Airlines of other states en route to and from southern Cyprus have always enjoyed the right of overflight over Turkish territory; see the statement of the Turkish Transport Minister Binali Yildirim: Cyprus Press and Information Office: Turkish Press and Other Media, No. 60/06, 28.3.2006 [3].

139 Convention on International Civil Aviation, signed at Chicago on 7 December 1944 [hereinafter Chicago Convention](15 UNTS 295). Turkey has been a party since 4 April 1947 and the Republic of Cyprus adhered on 16 February 1961.

140 International Air Services Transit Agreement, signed at Chicago on 7 December 1944 [hereinafter Chicago Agreement] (84 UNTS 389). Turkey is a party since 6 June 1945 and Cyprus acceded on 12 October 1961.

141 See Article 5(1) Chicago Convention, Article 1, Sec. 1 Chicago Agreement.

Cyprus,<sup>142</sup> airlines registered in the Republic of Cyprus have no right to make scheduled landings at Turkish airports in order to take on or discharge passengers, cargo or mail.<sup>143</sup> If Turkey denied planes registered in the Republic of Cyprus the right of overflight or to land at Turkish airports for non-traffic purposes, it would violate its international treaty obligations. But this does not seem to be the case. On 27 March 2006, Turkish Transport Minister Binali Yildirim declared: “All the passenger planes whether they belong to the Greek Cypriot side or not, use our air space for transit flights. However, they cannot land on the Turkish airports. Landing permission is given only for emergency cases”.<sup>144</sup>

There is no right of access to foreign ports under customary international law except in circumstances of *force majeure* or distress in order to safeguard human life.<sup>145</sup> The ICJ noted in its judgment in the *Nicaragua* case that it is “by virtue of its sovereignty that the coastal State may regulate access to its ports”.<sup>146</sup> Rights of reciprocal free access to ports may be based only on bilateral or multilateral treaties. No such bilateral treaty exists between Turkey and the Republic of Cyprus. The Convention and Statute on the International Regime of Maritime Ports provides for the equality of treatment of all Contracting States as regards freedom of access to their ports.<sup>147</sup> But, while the Republic of Cyprus is a party to this treaty, Turkey is not.<sup>148</sup> Both States are, however, parties to the General Agreement on Tariffs and Trade (GATT 1994) which in Article V(2) provides for “freedom of transit through the territory of each contracting party [...] for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin [or] departure [...] of vessels”.<sup>149</sup> The EC relied, *inter alia*, on Article V GATT 1994 in the swordfish dispute against Chile before the World Trade Organization (WTO), challenging Chile’s denial of port access to

142 See International Civil Aviation Organization, Aeronautical Agreements and Arrangements registered with the Organization, 1 January 1946–31 December 1990: ICAO Document 9460 LGB/382, 55–56 and Supplement. There is, however, a Cooperation Agreement on Civilian Aviation between Turkey and the Turkish Republic of Northern Cyprus of 19 September 2002, which would have become binding on the United Cyprus Republic if the Annan Plan had been approved. See Treaty No. 1002 in the List of International Treaties and Instruments Binding on the United Cyprus Republic, Annex V to the Foundation Agreement of the Annan Plan.

143 As to the right of aircraft, engaged in non-scheduled air services, to take on or discharge passengers, mail and cargo, see Article 5(2), Chicago Convention.

144 Cyprus Press and Information Office: Turkish Press and Other Media, No. 60/06, 28.3.2006 [3].

145 See Robin Churchill/Alan Vaughan Lowe, *The Law of the Sea*, 3rd edn. (1999), 61–63.

146 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports (1986), 14 at 111, para. 213.

147 See Article 2 of the Statute on the International Regime of Maritime Ports, done at Geneva on 9 December 1923 (58 LNTS 285).

148 The Republic of Cyprus has been a party since 16 August 1960.

149 General Agreement on Tariffs and Trade, done at Marrakesh on 15 April 1994—GATT 1994 (1867 UNTS 190). GATT 1994 is in force for Turkey since 26 March 1995 and for the Republic of Cyprus since 30 July 1995. GATT 1994 incorporates and modifies the General Agreement on Tariffs and Trade, signed at Geneva on 30 October 1947 – GATT 1947 (55 UNTS 194). Turkey has been a party since 17 October 1951 and the Republic of Cyprus since 16 August 1960.

EC fishing vessels.<sup>150</sup> It should, however, be noted that nothing in the GATT provisions derogates from the general principle of State sovereignty over ports. It may be questioned whether the GATT was really intended to regulate the question of port access. It seems to stretch the interpretation of Article V(2) GATT 1994 too far by establishing a right of port access through the back door.<sup>151</sup> After all, Article V deals with “traffic in transit”, which is defined as “transit [or passage] *across* the territory of a contracting party”.<sup>152</sup> State practice also points to a more limited interpretation. The members of the Arab League have denied port access to Israeli ships and ships trading with Israel, despite the fact that Israel and several Arab countries are parties to the GATT 1947 and 1994.<sup>153</sup> Since December 1992, the United States has denied port access to Cuban ships and barred all ships which call at Cuban ports from its ports for the following 180 days, irrespective of the owner or flag of the vessel.<sup>154</sup> Both the United States and Cuba are parties to the GATT 1994.<sup>155</sup> None of these practices have so far been challenged before the WTO.<sup>156</sup> Even if Article V(2) provided for a right of access to Turkish ports, this right would be restricted to “traffic in transit to or from the territory of other contracting parties”. While ships sailing under the flag of the Republic of Cyprus might call at Turkish ports, they would not be allowed to load goods or unload goods destined for Turkey under this provision. Turkey might also choose to justify the denial of port access on the basis of the security exceptions in Article XXI GATT 1994, which allows a contracting party to take any action “in time of war or other emergency in international relations” that it considers necessary for the protection of its essential security interests. As Turkey has occupied 36.4 per cent

150 The EC challenged Chilean legislation which prohibited Community fishing vessels from unloading their swordfish in Chilean ports, either to land them for warehousing or to tranship them on to other vessels. The EC said that this legislation made transit through the ports of Chile impossible for swordfish and also rendered impossible the importation of the affected catches into Chile. The EC argued that this legislation was not in conformity with Chilean obligations under Articles V(1)–(3) and XI(1) of GATT 1994. See Chile—Measures Affecting the Transport and Importation of Swordfish, WTO Docs. WT/DS193/1, 26.4.2000; WT/DS193/2, 7.11.2000; WT/DSB/M/92, 15.1.2001, p. 18–22; WT/DSB/M/94, 15.2.2001, p 12–13. In March 2001, the parties to the dispute agreed to suspend the proceedings which have remained suspended ever since.

151 Cf. Terje Lobach, *Port State Control of Foreign Fishing Vessels*, FAO Fisheries Circular No. 987, FIP/C987 (En) (2003), 11; Marcos Orellana Cruz, *The Swordfish in Peril: the EU Challenges Chilean Port Access Restrictions at the WTO*, Bridges, (July–August 2000), 11; Andrew Serdy, *See You in Port: Australia and New Zealand as Third Parties in the Dispute between Chile and the European Community over Chile’s Denial of Port Access to Spanish Vessels Fishing for Swordfish on the High Seas*, 3 Melbourne JIL (2002), 79–119 at 94–98.

152 Article V(1) GATT 1994 (emphasis added).

153 See “Arab League Ship Boycott ‘Weakening’”, *Lloyd’s List*, 20 June 1995, 12; “Syrian Ban on Ships Calling at Israel Catches Owners on Hop: Nine Israeli Firms and Greek, Danish and Maltese-flag Vessels Blacklisted”, *Lloyd’s List*, 6 May 2004, p. 16.

154 See Cuban Democracy Act, 22 USC 6005 (b). See also Special Report on Cuba: Investing with The Future in Mind, *Lloyd’s List*, 22 November 1998, 9.

155 The United States has been a party since 1 January 1995 and Cuba since 20 April 1995. Both States were also parties to GATT 1947.

156 While the United States considers its embargo against Cuba compatible with GATT 1994, the EC considers it in violation, inter alia, of Article V GATT 1994; see Petros Mavroidis, *The General Agreement on Tariffs and Trade. A Commentary* (2005), 224.



of the Republic of Cyprus since August 1974 and the relationship between the two States is governed only by a cease-fire agreement, this could be described as an “emergency in international relations”. It may be argued that at the heart of the Turkish measures lies genuine political confrontation; the measures do not really have a commercial purpose.<sup>157</sup> Turkey is thus not under an international legal obligation to open its ports to ships registered in the Republic of Cyprus or to ships which have docked there.

Turkey has imposed sea transportation restrictions on vessels registered in the Republic of Cyprus since 1987. On 28 April 1987, the Turkish government published the following notice:

The Greek Cypriot Administration continues to implement discriminatory economic measures against the Turkish Cypriot Community in several fields. In this framework, the ports in Northern Cyprus remain declared ‘illegal’ and closed to shipping of all countries. Ships and captains which call at these ports are subjected to prosecution in Southern Cyprus. This Greek Cypriot policy is directed against not only the Turkish Republic of Northern Cyprus but also against Turkey and harms Turkish economic interests. Taking this situation into consideration, it is decided to prohibit the entry and use of Turkish ports by ships carrying the Greek Cypriot flag. This decision, taken in exercise of Turkish sovereign rights over its internal waters and ports, will become effective as of 14 May 1987.<sup>158</sup>

Subsequently, the Turkish government extended these restrictions to all ships calling at ports in southern Cyprus, irrespective of the owner or flag of the vessel.<sup>159</sup> In the latest incident on 22 February 2006, the Cypriot-flagged container ship *Able F* was refused permission to enter the Turkish port of Mersin.<sup>160</sup> As one of the major flag States, these restrictions have been of the utmost concern to the Republic of Cyprus.<sup>161</sup> The Turkish restrictions have had a damaging effect on the maritime economy of Cyprus, with container traffic to its ports dropping substantially, and many ships being registered under other flags. The Government of the Republic of Cyprus has tried to use Turkey’s aspirations to EU membership, and, in particular, the Ankara Agreement, as leverage to get these restrictions lifted.

### *II.C.ii. Scope of the Ankara Agreement*

There are differences in interpretation of what is required under the extended Ankara Agreement. While European institutions take the view that full and non-discriminatory implementation of the Ankara Agreement requires Turkey to open its sea ports to vessels flying the flag of the Republic of Cyprus or approaching from harbours in the southern

157 On the national security exception, see, e.g. Andreas Lowenfeld, *International Economic Law* (2003), 34–35, 756–757.

158 Rainer Lagoni, *Der Hamburger Hafen, die Internationale Handelsschifffahrt und Das Völkerrecht*, 26 AVR (1988), 261–365 at 270, n. 29.

159 Information supplied by Verband Deutscher Reeder [German Shipowners’ Association].

160 Cyprus Press and Information Office: Turkish Press and Other Media, No. 38/06, 23.2.2006 [2] and No. 39/06, 24.2.2006 [6].

161 In 2005, the Republic of Cyprus was the world’s sixth-largest ship registry measured by gross tonnage of registered ships.

part of the island and to open its airports to Cypriot air carriers,<sup>162</sup> Turkey argues that “ports and airports are in the services sector”, which is not covered by the customs union within the framework of the Ankara Agreement and the Additional Protocol of 1970.<sup>163</sup> This has led Turkish Foreign Minister Abdullah Gül to state on 30 August 2005 that “the customs union has already been in full force with all EU Member States since Oct. 2, 2004 through a decree of the Council of Ministers. Let me inform you that since then, Greek Cypriot companies have started to export their goods to Turkey; they have already exported goods worth thousands of euros and vice versa. So, the customs union is functioning normally with each and every EU Member State”.<sup>164</sup>

It is argued that neither side is entirely correct in its assessment: neither does the customs union require Turkey to abolish all existing restrictions, nor is the issue of access to ports and airports completely outside the reach of the Ankara Agreement and the Additional Protocol of 1970. It is true that the customs union is confined to the free circulation of industrial goods and processed agricultural products originating in the Community or in Turkey between the members of the customs union, and does not cover maritime or air transport services.<sup>165</sup> The Turkish restrictions may, however, impair the free movement of goods and products. The EC-Turkey Association Council Decision No. 1/95 establishing the customs union provides that “quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the parties”.<sup>166</sup> This provision is to be interpreted for the purposes of its implementation and application to products covered by the customs union, in conformity with the relevant decisions of the European Court of Justice (ECJ).<sup>167</sup> The ECJ defined the term “measures having equivalent effect” as all measures “capable of hindering directly or indirectly, actually or potentially,

162 See, e.g. 44th meeting of the EC-Turkey Association Council, 26 April 2005, Document CE-TR 104/05, 10.5.2005, 15 and European Parliament resolution on the opening of negotiations with Turkey, 28 September 2005, P6\_TA(2005)0350, para. 4. See also the statement of EU Enlargement Commissioner Olli Rehn on 1 September 2005: “full implementation [of the Protocol of the Ankara Agreement] means certainly opening the ports of Turkey to Cypriot vessels”. ([www.americanhellenic.org/News-article-273.html](http://www.americanhellenic.org/News-article-273.html)).

163 “EU/Turkey: Foreign Ministers Make Headway on ‘Counter-Declaration’”, European Report No. 2985, 3.9.2005. Cf. also Cyprus Press and Information Office: Turkish Press and Other Media, No. 144/05, 1.8.2005 [3] and No. 147/05, 4.8.2005 [6].

164 “Privileged Partnership an Immoral Offer”, Turkish Daily News, 31 August 2005.

165 Steve Peers, above n. 6, 414. Cf. also Decision No. 2/2000 of the EC-Turkey Association Council of 11 April 2000 on the opening of negotiations aimed at the liberalization of services and the mutual opening of procurement markets between the Community and Turkey. The sole article of the Decision provides that “Negotiations aimed at the liberalisation of services and the mutual opening of procurement markets between the Community and Turkey shall begin in April 2000”. (OJ No. L 138, 9.6.2000, 27). These negotiations were never completed. See further, Proposal for a Council Decision on a Community position in the EC-Turkey Association Council on the implementation of Article 9 of Decision No 1/95 of the EC-Turkey Association Council on implementing the final phase of the Customs Union, COM(2005) 492 final, 14.10.2005, 2.

166 Article 5 of Decision No. 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the customs union, OJ No. L 35, 13.2.1996, 1. A similar provision may already be found in Article 21 of the Additional Protocol to the Ankara Agreement, signed at Brussels on 23 November 1970, OJ No. C 113, 24.12.1973, 18. See also Article 28 TEC. Similar provisions exist for exports, see Article 6 of Decision No. 1/95 and Article 27 of the Additional Protocol. See also Article 29 TEC.

167 See Article 66 of Decision No. 1/95.

intra-Community trade”.<sup>168</sup> It thus covers all measures restricting the import of goods from other members of the customs union, including restrictions that may lead to an increase in transportation time and cost.<sup>169</sup> The closure of ports and airports to ships and aircraft registered in the Republic of Cyprus and to ships calling at harbours in southern Cyprus can impede the free movement of goods between members of the customs union. These restrictions cannot be justified on the grounds of Turkish public policy as they constitute “a means of arbitrary discrimination” against the Republic of Cyprus.<sup>170</sup> To the extent, and only to the extent, that the Turkish transport restrictions on the Republic of Cyprus affect the free movement of goods within the customs union, they are in breach of the Ankara Agreement and the related customs union. Turkey must thus open its ports and airports to ships and aircraft serving the trade in goods between the EC Member States and Turkey as well as between the EC Member States.<sup>171</sup> But it may continue to deny access to its ports and airports to all Cypriot ships and aircraft involved in trade between the Republic of Cyprus and third States or between non-member States of the customs union, as well as to Cypriot ships and aircraft transporting goods not produced or in free circulation in the EC or in Turkey. Furthermore, Turkey may continue to close its ports to ships calling at harbours in southern Cyprus which are not involved in the intra-customs union trade. The “full, non-discriminatory implementation” of the Ankara Agreement, as demanded in the EC counter-declaration, may thus not bring about the result desired by the Republic of Cyprus.

*II.C.iii. Failure to implement the Agreement and its effects on the accession negotiations*

Failure by Turkey to implement the Ankara Agreement may have serious implications for its accession negotiations. The EC and its Member States stated in their counter-declaration that they will evaluate the full implementation of the extended Ankara Agreement in 2006. They also stressed that the opening of negotiations on the relevant chapters depended on Turkey’s implementation of its contractual obligations to all Member States and that failure to do so in full would affect the overall progress of the negotiations.<sup>172</sup> A reference to the implementation of the Ankara Agreement was also included in the Negotiating Framework for Turkey, agreed by the Council on 3 October 2005, which lays down the guiding principles and procedures for the accession negotiations and which serves as a basis for the Member States to conduct these negotiations with Turkey. The part on Negotiating Procedure provides that:

168 See Case 8/74, *Procureur du Roi v. Benoit and Gustave Dassonville*, [1974] ECR 837, para. 5; Cases C-1/90 and C-176/90, *APESA v. DSSC*, [1991] ECR I-4151, paras. 24–25; Cases C-267/91 and C-268/91, *Keck and Mithouard*, [1993] ECR I-6097, para. 17; Case C-470/93, *Verein Gegen Unwesen in Handel und Gewerbe Köln EV v. Mars GmbH*, [1995] ECR I-1923, para. 25.

169 See Ulrich Becker, Article 28, in Jürgen Schwarze (ed.), *EU-Kommentar* (2000), MN. 52.

170 See Article 7 of Decision No. 1/95. See also Article 9 of the Ankara Agreement (“within the scope of this Agreement [...] any discrimination on the grounds of nationality shall be prohibited”) and Article 29 of the Additional Protocol of 1970.

171 The customs union provisions also apply to goods in transit; see Article 7 of Decision No. 1/95 and Article 1 of Annex 7 to this Decision.

172 See the EU counter-declaration, above n. 101, para. 4.

the Council, acting by unanimity on a proposal by the Commission, will lay down benchmarks for the provisional closure and, where appropriate, for the opening of each chapter. The Union will communicate such benchmarks to Turkey. [...] Where relevant, benchmarks will also include the fulfilment of commitments under the Association Agreement, in particular those pertaining to the EU-Turkey customs union and those that mirror requirements under the *acquis*.<sup>173</sup>

The EU could choose to make the opening of ports a benchmark, e.g. for the opening and/or closure of the chapters on free movement of goods (ch. 1) and customs union (ch. 29) and, possibly, the right of establishment and freedom to provide services (ch. 3) and transport policy (ch. 14). A precondition for such a benchmark would be a unanimous decision of the Council. It is thus not up to the Republic of Cyprus to establish such a benchmark. The Government of the Republic of Cyprus may, however, link the question of benchmarks with other questions on which it has a right of veto.

So far, the ports issue has had no effect on the accessions process. On 20 October 2005, the European Commission started the process of screening Turkey's laws and regulations with regard to the 35 chapters of the *acquis* as a first step towards accession negotiations. The screening process included the chapters on customs union and free movement of goods, without giving rise to questions by the European Commission on the ports issue.<sup>174</sup> The conclusion of the screening process will mark the opening of negotiations on the individual chapters. The EU is in the driving seat with regard to the ports issue. It may fudge the issue for some time by deciding to deal with some less controversial chapters first, or it may make customs union or the free movement of goods one of the first chapters of the negotiations, thus bringing the matter to a head. However, the revision clause in the EU counter-declaration, committing the EU to monitor and evaluate full implementation of the Ankara Agreement in 2006, may force it to address the issue. This was underlined by EU Enlargement Commissioner Olli Rehn, who stated during an interview on 28 March 2006 that "the commission is working to avoid a train crash at the end of the year. The Finnish presidency will have to use all its diplomatic skills, inherited from the period of neutral policy, to avoid this train crash. [...] The sooner Turkey will open the ports and fully implement the protocol, the better. But we will have to present our assessment in the course of this year".<sup>175</sup> The European Commission is scheduled to submit its regular Progress Report on Turkey in October 2006. This report will be taken up by the General Affairs Council of the EU Foreign Ministers and then, in December 2006, at the European Council under the Finnish term presidency. If the Commission finds that Turkey does not fulfil its obligations under the Ankara Agreement, this must have consequences for the accession process in line with the EU counter-declaration, and may even lead to a halting

173 Negotiating Framework for Turkey, 3 October 2005, para. 21 ([http://europa.eu.int/comm/enlargement/docs/pdf/st20002\\_en05\\_TR\\_framedoc.pdf](http://europa.eu.int/comm/enlargement/docs/pdf/st20002_en05_TR_framedoc.pdf)). See also Commission presents a rigorous draft framework for accession negotiations with Turkey, IP/05/807, 29.6.2005, 2.

174 On the screening process, see [www.euractiv.com/en/enlargement/eu-turkey-negotiations/article-145219](http://www.euractiv.com/en/enlargement/eu-turkey-negotiations/article-145219).

175 [www.cyprus-mail.com/news/main.php?id=25121&cat\\_id=1](http://www.cyprus-mail.com/news/main.php?id=25121&cat_id=1).

of the accession negotiations. One way for Turkey to influence events and avoid a possible train crash, or at least soften its impact, could be to challenge any finding of the Commission that Turkey breaches the Ankara Agreement before the EC–Turkey Association Council. If the Association Council cannot settle the dispute (which is likely because of the unanimity requirement),<sup>176</sup> and does not agree to submit the dispute to the ECJ or any other existing court or tribunal, Turkey may submit the dispute to arbitration.<sup>177</sup> Such an approach, however, may not be politically opportune for a variety of other reasons.

### III. Conclusion

Nothing Turkey has done so far during the EU accession process implies its recognition of the Greek Cypriot-controlled Government of the Republic of Cyprus' claim to be the government of the whole of Cyprus. The opening of Turkish ports and airports to ships and aircraft flying the flag of the Republic of Cyprus would not amount to recognition, as the question of port and airport access does not allow any conclusion to be drawn as to the territorial sovereignty of the flag State. Consequently, Turkey could implement its limited obligations under the Ankara Agreement to open its ports and airports to trade-related traffic with southern Cyprus at any time. However, there are other reasons for the closure of ports and airports. Turkey is using the transport restrictions vis-à-vis the Republic of Cyprus as a bargaining chip in the negotiations to end the political, cultural and economic isolation of the Turkish Cypriots, and especially to allow direct trade with and flights to northern Cyprus. Turkey has made this clear in several initiatives aimed at “the *simultaneous* lifting of all restrictions on Cyprus by all relevant parties”.<sup>178</sup> During the meeting of the EC–Turkey Association Council on 26 April 2005, Turkish Foreign Minister Abdullah Gül said: “Turkey is in favour of removal of all restrictions on both sides of Cyprus. If the international community, including the EU and the Greek Cypriot side, can initiate steps such as direct trade and direct flights, Turkey would be in a position to complement these measures accordingly”.<sup>179</sup>

The linkage of Turkey's accession process to the recognition of the Republic of Cyprus has set the EU and Turkey on a collision course. Both sides are heading for a crash unless the Cyprus problem can be resolved and a new government of a United Cyprus Republic emerges in time. According to the EU counter-declaration, Turkey must recognize the Republic of Cyprus during the accession process. Turkey, however, cannot recognize the Greek Cypriot-led Government of the Republic of Cyprus as the government of the

176 Article 23(3) of the Ankara Agreement.

177 Article 25(4) of the Ankara Agreement.

178 Statement of Mr. Namik Tan, the Spokesman of the Ministry of Foreign Affairs, on the EU Counter Declaration, 22 September 2005 ([www.mfa.gov.tr/MFA/](http://www.mfa.gov.tr/MFA/)) (emphasis added). See also the Letters dated 31 May 2005 and 24 January 2006 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General, UN Documents A/59/820-S/2005/355, 1.6.2005 and A/60/657-S/2006/48, 25.1.2006.

179 44th meeting of the EC–Turkey Association Council, 26 April 2005, Document CE-TR 107/05, 21.6.2005, 18.

whole of Cyprus without at the same time “de-recognizing” the Turkish Republic of Northern Cyprus and its government, and accepting the Greek Cypriot position that, contrary to the will of the Government of Republic of Cyprus, Turkey is occupying parts of the Republic of Cyprus. In Turkey, this would be widely seen as a betrayal of the Turkish Cypriots and the Turkish cause, and might bring down any government granting such recognition. The EU, on the other hand, has manoeuvred itself into a position where any Member State would be justified in halting the accession process on the basis of Turkey’s non-recognition of the Republic of Cyprus or its non-implementation of the Ankara Agreement. By expressly linking the opening of negotiations on certain chapters with Turkey’s implementation of the Ankara Agreement and by committing itself to evaluating full implementation in 2006, the EU has needlessly tied its hands. Even a limited opening of Turkish ports and airports without a simultaneous lifting of the restrictions on the Turkish Cypriots seems highly unlikely. Such a move would be viewed in Turkey as a humiliating political climb-down which would be difficult for any government to survive. The EU itself may be forced to implement its threat of not opening negotiations on certain chapters of the *acquis* in order not to lose credibility; a move which would affect the overall progress in the accession negotiations. Not opening or closing certain chapters of the negotiations will, however, only allow the two sides to buy time; it will not avoid the crash for which the two sides are heading. The European Parliament said in its resolution of 28 September 2005 that “the objective of the negotiations is Turkish EU membership, but that the realisation of this ambition will depend on the efforts of both sides”<sup>180</sup>—both sides need to make much more effort to settle the Cyprus problem if the Turkish ambition of EU membership is to be realized.

180 European Parliament resolution on the opening of negotiations with Turkey, 28 September 2005, P6\_TA(2005)0350, para. 17.