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8.1 Introduction

The majority of the rules governing the special relationships with third countries reside in the innermost sphere of the layered global player. They manifest themselves at the conclusion of association agreements, at the establishment of more comprehensive frameworks such as the European Neighbourhood Policy, and in the ongoing process of EU enlargement. In the fields concerned, the Member States are, to a large extent, free to act in an autonomous capacity; while the EU does have some role to play here *qualitate qua*, this does not forestall the exercise of their sovereign prerogatives. Notwithstanding the fact that the Union is tasked with the adoption of certain specific rules, and that it formulates and implements

overarching policies, here more than anywhere else, it are actually the Member States calling the shots. When they undertake to rubber stamp concerted actions in an EU setting, this usually amounts to the approval of measures already voluntarily agreed upon before. At the end of the day, the creation of special linkages with a particular third country or group of countries, the severance of any existing ties, or the invitation of new countries to accede are all dependent on discretionary choices of the Member States.¹ For these reasons, the rules that govern the special relationships with the countries surrounding the Union belong to the EU's 'hard core'. In contrast, the Member States are enveloped and tied down much more definitively by the other external EU policies, as described in the previous chapters.

In the sections that follow, we first devote attention to the theory and practice of association agreements (Sect. 8.2), highlighting their legal basis, the procedure for concluding them, the institutional apparatus, and the effect of the rules laid down. Next, we take a look at a number of more comprehensive frameworks for entertaining relations with groups of third countries (Sect. 8.3), scrutinising in subsequent order the European Neighbourhood Policy, the Union for the Mediterranean and the Eastern Partnership. Finally, the topic of EU accession is brought to the fore (Sect. 8.5), with an analysis of the relevant criteria, a discussion of the applicable procedure, and some reflections on the contradictory positions that have been—and still are—taken with regard to the eligibility for membership.

8.2 Association Agreements

8.2.1 Legal Basis and Definition

As observed before, third countries or international organisations may be granted all sorts of favours or privileges, either through EU secondary law (e.g. the GSP Regulation), or through an international treaty or convention based on Article 216 TFEU. By law, the EU is not *obliged* to offer such favours or privileges to any particular state or region (apart from the possible kicking in of the MFN clause under international trade rules). Conversely, as the ECJ has asserted, under the Treaties there exists no general principle either that obliges the Union to accord equal treatment to third countries in each and every respect.²

If the Union prefers to draw a third country, group of countries or international organisation even closer, Article 218 TFEU allows for the creation of a special arrangement in the form of an association agreement. In the post-Lisbon era, there is also Article 8 TEU, which proffers an additional legal basis for associations with

¹As will be outlined below, during the (pre-)accession process, the Commission functions essentially in an advisory capacity when negotiating with third countries, monitoring developments and drawing up and submitting progress reports. The restraint expressed by the Court is exemplified by Case 93/78, *Mattheus v Doego*.

²See e.g. Case 55/75, *Balkan-Import Export GmbH v Hauptzollamt Berlin-Packhof*, paragraph 14.

the countries located in the Union's direct neighbourhood, even *demanding* that such relationships are set up. Neither provision, however, defines what an association actually is, and both are unhelpfully vague as regards the content of the agreement. Associations are said to involve 'reciprocal rights and obligations', the 'possibility of undertaking activities jointly', 'common action' and 'special procedure'. Of course, this absence of a strict definition brings considerable freedom and allows for a great variety in structure, composition and substance. The Court of Justice has only been a tiny bit more outspoken when it pronounced that 'an association agreement creates special, privileged links with non-member country which must, at least to a certain extent, take part in the Community system'.³

By now, it will already have become clear that the underlying idea of an association is to establish a more intense nexus between the EU and the country or organisation concerned. Inter alia, this will entail structural access to the internal market and other resources of the Union under (more) favourable conditions than before, and but also the joint shouldering of burdens, and the resolution of difficulties in good faith (i.e. without resorting to classic countermeasures, retorsions or reprisals). Another recurring feature of association relationships is that nowadays they are all predicated on human rights conditionality.

8.2.2 Creation

Association relationships are created through the conclusion of an association agreement. To be lawful, this conclusion has to take place in accordance with the procedure of Article 218 TFEU, which was extensively discussed earlier.⁴ For the present purposes, we need to take special note of Article 218(2) TFEU, which spells out that in a number of cases, the Council may adopt the decision concluding an agreement only after having obtained the consent of (a majority of the members of) the European Parliament. One of these cases is, following section (2)(a)(i), the setting up of an association agreement. This ensures that the arrangement can stake a claim to democratic legitimacy, at least from the side of the EU.⁵

A second point to note concerns the voting modalities in the Council. Whereas the first sentence of Article 218(8) TFEU states that ordinarily, the Council acts by QMV at every step of the procedure for concluding an international agreement, the second sentence spells out the exceptions to that rule. One of these exceptions pertains to association agreements, stipulating that, for the successful adoption of those types of treaties, the representatives of the Member States have to act by unanimity throughout. Again, this strengthens the legitimacy of the arrangement, ensuring that no Member State will be bound to participate in a special relationship

³Case 12/86, *Demirel v Stadt Schwäbisch Gmünd*, paragraph 9.

⁴See Chap. 1, Sect. 1.5.

⁵After all, the consent of a democratically elected, representative organ of the other contracting party or parties will not always be guaranteed.

against its will; if it opposes the scheme, it may simply vote against, and a single veto will mean that the proposed arrangement cannot be (lawfully) carried through.

A final thing to keep in mind is that association agreements usually cover policy fields in which the Member States have transferred at least some of their competences to the supranational plane. Thus, they are almost always concluded as a mixed agreement.⁶ For the procedure of Article 218 TFEU, this means that, after the signing, once the Parliament has consented and the representatives of the Member States in the Council have concluded the envisaged agreement, it will have to be subjected to ratification in all the countries of the EU. It will only officially enter into force once it has been ratified by every state in accordance with the applicable domestic constitutional requirements.⁷ Although once again one may say that this bolsters the level of support for the arrangement in question, it does carry the risk that the whole deal is derailed all too easily: a single *accident de parcours* in any of the Member States (e.g. a negative outcome of a popular referendum) suffices.

8.2.3 Institutional Make-Up

Whenever the decision has been made to engage in an association relationship, a specific institutional framework is established. The exact details will be laid down in the agreement concluded. Although the actual design may vary, depending on where the preferences lie in the particular case (and accordingly, on what has been put on paper), the associations that have been established so far display a number of common features.

Firstly, there usually is an organ known as the ‘association council’, a joint body composed of representatives of the Council and the Commission on the one hand, and representatives of the government of the third country on the other.⁸ The association council will take decisions that further implement the (terms of the) association agreement. It always proceeds by unanimity.

Next, there ordinarily exists an ‘association committee’, which is entrusted with the daily administration, and to which preparatory and executive powers may be delegated by either the association council or the terms of the agreement.⁹ The association committee is normally made up of representatives of the parties at senior civil servant level.

⁶Even when this is not legally necessary, Member States often decide for political reasons that an association treaty will be a mixed agreement. In so doing, they are able to ‘stay in the picture’ more emphatically.

⁷Albeit that Article 218(5) TFEU allows for provisional application of a treaty, but where it concerns association agreements this is not a fixed practice. Provisional application can be terminated by a party to the agreement without further notice and without giving reasons (Article 25(2) VCLT). This renders it a weak position to be in for too many years.

⁸Or of the governing body of the international organisation.

⁹Sub-committees may be designated where useful.

Box 8.1 Association Agreements – What’s in a Name?

While countless treaties are already by their official name identifiable as setting up an association, a number of alternative terms and labels have been used as well, most prominently ‘partnership’, ‘cooperation’, or ‘stabilisation’ agreements. Ultimately, all that matters for the proper Union law qualification is adoption on the basis of Article 217 TFEU. The name of the organs that are established may vary accordingly, depending on the designation chosen for the relationship. If the official name of the treaty is for instance a ‘partnership and cooperation agreement’, it will have a ‘partnership and cooperation council’, as well as a ‘partnership and cooperation committee’.

Most associations also set up an advisory parliamentary body. This body consists of MEPs on the one hand, and members of the parliament of the associated country on the other.¹⁰ It is kept informed, may request relevant information, and make recommendations to the association council.

A modern innovation are platforms that enable regular meetings of civil society organisations.¹¹ These may offer recommendations to the association council and may be consulted by the association committee and the parliamentary body.

As a rule, no separate judicial body is created. In case of a dispute between the contracting parties on the interpretation or application of the agreement, or on any decisions adopted on the basis of the agreement, traditionally the association council functions as the central mediator, and will attempt to resolve the issue. Increasingly, however, for differences of opinion *inter partes*, resort is taken to special arbitration mechanisms.¹² If disputes on the interpretation or application of the association agreement arise instead before a national court within an EU Member State, the latter may initiate a preliminary reference to the European Court of Justice in accordance with Article 267 TFEU.¹³

8.2.4 Legal Effect

Once they are formally concluded, association agreements find themselves incorporated into EU law and the law of the Member States. The ECJ views them

¹⁰Or of the representative body (if any) of the international organisation.

¹¹On the EU side, the platform can consist of members of the European Economic and Social Committee.

¹²Cf. Semertzi (2014).

¹³See Case 181/73, *Haegeman v Belgium*. This also includes referring questions on the interpretation, application or validity of any decisions adopted by the association council; see Case C-192/89, *Sevince v Staatssecretaris van Justitie*.

as acts of the institutions that form an integral part of the European legal system.¹⁴ Consequently, they can be the subject of litigation at the EU Courts, and as remarked, national judges are also competent to refer any related preliminary questions.

In addition, the ECJ has held that provisions in association agreements may be directly effective, which means that they may be invoked and relied upon in any disputes in the courts of the Member States. The Court employs fairly 'modern' criteria for this: a provision is capable of enjoying such direct effect if, with regard to its wording and the purpose and nature of the agreement itself, it contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.¹⁵

The decisions of association councils may be directly effective in Member State courts as well. According to the ECJ, for determining whether the provisions of such a decision enjoy direct effect, the same criteria apply as for the determination of the direct effect of provisions of the underlying agreements.¹⁶

Nevertheless, in the grant of direct effect to association agreements, the ECJ is known to vacillate and sometimes contradict itself, by awarding it to provisions of one type of association agreement, and denying it to provisions of another, even if their wording is highly similar.¹⁷ The Court professes to take into account the overall purpose and nature of the agreement in question, but therewith, it basically feigns consistency, and in practice gives itself a free hand. This has led to rather dubious outcomes in more than one case.¹⁸

The effect of an association agreement in the legal order of the third country concerned will depend on the relevant national constitutional rules. Naturally, in a monist system, provisions from the agreement can be enforced more stringently than in a dualist system. This may influence the decision of the ECJ, especially when an award of direct effect within the EU legal order may lead to an unbalanced, asymmetrical outcome, and produce significant economic or political disadvantages.¹⁹ Conversely, when an association is set up with more than one

¹⁴See Case 181/73, *Haegeman v Belgium*.

¹⁵See e.g. Case 12/86, *Demirel v Stadt Schwäbisch Gmünd*; Case C-63/99, *The Queen v Secretary of State for the Home Department, ex parte Gloszczuk*; Case C-171/01, *Birlikte v Wählergruppe Gemeinsam*; Case C-265/03, *Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol*.

¹⁶See Case 30/88, *Greece v Commission*; Case C-192/89, *Sevince v Staatssecretaris van Justitie*; Case C-188/91, *Deutsche Shell AG v Hauptzollamt Hamburg*.

¹⁷Contrast e.g. the outcome in Case 270/80, *Polydor Limited and RSO Records Inc. v Harlequin Records Shops Limited and Simons Records Limited* with that of Case 104/81, *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG*.

¹⁸Compare the cases mentioned in the previous footnote with Joined Cases 41-44/70, *NV International Fruit Company and others v Commission* and Case C-149/96, *Portugal v Council* (discussed in Chap. 4).

¹⁹Which has so far served as a main motive for the denial of direct effect in the GATT/WTO case law.

third country (i.e. a multilateral framework), it is possible that the rules of the agreement enjoy an unequal status across the partner states; in some of them, it may be more easily enforceable than in others, due to the former being monist while the latter are dualist.

8.2.5 Functioning Associations: A Sample

In 1963, Greece and Turkey were the first two countries to be singled out for special treatment, when the EEC decided to use its competence to engage in association relationships for the very first time. Since then, agreements have been concluded with a great number of states across the globe.

On the European continent, association agreements have figured as a crucial first step towards EU membership, e.g., in the cases of Portugal and Spain in the 1980s. In the 1990s, the so-called Europe Agreements went a long way in preparing the Central and Eastern European countries for accession. With three of the four countries participating in the European Free Trade Association (Norway, Liechtenstein and Iceland), a special association framework has been created in the form of the European Economic Area agreement.²⁰

Further away, partnership and cooperation agreements have been agreed with most of the former Soviet republics (e.g. Kazakhstan, Azerbaijan, Kyrgyzstan). There are newly updated versions of these accords (e.g., with Moldova, Georgia and Ukraine) that lay the groundwork for a deep and comprehensive free trade area.

In North Africa and the Middle East, associations have been established with most of the Maghreb and Mashreq countries, the Palestinian authority and Israel. Currently, the EU is also in an association with 79 African, Caribbean and Pacific states in the form of the Cotonou Agreement.²¹

Framework cooperation agreements have been concluded with Mercosur and the Andean Community in South America, and in Asia with ASEAN. There are trade and economic cooperation agreements with, inter alia Macao and Mongolia, and cooperation agreements on partnership and development with India and Sri Lanka.

The foregoing is merely a brief sample, and by no means provides an exhaustive overview. The illustrations serve to indicate what is out there, showcasing the huge variety of functioning association relationships.

As regards their substantive content, all the above agreements simplify access to the EU market for the goods that come from the third countries. This usually occurs in the form of tariff reductions, abolition of fiscal discrimination, or award of MFN status. The agreements also commit the contracting parties to economic

²⁰The EEA has an unusual institutional make-up, different to what has been described in Sect. 8.2.4, starring e.g. the EFTA Surveillance Authority instead of an AA committee. Switzerland participates in the EFTA but not in the European Economic Area; at present, the EU entertains a web of bilateral accords with that country, which provide for a high degree of cooperation.

²¹In force since 2003; historically preceded by the Conventions of Yaoundé (1963) and Lomé (1975).

cooperation. As said however, there is virtually no limit to what can be stipulated in AAs. For example, the agreements with Russia and Turkey have led to increased equal treatment between workers from those countries and nationals of EU Member States.²²

8.3 Comprehensive Frameworks

In the past years, the European Commission has endeavoured to create several comprehensive frameworks through which the various association relations may be ordered and streamlined. Among these are the European Neighbourhood Policy, the Union for the Mediterranean and the Eastern Partnership. These initiatives have received the principal go-ahead and substantial political backing from the Member States. At the same time, the precise legal status of the schemes, as well as their interrelation, remains rather fuzzy.

8.3.1 The European Neighbourhood Policy

As remarked earlier, Article 8 TEU contains specific instructions with regard to the countries neighbouring the EU, and actually orders the creation of a comprehensive framework. According to this provision, the central aim should be the establishment of an area of prosperity and good neighbourliness, founded on the values of the EU, characterised by close and peaceful relations based on cooperation. To that end, the second section mandates the Union to conclude specific agreements with the countries concerned. The implementation of those agreements must be subjected to periodic consultations.

In fact, the European Neighbourhood Policy has already been up and running since 2004, pursuant to a Commission strategy paper.²³ It was launched on the eve of the ‘big bang’ enlargement of the Union with 10 Member States, as a sort of follow-up, with the aim of avoiding the emergence of new dividing lines between the enlarged EU and its new neighbours.²⁴ Simultaneously however, it created an opaque twilight zone for third countries hovering between association and accession.

The ENP focuses on the 16 closest neighbours of the Union, namely Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya,

²²See e.g. Case C-265/03, *Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol*; Case C-242/06, *Minister voor Vreemdelingenzaken en Integratie v Sahin*.

²³*Communication from the Commission: European Neighbourhood Policy Strategy Paper*, COM(2004) 373 final. In embryonic form, it was already outlined in the *Communication from the Commission: Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, COM(2003) 104 final.

²⁴A detailed analysis of its origin and development offers Cremona (2008).

Moldova, Morocco, Palestine, Syria, Tunisia and Ukraine.²⁵ The first ENP strategy paper set out in concrete terms how the EU thought to collaborate more closely with these countries. The ENP builds upon the existing agreements between the EU and the partners in question, whereby selected neighbours are singled out for deeper economic integration and political association with the EU.

As indicated earlier, the Member States call the shots in this domain, so that in general the Union's institutions are expected to kowtow to their bidding. By consequence, the ENP operates mainly through soft law.²⁶

The central vehicles of the ENP are the action plans between the EU and each ENP partner. These set out an agenda of political and economic reform, with short- and medium-term goals. The plans do not seek to replace the existing association agreements. Rather, they identify key actions in a limited number of fields that need to be addressed with high priority, and also set up a time horizon for addressing them. The action plans are decided upon by the association council, with the association committees monitoring the implementation. Where necessary, existing AAs may be revised and amended accordingly. Since 2009, the task of overseeing the development of the ENP has been included in the portfolio of a Commission member. Regular thematic reports are published that track cross-cutting developments in the neighbourhood, e.g. on fundamental rights and gender equality.

Box 8.2 Being Included in the ENP: *Quo Vadis?*

The ENP policy documents leave participating countries that aspire to join the EU between hope and fear. The Commission has proclaimed that the ENP is not an enlargement policy, and that it does not automatically open up the prospect of Union membership. At the same time, being included in the ENP does not prejudice the prospects of those countries either. At some point in the future, they might wish to apply, whereby that application cannot be dismissed out of hand simply because of their status as an ENP partner. Of course, within the parameters of law and reason, other impediments can be legitimately brought to the fore—so whether the applications of such countries will eventually turn out successful is another thing entirely.

Following strategic reviews in 2011 and in 2015, the ENP's overall objectives were brought in novel focus, with stabilisation, strengthening of democracy and the rule of law rising in prominence. Moving away from a 'one size fits all' approach, differentiation between partners also became a main leitmotiv. Initially, the level of ambition of the relationships was made dependent on the extent to which EU values

²⁵In the absence of concrete action plans, the ENP has not become fully operational yet with regard to Algeria, Belarus, Libya and Syria.

²⁶A choice that is further queried in Van Vooren (2009).

are shared with the specific neighbour.²⁷ That normative language has now been heavily toned down, the emphasis shifting to the partner's genuine potential and willingness to adapt and reform.

In 2007, the ENP was equipped with special financial means, an asset renamed to European Neighbourhood Instrument (ENI) in 2014.²⁸ The ENI is managed by the Commission, funded via the EU's budget and the European Investment Bank.

8.3.2 The Union for the Mediterranean

Although a number of Mediterranean, African and Middle Eastern countries have been included in the European Neighbourhood Policy arrangement, to complicate matters a comprehensive framework for the Mediterranean region was put in place as long ago as 1995. In that year, the so-called Barcelona Process was launched, in which all existing cooperation agreements were transformed into newly styled 'Euromed Agreements' (EMAs). These EMAs covered much more ground than their predecessors, sporting robust human rights clauses, providing for a free trade area in industrial goods, liberalising trade in agricultural goods, services and capital. Periodic Euromed conferences were convened, whereby government representatives would meet and discuss topical affairs and dossiers. With greater frequency, sectoral meetings were staged, whereby resident experts and civil society organisations could exchange views and intensify their contacts. The grand objective of the Barcelona Process was the establishment of a free trade area between the EU and all the Euromed countries. Yet, the advancement towards that goal proved extremely sluggish.

In 2008, the French EU Presidency launched the idea to refurbish the franchise and rebrand it into a 'Union for the Mediterranean'. As the original setup of the UfM amounted to the creation of a separate entity that partially overlapped with traditional EU competences and policies, the French proposal met with heavy resistance from both the Member States and the Commission. Unsurprisingly, the plans were watered down quickly. By consequence, the UfM that was launched at the end of 2008 represented a more modest improvement upon the Barcelona Process, not an abandonment or wholesale reconfiguration.²⁹ While the periodic Euromed meetings continued as before, the idea was to beef up the level of cooperation, and accelerate the march towards a free trade area.

Ideally, the work of the UfM is driven forward through concrete initiatives. Six priority areas for cooperation have been identified, namely business development,

²⁷For critical and empirical investigations of this approach, see Ghazaryan (2014) and Poli (2016).

²⁸Respectively Regulation 638/2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument, OJ [2006] L 310/1, and Regulation 232/2014 establishing a European Neighbourhood Instrument, OJ [2014] L 77/27.

²⁹See the *Communication from the Commission: Barcelona Process – Union for the Mediterranean*, COM(2008) 319 final, as well as the approving *Joint Declaration of the Paris Summit for the Mediterranean*, Paris, 13 July 2008.

social and civil affairs, higher education and research, transport and urban development, waste and environment, and energy and climate action. Over 40 projects received the label of UfM support so far, covering actions for the de-pollution of surface waters, establishment and renovation of maritime and land highways, as well as various programmes for the empowerment of women.

Presently, the UfM comprises over 40 countries. Alongside the EU Member States, these are Albania, Algeria, Bosnia and Herzegovina, Egypt, Israel, Jordan, Lebanon, Mauritania, Monaco, Montenegro, Morocco, Palestine, Syria, Tunisia and Turkey.³⁰ The UfM secretariat, located in Barcelona, has been entrusted with ensuring continuity. Senior officials meet several times a year at the Secretariat or in one of the partner countries. At ministerial level, sectoral gatherings take place at regular intervals. The proceedings are monitored and guided by the EEAS, as part of the portfolio 'Middle East & North Africa'.

Despite the UfM's broad-ranging objectives, and the renewed enthusiasm for continuing the Barcelona Process, the first signs of stagnation already came to the fore shortly after its inception. While the Union's success depends on the goodwill of all contracting parties, the organisation has been bogged down by controversies from the very beginning. Countries engaged in public jostling while attempting to align their positions, summits were cancelled due to acrimonious Arab–Israeli disagreements, and at the astounding upheavals in North Africa and the Middle East in the early 2010s, the UfM was nowhere to be seen, failing in its function as an agora for negotiation or debate. That at roughly the same time, the first two secretaries-general resigned in quick succession did not aid the cause much either.

One may wonder indeed whether the respective UfM partners have sufficient interests in common, and whether they are truly willing to work together, structurally and peacefully, in the pursuit of those interests.³¹ The progress of the past years has been underwhelming, conveying the impression of an organisation that struggles to make a mark. Experiences so far lead one to suspect that the project that was originally overloaded with ambition performs disappointingly in its current shape—with tailor-made approaches likely to be more productive in the long run.

8.3.3 The Eastern Partnership

As described, the ENP encompasses on the one hand third countries that are also involved in the UfM. To complicate matters further still, the ENP involves on the other hand countries that take part in the 'Eastern Partnership' (EaP) arrangement.

³⁰Libya is an observer; the Arab League holds an associated status.

³¹Two dossiers are bound to keep sowing discord: the Western Sahara conflict and the Middle East peace process.

Whereas the UfM is an exercise in looking south, the EaP, as its name suggests, is all about looking east. The Eastern Partnership is geared towards Armenia, Azerbaijan, Georgia, Moldova, Ukraine and Belarus. It was chiefly born out of the need to lend these countries a helping hand economically and financially, to provide clarity as regards their accession perspectives, and to alleviate military and political tensions.³²

On the basis of a proposal drawn up by the Commission, the Eastern Partnership was officially launched in mid-2009.³³ The overall goal of the EaP is declared to be the promotion of stability, better governance and economic development on the eastern borders of the EU. Similar to the Barcelona Process, the approach of the EaP is to revamp, update and modernise the existing AAs, most of which were signed and concluded in the 1990s. Strikingly, none of the EaP documents issued so far have addressed *expressis verbis* the issue of possible EU accession.

Unlike the UfM, the EaP does not set up an own institutional apparatus; it functions predominantly as an overarching policy framework. Nevertheless, panels have been set up for promoting and monitoring progress, and periodic meetings take place at governmental level. Hereby four priorities have been identified: (1) economic development and market opportunities; (2) strengthening institutions and good governance; (3) connectivity, energy efficiency, environment and climate change; (4) mobility and people-to-people contacts. A comprehensive programme for improving the quality of society and public governance forms part of the EaP. For obvious reasons, migration, security and border management issues also sit high on the agenda. The necessary funds are made available through (supplements to) the European Neighbourhood Instrument.

Like the ENP and the UfM, political turmoil has had a marked impact on the evolution of the EaP. The Vilnius Summit of November 2013 marked the beginning of a crisis era, caused by external destabilisation efforts. The enhanced association agreements proposed by the EU, foreseeing the creation of a deep and comprehensive free trade area, led to a rift. Ukraine, Moldova and Georgia were happy to accept, while Azerbaijan held back. Armenia elected to join the customs union set up by Russia instead (of which Belarus was already a member), but signed up to an Enhanced and Comprehensive Partnership Agreement later. Simultaneously, Moldova opted for an observer status at the Russian-led customs union. This curious sequence of events placed dents in the viability of the EaP as such, arguably underscoring the need to develop individual approaches towards each of the partners.³⁴

³²Especially the military and political strife on the Caucasus in the late 2000s brought a sense of urgency to the setting-up of a new comprehensive arrangement. On its origins and intentions, see also Korosteleva (2011).

³³See *Communication from the Commission: Eastern Partnership*, COM(2008) 823 final, as approved in the *Joint Declaration of the Prague Eastern Partnership Summit*, Prague, 7 May 2009.

³⁴Cf. Nielsen and Vilson (2014).

8.4 Accession to the EU

8.4.1 The General Requirements

Those countries in special relationships that have the right vocation may eventually end up as full-blown EU Members. While in theory, the process of EU enlargement can go on endlessly, as the Treaties do not specify a maximum number of Member States, the prospects of accession are only truly realistic for those countries that qualify for it under Article 49 TEU. Unfortunately, this vital provision is not generous in details.

The common view is that Article 49 TEU lays down a ‘political criterion’ and a ‘general policy criterion’. The ‘political criterion’ relates to the words ‘any European state’: countries that are non-European are thus manifestly ineligible for membership. It is open to debate however whether the adjective ‘European’ should here be taken in a (limited) geographical sense or in a (potentially broader) cultural sense.³⁵

The ‘general policy criterion’ refers to the phrase that the state wishing to accede has to respect the values listed in Article 2 TEU, i.e. respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men. The country concerned must also be committed to promoting these values. In the so-called Copenhagen Criteria, the general requirements for being admitted to the EU have been worked out further.³⁶

8.4.2 The Copenhagen Criteria

The Treaties originally made no mention of any more specific conditions, but after the fall of the Berlin Wall, at the prospect of numerous Central and Eastern European countries acceding in due time, a need arose for a more extensive elaboration. In response, in June 1993, the (then 12) Member States outlined the criteria for joining the EU in greater detail at the European Council Summit in the capital of Denmark, after which city they have taken their name.³⁷

³⁵The Commission has not brought much clarity by proclaiming that geographic, historic as well as cultural elements are of relevance: see the report *Europe and the Challenge of Enlargement*, Bull. EC [1993] Supplement 3.

³⁶Covertly referred to in Article 49 TEU as “the conditions of eligibility agreed upon by the European Council”.

³⁷Presidency Conclusions, Copenhagen European Council, 21–22 June 1993, paragraph 7.

Box 8.3 The Official Copenhagen Criteria

The official Copenhagen Criteria, rehearsed on countless occasions by the European Council since their debut in 1993, are threefold: to qualify for EU membership, a candidate country must, firstly, have achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; secondly, the candidate country should dispose of a functioning market economy, the capacity to cope with competitive pressure and market forces within the Union; thirdly, the candidate country must have the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union (with the exact moment of accession to the EMU kept in abeyance, left to be decided at a later date—the single currency, in other words, does not need to be introduced upon entry).

Essentially, the Copenhagen Criteria require that any country bent on acceding to the EU possesses the necessary institutions to preserve democratic governance and protect fundamental rights, that it has a market economy operating within normal parameters, and that it understands and accepts all of the Union's obligations and aspirations.³⁸ The Madrid European Council of December 1995 added that EU membership also requires that the candidate country must have created the conditions for its integration in the Union through the adjustment of its administrative structures.³⁹ It was also stressed that, while it is imperative that European legislation is transposed into national legislation, it is even more important that the legislation is implemented effectively, i.e. through appropriate administrative and judicial structures. Finally, the Helsinki European Council of December 1999 added a requirement of 'good neighbourliness', emphasising that the prospective Member State should take every care to resolve any outstanding disputes or conflicts relating to its borders with other countries.⁴⁰

8.4.3 The Accession Procedure

If a European country has applied for membership and is deemed to meet the first of the Copenhagen criteria, it is normally granted official candidate status.⁴¹ This is an

³⁸The requirements are worked out further in the Commission Report *Agenda 2000: For a Stronger and Wider Union*, Bull. EU [1997] Supplement 5, encompassing inter alia a modern constitution guaranteeing basic democratic rights, independent judicial and constitutional authorities, respect for human rights, protection of the rights of minorities, and a liberalised market governed by supply and demand, with no barriers to exit or entry.

³⁹*Presidency Conclusions, Madrid European Council*, 15-16 December 1995, part III-A.

⁴⁰For a further analysis of these additions, see Hillion (2004).

⁴¹While Article 49 TEU makes no mention of this, it is ordinarily the Member States meeting in the framework of the European Council that decide to confer that status. A practice has developed

important symbolic moment, and means that the country can start preparing itself for going through the various stages of the accession process proper. Receiving official candidate status does not mean however that the accession process takes off straight away. Rather, from that moment on, the Commission undertakes preliminary screenings in order to decide the right moment for opening negotiations. Although in reality the order of proceeding can vary, depending on which particular country is applying, this moment usually arrives when the second of the Copenhagen Criteria is deemed to be fulfilled. At that point, on the advice of the Commission, the Council will decide by unanimity on the opening of accession negotiations.⁴² In practice, the Commission does not deliver its opinion before the Council has first requested it do so, which enables any Member State to block the initiation of the procedure.⁴³ The same cannot be said of the Commission, since Article 49 TEU does not require its opinion to be positive for the Council to proceed.

Once the accession negotiations have started, every effort is taken to verify that the potential member fulfils especially the third Copenhagen criterion. The Commission has a pivotal role here, producing annual and strategic reports on the candidate's progress on the road to membership. Gradually, an elaborate 'pre-accession strategy' has been developed, with the competent DG in Brussels providing recommendations and advice to the state(s) in question, staging monitoring missions and on-the-spot investigations in order to check and double-check compliance with EU requirements. In fact then, the term 'accession negotiations' is a bit of a misnomer, since there is not that much to negotiate about: the acceding country needs to take on the *acquis communautaire*, and import it integrally into its domestic legal system.

For the sake of efficiency, transparency and manageability, the *acquis* is split up and arranged in several chapters. These chapters mark distinct stages in the accession process.⁴⁴ Every chapter will have to be 'ticked off' prior to the opening of a new one. Overall, a multitude of assessments takes place, so as to make sure that the EU exports stability rather than imports instability.⁴⁵

Commentators have noted that the accession criteria have of late been applied with greater rigour than ever before.⁴⁶ At present, the EU package has to be adopted

whereby countries with an EU vocation that not yet fulfil the first of the Copenhagen Criteria are tagged as 'potential candidate members'.

⁴²The opinion of the Commission is quite lengthy, and will have reflected on the possibility of the applicant to meet all the requirements in due time.

⁴³Or delay it. For instance, in 2009, the request for an opinion on the application of Albania was postponed on the insistence of the German government.

⁴⁴Chapters can e.g. pertain to the EU rules on competition, the environment, consumer protection or the media. The number and content of the chapters may vary; for example, during the accession process of Bulgaria and Romania, the *acquis* was divided into thirty-one chapters, whereas Turkey and Croatia have been confronted with a line-up of 35 chapters.

⁴⁵As Mr Frits Bolkestein, a former Internal Market Commissioner, once quipped.

⁴⁶See e.g. Smith (2003); Gateva (2015).

in full, whereas in the 1970s and 1980s, much more room was given for transitory regimes; parts of the *acquis* could even be taken up after accession. Nowadays, the entire body of EU law has to be implemented in a satisfactory manner (including ‘Schengen’ and EMU commitments). As a rule, no preliminary opt-outs are permitted. In addition, the scope of the obligations flowing from the Copenhagen Criteria has broadened considerably. Great demands are placed on the adjustment and reform of administrative and judicial structures, and the EU Charter of Fundamental Rights is ever more frequently employed as a measuring rod.⁴⁷

Once the candidate country has met all the imposed requirements, all the chapters are closed and the Commission has expressed its satisfaction in a final opinion, the accession agreement can be drawn up.

Box 8.4 The Legal Status of an Accession Agreement

As Article 49 TEU prescribes, it are the Member States of the EU that conclude the accession agreement with the applicant country. The agreement then has to be submitted for ratification by all the contracting parties, in accordance with their pertinent constitutional rules. The Union itself is not a party to this treaty, delivering additional testimony that we find ourselves at the ‘hard core’ of the franchise where national sovereign powers hold sway. Nonetheless, Article 49 does stipulate that the European Parliament also needs to give its consent, acting by a majority of its component members. During this period, the prospective new member holds the status of observer in the EU institutions.

The accession agreement will specify the date of entry, the exact terms of admission, and include any necessary adjustments to the Treaties on which the Union is founded. Since the Union is itself not a party to this treaty, the Court’s opinion ex Article 218(11) TFEU cannot be procured.

8.4.4 The Question of Eligibility

Judging by the discussion above, the practical application of the Copenhagen Criteria may appear to be rather straightforward. The EU has nevertheless repeatedly been accused of double-heartedness, and these charges cannot be dismissed out of hand.

For starters, it is surprising that the detailed requirements for qualifying for membership have been largely left to practice, and were never codified in the

⁴⁷As pointed out by Williams (2000), these aspects have not always been taken sufficiently seriously.

Treaties.⁴⁸ Even the Copenhagen Criteria themselves are only set down in soft law documents. No attempts have been made to pour these into the firmer cement of the Treaties, although Article 49 TEU could accommodate them quite easily.

The foregoing is hardly surprising though, when looking at the actual handling of said criteria. Multiple third countries are vying to qualify for membership, and seem capable of qualifying in the mid- or long term. Moldova, Ukraine and Georgia are notable examples. Yet, precisely these countries are kept at bay and fobbed off with association and neighbourhood policy arrangements. Equally telling has been the relabelling of the Commission's DG 'Enlargement' to 'Enlargement Negotiations', coupled with the somewhat callous announcement that there would be no accessions between 2014 and 2019, period.

While the EU does not pretend to have definitive borders, it has no innate cognisance either of where its limits ought to lie. In that light, it would be fair if any country that meets the Copenhagen Criteria could be considered eligible for membership per se. After all, the other conditions are non-descript and flexible: a country like Turkey may for instance have no lesser claim to being 'European' than Russia, and possibly stand on a par with Israel or Armenia.⁴⁹ Yet, once the EU is ready to admit a relatively remote country like Turkey, it has no reason to bar other such countries (e.g. the former Soviet republics) for geographic reasons.

Occasionally, the 'strategic position' of a country is referred to as a decisive argument, but the exact content of that concept remains misty even to those that use it.⁵⁰ If this criterion indeed plays a crucial (underhand) role, it is not immediately clear why e.g. the countries on the Caucasus may be denied such an invaluable status.

Finally, there are countries that have been pulled in at a reckless pace, a bizarre effort corroding the official accession requirements. The hallmark cases are Romania and Bulgaria, whose shortcomings have been deliberately downplayed or overlooked, under the pretext of their manifest destiny of becoming EU members. This capital blunder rendered it necessary to install an unprecedented 'Cooperation and Verification Mechanism', in order to monitor the countries' post-accession behaviour. Here in particular, the double-dealing was hardly concealed,

⁴⁸With Article 49 TEU merely stating that "[t]he conditions of eligibility agreed upon by the European Council shall be taken into account", which leaves the latter some flexibility to mould them. Scholars have wondered whether the provision itself is actually that important; see e.g. Avery and Cameron (1998), p. 23.

⁴⁹By the same standard, one could question the genuine 'European' character of Malta and its inhabitants.

⁵⁰It has often voiced in debates on Turkish accession. A common additional argument for admitting that country is that it was promised membership in the 1960s already. However, one could reply that at that time, the prospect was given of joining an economic community, and that the Member States made good on their promise when they established a customs union with Turkey at the end of the 1990s.

with neither smoke nor mirrors succeeding to convince the public at large of the need to haul in these countries so quickly.⁵¹

In response, Croatia was subjected to a tortuous trajectory that signalled a break with the past.⁵² The restyled *modus operandi* puts the rule of law and democratic governance at the heart of the process. Henceforth, negotiations open and close with the chapters on fundamental rights, justice, freedom and security, and progress on these issues is tested through interim benchmarks. Pre-accession screening is intensified, with enforcement being monitored through implementation track records. All this might or might not be enough to secure a lasting credibility for the Union's approach towards (potential) new members.

8.5 Conclusion

In this chapter, several special regimes for organising the relations between the EU and third countries were highlighted and discussed. Unfortunately, the dividing lines between the various regimes are hardly sharp and sturdy. Legally, association agreements are the most tangible creatures, and they are founded on solid textual bedrock in the Treaties. Policies and structures such as the ENP, the UfM and the EaP have been zealously propelled by the Commission and its interlocutors, but operate in a legal limbo or normative no man's land. Whereas these frameworks may in theory span the whole gamut of accession relationships, their confusing interrelation and troublesome questions of overlap put paid to any attempts at classification. One cannot escape the impression that neither politicians nor officials have been able to make up their minds as to which programme, tactic, scheme or strategy should be preferred, and that they did not shy away from launching new initiatives even before the earlier ones had matured properly.⁵³

One day, third countries might jointly voice their discontent, and demand a change of tack. At present, it is unhelpfully obscure which of them will end up inside the EU, which of them should remain in a special (association) relationship, and which of them are entitled to be woven into a more comprehensive framework. The countries in the Western Balkans are covered by the ENP, but clearly enjoy an accession prospect. Other ENP countries, even those in close proximity to the EU, momentarily have to make do without it. Ukraine takes part in the EaP, with perennial ambiguity surrounding its potential Union membership. There is however no convincing geographic or cultural reason for keeping it at a distance, so long as Turkey remains en route to joining the EU. Also, it makes little sense to

⁵¹See further e.g. Kochenov (2008); Albi (2009).

⁵²*Communication from the Commission: Enlargement Strategy and Main Challenges 2012–2013*, COM(2012) 600 final.

⁵³In the preceding sections, we have consciously left aside kindred projects such as the 'Northern Dimension' (1999), the 'Black Sea Synergy' (2008), and the 'Strategy for the Ionian and Adriatic Region' (2014).

have a UfM for upholding special ties with the Mediterranean countries, while categorically ruling out accession for all participants. If relatively remote nations like Malta, Cyprus and Turkey are fit for (candidate) membership, there are several in North Africa and the Middle East that can plead a strong case as well. Of course no one will admit to the use of ethnic criteria, yet countries like Morocco or Russia cannot so easily be rejected on geographic grounds alone. The real reasons may or may not have everything to do with manageability and absorption capacity (frequently heard, sadly underdetermined concepts).⁵⁴ Then, indeed, Ukraine ought never to become an EU member—but probably neither should Turkey.

Meanwhile, the Union and the Member States carry on with envisioning, concluding and implementing new and existing association relationships. At the end of the day though, it might be apt to rearrange some of these, and unambiguously underline the primary and secondary objectives of the more comprehensive frameworks. As regards accession, perhaps the Member States should come round to applying the Copenhagen Criteria as a single, unequivocal yardstick. At the very least, one may expect the Commission to act as an honest broker. One way or another, the wantonness and *double entendre* that continue to haunt the engagements with its neighbouring countries deserve to be curbed.

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⁵⁴Already alluded to in the 1993 Presidency Conclusions outlining the Copenhagen Criteria, worked out further in the *Communication from the Commission: Enlargement Strategy and the Main Challenges*, COM(2006) 649 final, Annex 1, *Special Report on the EU's Capacity to Integrate New Members*, and the Presidency Conclusions, *Brussels European Council*, 14–15 December 2006, part I.

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