

ARTICLE

THE PAST, PRESENT, AND FUTURE OF EU
ENLARGEMENT

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Enlargement is one of the EU’s most powerful policy tools. The pull of the EU has helped transform Central and Eastern Europe from communist regimes to modern, well-functioning democracies. . . . It is vitally important for the EU to ensure a carefully managed enlargement process that extends peace, stability, prosperity, democracy, human rights and the rule of law across Europe.¹

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1. See *Communication from the Commission, 2005 Enlargement Strategy Paper*, at 2, COM (2005) 561 final (Nov. 9, 2005) [hereinafter *2005 Enlargement Strategy Paper*].

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I. INTRODUCTION

From the founding days of the European Coal and Steel Community (“ECSC”) in 1952, European integration has been designed as an open access model. At least in principle, every European State has the right to join.² And in spite of the

2. According to Article 98 of the European Coal and Steel Community Treaty of April 18, 1951, “Any European State may request to accede to [the Coal and Steel Community].” Treaty Establishing the European Coal and Steel Community art. 98, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter Treaty of Paris]. The European Economic Community Treaty of March 25, 1957, was even more explicit. *See* Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter Treaty of Rome]. In its Preamble the founders are “calling upon the other peoples of Europe who share their ideal to join.” *Id.* The latter passage has survived numerous treaty changes and re-organizations and can still be found in the Preamble of the currently applicable Treaty on the Functioning of the European Union, 2012 O.J. C 326/47, at 49 [hereinafter TFEU]. The concept of “Europe,” as something more than a geographic term is nicely developed in ALLAN F. TATHAM, ENLARGEMENT OF THE EUROPEAN UNION 203–05 (2009). The Commission itself has confirmed that:

The term “European” has not been officially defined. It combines geographical, historical and cultural elements which all contribute to the

somewhat mixed reviews the European Union (EU)³ has been getting from its citizens over the years,⁴ it has shown a remarkable and sustained attractiveness to those not yet among its members.⁵ The main reason is, undoubtedly, that the EU has been successful in its primary mission, namely to bring peace and prosperity⁶ to a continent that was regularly torn apart by violent conflict ever since historic records exist. At first, only Western Europe was able to benefit but right when the impact of European integration on peace and prosperity in the region was beginning to be taken for granted, the challenge of expanding the mission to all of Europe presented itself. As we all know, the EU has meanwhile grown from 6 Western founding members to 28 current members and now encompasses virtually the entire

European identity. The shared experience of proximity, ideas, values, and historical interaction cannot be condensed into a simple formula, and is *subject to review by each succeeding generation.* The Commission believes that it is neither possible nor opportune to establish *now* the frontiers of the European Union, whose contours will be shaped over many years to come.

Europe and the Challenge of Enlargement, 3 E.C. BULL., no. 92, at 11 (1992) (emphasis added). The concept of European identity is elaborated on by Tatham. See TATHAM, *supra*, at 477–90.

3. Although “European Union” only replaced “European Community” or “European Communities” with the entry into force of the Maastricht Treaty, or TEU, on November 1, 1993, for the most part the present article shall use European Union and the abbreviation EU indiscriminately.

4. Since 1973, Eurobarometer has polled thousands of citizens in all Member States as well as certain candidate countries several times per year to compile a representative picture of public opinion on European integration as such, various questions related to the EU and its institutions, as well as a number of issues of current interest. The results are available online at http://ec.europa.eu/public_opinion/index_en.htm. For an early analysis, see generally KARLHEINZ REIF & RONALD INGLEHART, EUROBAROMETER: THE DYNAMICS OF EUROPEAN PUBLIC OPINION (1991). For more recent discussion see, for example, Danilo Di Mauro & Marta Fraile, *Who Wants More? Attitudes Towards EU Enlargement in Time of Crisis – General Attitudes Towards Enlargement 2007-2011* (EURO Spotlight 2012/04, Oct. 2012), available at <http://www.eui.eu/projects/eudo/documents/2012/spotlight4.pdf>; Robert C. Luskin, James S. Fishkin, Stephen Boucher & Henri Monceau, *Considered Opinions on Further EU Enlargement: Evidence from an EU-Wide Deliberative Poll* (Stanford working paper series, presented at the annual meeting of the American Political Science Association, Toronto, ONT, Canada, Sept. 3–6, 2009), available at <http://cdd.stanford.edu/research/papers/2008/EU-enlargement.pdf>.

5. See, e.g., *Europe’s Magnetic Attraction*, ECONOMIST, May 19, 2001, at 3.

6. Peace and prosperity remains a core theme in the development of the EU. See *2005 Enlargement Strategy Paper*, *supra* note 1; see also *Communication from the Commission, Enlargement Strategy and Main Challenges 2006-2007*, at 2, COM (2006) 649 final (Nov. 8, 2006) [hereinafter *2006 Enlargement Strategy*].

geographic range of Europe. One additional country managed to sneak in through the backdoor without a formal accession procedure.⁷ Only two countries, Norway⁸ and Switzerland,⁹ have ever decided against accession, and only one territory, Greenland,¹⁰ has ever decided to leave the EU.¹¹ No fewer than

7. By ratifying the 1990 Unification Treaty between the Federal Republic of Germany and the German Democratic Republic (Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands – Einigungsvertrag), East Germany accepted the extension of the application of the West German Basic Law and, as a consequence, the entire West German legal order, to its territory and its citizens pursuant to Article 23 of the Basic Law. Since this procedure did not create a new state but an incorporation of East into West Germany, the united Germany retained its international rights and obligations, including the membership in the EU. Although Germany thus grew by about 16 million inhabitants, its voting power in the Council of Ministers and the number of seats in the European Parliament were not adjusted because, from the perspective of the EU, there had not been a formal accession of a new member state. The simplified incorporation procedure under Article 23 was repealed with the ratification of the Unification Treaty. Thus, there will not be another stealth accession to the EU by “other parts of Germany,” such as the Kaliningrad area. For the Basic Law in force before 1990, see *Documents – Founding of Two States: The Federal Republic of Germany and the German Democratic Republic*, GHDI, http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=2858 (last visited Apr. 9, 2014). For background reading, see TIMOTHY GARTON ASH, *IN EUROPE’S NAME: GERMANY AND THE DIVIDED CONTINENT* 343–77 (1993); TATHAM, *supra* note 2, at 47–56.

8. Indeed, the Norwegians voted twice against accession, first in 1972 (by 53.5%), and again in 1994 (by 52.2%). For more information on Norway, see generally NORWEGIAN MINISTRY OF FOREIGN AFFAIRS, *NORWAY AND THE EU: PARTNERS FOR EUROPE* (2009), available at <http://www.regjeringen.no/upload/UD/Vedlegg/eu/Norway%20and%20the%20EU.pdf>. Specifically for a discussion of the two NO votes, see Kate Hansen Bundt, *Why the Norwegians Said No*, in *EURO-SKEPTICISM: A READER* 113 (Ronald Tiersky ed., 2001).

9. To be precise, the Swiss did not vote against EU membership when they rejected the European Economic Area (“EEA”) on December 6, 1992, but de facto, by rejecting the lesser alternative to full membership, they made it impossible for their government to pursue an application it had already submitted. For background information on Switzerland, see Frank Emmert, *Switzerland and the EU: Partners, for Better or for Worse*, 3 *EUR. FOREIGN AFF. REV.* 367, 367–98 (1998); for a more recent analysis see Christine Kaddous, *Zusammenarbeit zwischen der Europäischen Union und der Schweiz*, in *1 ENZYKLOPÄDIE DES EUROPARECHTS* (Armin Hatje & Peter-Christian Müller-Graff eds., 2014).

10. Greenland became a member of the EU in 1973 as part of Denmark. The population of Greenland had voted against joining in 1973 but was overruled by the majority of all of Denmark. After gaining a larger measure of autonomy in 1979, Greenland held another referendum and decided to leave the EU, which finally happened in 1985. For analysis, see Phedon Nicolaidis, *Withdrawal from the European Union: A Typology of Effects*, 20 *MAASTRICHT J.* 209 (2013). Algeria is another special case. Since it was considered an integral part of France when the Treaties of Paris and Rome, *infra* notes 18–19, entered into force, Algeria became part of the EU with France, albeit

eight more countries are right now at various stages of accession preparation,¹² and several more may yet decide to apply.¹³ Thus,

with limitations as per Article 227 EEC-Treaty. Upon gaining independence in 1962—and before the transitional period for the direct application of EU law ended—the membership of Algeria also came to an end. Muriam Haleh Davisspoke is analyzing this particular part of EU history in her doctoral thesis, *Producing Eurafrika: Development, Agriculture and Race in Algeria, 1958-1965*, available at <http://www.eui.eu/Research/HistoricalArchivesOfEU/News/2013/07-30-EurafrikaandDeGaullesConstantinePlan.aspx>.

11. The UK held a referendum in 1975 on whether it should remain part of the European Economic Community. While the Conservative and Liberal Parties supported EC membership, Labour was divided. The result, 67.2% in favor, was a rather strong endorsement. The Tories as members of the current coalition with the Liberals have announced another referendum on the same question to be held after the next general elections in 2017. Since neither Labour nor Liberals are supportive of such a referendum, the announcement is a thinly veiled attempt by the Tories at playing the European card to win another term in office, based on a majority of polls showing that less than half of British voters are supporting EU membership.

12. The *Former Yugoslav Republic of Macedonia, Iceland, Montenegro, Serbia, and Turkey*, are currently negotiating or waiting to negotiate their accession treaties. *Albania, Bosnia and Herzegovina*, as well as *Kosovo*, have been promised “the prospect of joining when they are ready.” See *EU: Enlargement*, EUROPEAN COMMISSION (Jan. 4, 2014), http://ec.europa.eu/enlargement/countries/check-current-status/index_en.htm.

13. *Norway* and *Switzerland* are obvious candidates, if their domestic views should change. As mature democracies with functioning market economies, and not least as potential net contributors to the budget of the EU, they would most likely be welcomed with open arms. Whether *Scotland*, should it vote for independence on September 18, 2014, would remain in the EU without interruption or would have to apply and go through the procedures of enlargement, seems unclear. The UK and Spain have strongly voiced their views that Scotland would initially be forced out of the EU, in a pretty obvious effort at dampening the enthusiasm of secessionist forces in both countries. This view seems to be shared by Herman van Rompuy, the President of the European Council. See Magnus Gardham, *Van Rompuy Torpedoes SNP Claims on EU Membership*, HERALD (Scot.) (Dec. 14, 2013), <http://www.heraldscotland.com/politics/referendum-news/van-rompuy-torpedoes-snp-claims-on-eu-membership.22950437>. However, the proponents of Scottish independence seem to be planning to negotiate the terms of their EU membership while Scotland is still part of the UK and thus of the EU, which would set a new precedent and certainly make for accession negotiations sui generis.

In geographic terms, applications by *Armenia, Azerbaijan, and Georgia*, may seem far-fetched at the present time, but all three are already Member States of the Council of Europe and their location will look much less remote after Turkey joins. Last but not least, *Belarus, Moldova, and the Ukraine* are squat in the heart of Europe—both geographically and from the perspective of a historically European identity—and it would be difficult to deny an application for membership if and when these countries fulfill the other requirements of accession. Indeed, so far only Morocco has been politely told that it is not a European State (Morocco inquired informally in 1985 and presented a formal application on July 20, 1987).

enlargement is an ongoing story and the map of the EU will still be re-drawn several more times before its final borders can be determined. At the same time, the procedure for accession negotiations is regulated only in very superficial terms,¹⁴ which have remained largely unchanged over time. Yet, the procedure has evolved considerably in practice. As always, when the law on a particular question provides only a basic framework, the discretionary powers of those who apply the law greatly increase. The Council and the Commission have not shied away from making use of those discretionary powers. It is the purpose of the present article to show how individual Member States, or

However, one could argue that the inclusion by the Commission of Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine in the European Neighbourhood Policy (“ENP”), together with Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine, Syria and Tunisia, is an effort at drawing a line beyond which the EU will not or should not grow. For more information on the ENP, see *Communication from the Commission, Wider Europe – Neighbourhood: A New Framework for Relations with Our Eastern and Southern Neighbours*, COM (2003) 104 final (Mar. 11, 2003); *Communication from the Commission, European Neighbourhood Policy: Strategy Paper*, COM (2004) 373 final May 12, 2004) [hereinafter *Strategy Paper*]. Although the Commission does not spell out in so many words that neighbors shall not become members, it does speak of the ENP as “a means to reinforce relations between the EU and partner countries, which is *distinct* from the possibilities available to European countries under Article 49.” *Strategy Paper, supra*, at 3 (emphasis added). Realistically, however, it will be for the future to tell who may or may not become a member of the EU. If the first 60 years of European integration are taken as guidance, our views on the desirability of the one or the other country joining the EU may well change quite suddenly, if geopolitical and other factors change. The current crisis in Ukraine may be an example of such a geopolitical change. The fact that our current perspectives on enlargement are probably not the last word on the matter is recognized even by the Commission in the more recent *Communication from the Commission, On Strengthening the European Neighbourhood Policy*, COM (2006) 726 final (Dec 4, 2006): “The ENP remains distinct from the process of EU enlargement—for our partners, considerably enhanced cooperation with the EU is entirely possible without a specific prospect of accession and, for European neighbors, *without prejudging how their relationship with the EU may develop in future.*” *Id.* at 2, (emphasis added). The careful reader will see the distinction between European neighbors and other “partners.” For critical review of the ENP see, for example, Roland Dannreuther, *Developing the Alternative to Enlargement: The European Neighbourhood Policy*, 11 EUR. FOREIGN AFF. REV. 183 (2006); Bernard Hoekman, *Regionalism and Development: The European Neighborhood Policy and Integration à la carte*, 1 J. INT’L TRADE & DIPL. 1 (2007); Sandra Lavenex, *A Governance Perspective on the European Neighbourhood Policy: Integration Beyond Conditionality?*, 15 J. EUROPEAN PUB. POL’Y 938 (2008); Amichai Magen, *The Shadow of Enlargement: Can the European Neighbourhood Policy Achieve Compliance?*, 12 COLUM. J. EUR. L. 383 (2006).

14. See TFEU, *supra* note 2, 2012 O.J. C 326; *infra* notes 22–26 and accompanying text. Thorough analysis of the procedure is provided by Roger J. Goebel, *Joining the European Union: The Accession Procedure for the Central European and Mediterranean States*, 1 LOY U. CHI. INT’L L. REV. 15 (2013); see also TATHAM, *supra* note 2, at 239–69.

rather individual leaders of those Member States, via the unanimity requirement in the Council, were able to impose their views on enlargement in the early years.¹⁵ Secondly, we will show that this power has shifted noticeably to the Commission as the number of Member States has grown. Nevertheless, strong individual leaders in the Member States can still put their mark on the timetable and conditions of enlargement. There just seem to be fewer of those distinguished leaders today. Thirdly, we try to predict the use of discretionary powers in ongoing and future accession negotiations. To that end, we analyze how accession negotiations were conducted with the Central and Eastern European Countries (“CEECs”) which joined in 2004¹⁶ and 2007,¹⁷ how and why the approach was modified for the negotiations with Croatia, and how and why the strategy is already different again for the next group of countries.

II. EU ENLARGEMENTS UP TO 1995

A. *The Procedure*

The so-called Treaty of Paris¹⁸ and the Treaties of Rome¹⁹ were signed by six founding members of the European Communities, France, Germany, Italy, and the BeNeLux countries, in 1951 and 1957 respectively. Since then, there have been seven rounds of enlargement, one every 6-8 years on average. Given that accession negotiations take several years and “[c]onsidering

15. Much has been written about the question *how* the national leaders develop their specific preferences. In addition to subjective criteria like personal experience and character of individual leaders, the history of European integration is full of examples how these leaders were driven alternatively or simultaneously by political constraints at home and broader international strategic considerations. *See, e.g.,* Andrew Moravcsik, *Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach*, 31 J. COMMON MKT. STUD. 473 (1993) (providing many further references).

16. Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia.

17. Bulgaria and Romania.

18. The Treaty Establishing the European Coal and Steel Community, or Treaty of Paris, was signed on April 18, 1951, in Paris. Treaty of Paris, *supra* note 2. It entered into force on July 23, 1952.

19. The Treaty Establishing the European Economic Community, or Treaty of Rome, and the Treaty Establishing the European Atomic Energy Community were both signed on March 25, 1957, in Rome. They entered into force on January 1, 1958. Treaty of Rome, *supra* note 2 .

that new members continue to adjust to membership in the first years after they accede—through ‘transitional arrangements’ and other flexibility mechanisms—the Union has been almost continuously ‘in pre-accession’ since the first enlargement to take in the UK, Denmark and Ireland in 1973.”²⁰

During the entire time, the basic parameters of enlargement have barely changed. Pursuant to Article 237 of the Treaty of Rome,²¹ which later became Article O and is now Article 49 TEU,²² the procedure is initiated when an interested country submits an application. The Commission takes the next step by writing a reasoned opinion whether or not the Union should start negotiations with the candidate country. This opinion—called *avis*—is addressed to the Council of Ministers.

20. KIRSTYN INGLIS, *EVOLVING PRACTICE IN EU ENLARGEMENT: WITH CASE STUDIES IN AGRI-FOOD AND ENVIRONMENT LAW* 22 (2010).

21. The 1957 original wording of Article 237 is as follows:

Any European State may apply to become a member of the Community. It shall address its application to the Council, which shall act unanimously after obtaining the opinion of the Commission.

The conditions of admission and the adjustments to this Treaty necessitated thereby shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the Contracting States in accordance with their respective constitutional requirements.

Treaty of Rome, *supra* note 2.

22. The current version is as follows:

Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.

The conditions of admission and the adjustments to the Treaties on which the Union is founded which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

Consolidated Version of the Treaty on European Union art. 49, 2012 O.J. C 326/13, at 43 [hereinafter TEU]. As can be seen, the differences are minor. On the one hand, the EP gets to vote by a majority of its members (assent procedure, versus majority of votes cast). On the other hand, there is a rather cryptic reference to “conditions of eligibility.” Importantly, the unanimity requirement in the Council and the requirement of ratification by all Member States (plus the candidate State) remain the same.

As the nature of the document suggests, the *avis* is an advisory opinion and not binding on the Council. In general, the Council follows the Commission, but sometimes it does not, usually for obvious political reasons.²³

Once the Council unanimously agrees to open negotiations for accession with a candidate country, the Commission takes the lead in the actual negotiations. Since the treaties are silent as to the content of these negotiations, the Commission, with more or less frequent and detailed instructions from the Council, has significant discretion here. It is one of the primary goals of this article to shed some additional light on what is going on behind the scenes during these negotiations and how the procedure has evolved over time.²⁴ Once the Commission is satisfied that the candidate country is ready for admission, it issues a second *avis* to that end. The details of the agreement between the EU and the candidate country, including any transitional periods during which some of the mutual rights and obligations are not yet fully applied, are then spelled out in a Treaty of Accession. Once the Treaty is ready, it goes to the European Parliament for its “assent”²⁵ and then the Council takes another unanimous vote approving the results of the negotiations and the signing of the

23. In 1976 the Commission was ambivalent about starting accession negotiations with Greece and proposed a pre-accession period for Greece to get better prepared. However, the Council decided to open the accession negotiations anyways. See TATHAM, *supra* note 2, at 30–31. With regard to Macedonia, the Commission recommended in 2005 that “negotiations for accession to the European Union should be opened with [Macedonia] once it has reached a sufficient degree of compliance with the membership criteria.” *Communication from the Commission, Commission Opinion on the Application from the Former Yugoslav Republic of Macedonia for Membership*, at 7, COM (2005) 562 final (emphasis added). By October 2009, the Commission found sufficient progress and recommended the opening of negotiations with Macedonia, a position it repeated in 2010, 2011, 2012, and 2013. However, the Council still decided not to start those negotiations. In the first case, the political background was the desire to strengthen the struggling democracy in Greece. In the second case, the problem was a veto by Greece over what has been called “the name game,” i.e. the Greek claim that the name “Macedonia” belongs exclusively to its northern province, which is unsuccessfully skirted by the “other” Macedonia calling itself, for the time being, “The Former Yugoslav Republic of Macedonia (FYROM).” See also *infra* note 154.

24. A good “road map” can also be found in Goebel, *supra* note 14.

25. Normally, the EP approves legislation by a majority of votes cast. Thus, absent MEPs and/or abstaining votes are not counted at all. The assent procedure, by contrast, requires a majority of members to approve, i.e. absent members and abstentions are counted as votes against the proposal; compare TFEU, *supra* note 2, art. 231, 2012 O.J. C 326, at 231, with TEU, *supra* note 22, 2012 O.J. C 326.

Treaty of Accession. After that, the Treaty goes to the Member States and to the candidate country for ratification. Last but not least, even with all approvals given and all ratifications accomplished, the Council has the final say whether and when to give the force of law to the Treaty of Accession.²⁶ This final decision also determines the official date of accession.

The accession negotiations with a candidate country preceding its admission as a new Member State essentially serve two purposes. On the one hand, the EU wants to ensure that the candidate country is “willing and able” to take on the obligations of membership. In practice, this means that the candidate country has to adapt its legal system to become compatible with the common rules of the Union, the so-called *acquis communautaire*.²⁷ It has been the position of the Union from the outset that candidate countries have to accept the body of law as it stands and that the EU will not re-negotiate its hard-won legislative and regulatory progress every time a new country joins. Thus, nowadays some 160,000 pages of treaties, regulations, directives, and other legal rules have to be transposed into the legal system of the candidate countries. Since the EU has much greater leverage prior to accession, it basically insists that these far-reaching reforms of the legal system of the candidate country are completed before the state is admitted. Willing and able nowadays also means that various

26. To be sure, the candidate country could also withdraw its application until this time. This may become necessary if the ratification fails, as was the case twice with Norway after the population rejected membership in the EU in a referendum. It could also happen that a political dispute erupts between the EU or one or more of its Member States and the candidate country, with the consequence that either side changes its mind about accession, at least until the matter is resolved. An example for the latter is provided by Slovenia’s last minute threat not to ratify the Accession Treaty of Croatia, unless Croatia dropped a law suit regarding the liquidation of a Slovenian bank in the early 1990s, during the struggle for independence of the two countries, which caused financial harm to Croatian account holders. See Andrew Rettman, *Slovenia Puts 172mn price tag on Croatia’s EU Entry*, EUOBSERVER (Sept. 21, 2012, 9:26 AM), <http://euobserver.com/enlargement/117629>.

27. The *acquis* is the body of EU law as it stands, i.e. the Treaties, as amended, the legislative and administrative acts of the institutions, in particular the regulations, directives, and decisions, the judgments of the European Court of Justice, international agreements involving the EU, and various soft-law and other acts and instruments, see *infra* Part IV.B. For further detail see Stephen Weatherill, *Safeguarding the Acquis Communautaire*, in *THE EUROPEAN UNION AFTER AMSTERDAM: A LEGAL ANALYSIS* 153 (Ton Heukels et al. eds., 1998).

institutional structures may have to be modified or created in the acceding country to ensure the real-world application of the *acquis* after accession.

On the other hand, the EU has to modify its own institutional structures to make room for the incoming Member State(s). Most importantly, this involves the determination of the number of seats and votes the new countries will be allocated in the various institutions. Since every enlargement invariably changes the dynamics of voting and the distribution of power in the institutions, this procedure is much more complicated than it sounds. However, only the former element, the preparation of the candidate country or countries, is subject to the accession negotiations with that country. The internal revision of the institutional structures is done by the old Members with limited or no input from the candidate countries.²⁸ That process has been well-described before²⁹ and shall not be the focus of the present Article.

28. The chapter “Institutions” is not negotiated with the candidate country or countries at all.

29. See, e.g., Anthony Arnulf, *Europe’s Nemesis? The Long Road to the Lisbon Treaty*, in EUROPE: THE NEW LEGAL REALISM: ESSAYS IN HONOUR OF HJALTE RASMUSSEN 11 (Henning Koch et al. eds., 2010); Renaud Dehousse & Florence Deloche-Gaudez, *Voting in the Council of Ministers: The Impact of Enlargement*, in FIFTY YEARS OF EUROPEAN INTEGRATION: FOUNDATIONS AND PERSPECTIVES 21 (Andrea Ott & Ellen Vos eds., 2009); Bruno de Witte, *Adapting the Institutional System of the EU to Enlargement*, in THE ENLARGEMENT OF THE EUROPEAN UNION 209 (Marise Cremona ed., 2003); Roger J. Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden*, 18 FORDHAM INT’L L.J. 1092 (1995); Roger J. Goebel, *The European Union in Transition: The Treaty of Nice in Effect; Enlargement in Sight; A Constitution in Doubt*, 27 FORDHAM INT’L L.J. 455 (2004); Neill Nugent, *Political Dynamics in the Enlarged European Union*, in ADJUSTING TO EU ENLARGEMENT: RECURRING ISSUES IN A NEW SETTING 91 (Constantine A. Stephanou ed., 2006); John A. Usher, *Assessment of the Treaty of Nice – Goals of Institutional Reform*, in THE TREATY OF NICE AND BEYOND: ENLARGEMENT AND CONSTITUTIONAL REFORM 183 (Mads Andenæs & John Usher eds., 2003); Joseph H.H. Weiler, *Amsterdam and the Quest for Constitutional Democracy*, in LEGAL ISSUES OF THE AMSTERDAM TREATY 1 (David O’Keeffe & Patrick Twomey eds., 1999). A nice review of the institutional structures and powers as they stand today can be found in Roger J. Goebel, *Supranational? Federal? Intergovernmental? The Governmental Structure of the European Union after the Treaty of Lisbon*, 20 COLUM. J. EUR. L. 77 (2012).

B. *The First Northern Enlargement: Denmark, Ireland, and the United Kingdom in 1973*

The political component of the decision by the Council of Ministers of whether or not to open negotiations with a candidate country, and whether or not to fast-track a country for membership, has been well established. More importantly, the Council does not speak as one European institution in the way the Commission tends to do. The Council is where the Member States seek to safeguard their national interests. While majority voting is nowadays possible for many questions, several factors make sure that decisions are rarely taken against the will and interests of any of the larger Member States: First, a number of important issues, such as the budget as well as any questions related to treaty changes or enlargement, remain subject to unanimity even today. Second, there is a clear preference in the Council for decision-making by consensus even in areas where (qualified) majority voting would be possible. Third, even if the Council is ready to call a vote and a single or a small group of Member States risk being overruled, they can remind the other Member States of the preference for consensus by invoking the infamous Luxembourg Compromise.³⁰ In the present context,

30. After acrimonious discussions over agriculture and majority voting, the European Council agreed on January 30, 1966, in Luxembourg as follows: "Where, in the case of decisions which may be taken by majority vote on a proposal of the Commission, very important interests of one or more partners are at stake, the Members of the Council will endeavour, within a reasonable time, to reach solutions which can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community." This is a classic agreement to disagree and leaves open the question how long is "a reasonable time" for further negotiations and what happens when those eventually seem futile. For analysis see, for example, Andrew Moravcsik, *Negotiating the Single European Act: National Interest and Conventional Statecraft in the European Community*, 45 INT'L ORG. 19 (1991); Anthony Teasdale, *The Luxembourg Compromise*, in MARTIN WESTLAKE, *THE COUNCIL OF THE EUROPEAN UNION* 104 (1995). It has been argued that the Luxembourg Compromise was overcome with the formal introduction of qualified majority voting in the Council via the Single European Act in 1985. See PHILIPPE DE SCHOUTHEETE, *THE CASE FOR EUROPE: UNITY, DIVERSITY, AND DEMOCRACY IN THE EUROPEAN UNION* 37 (2000). However, subsequent practice shows that the Council is still trying to make decisions by consensus whenever possible and does not actually vote very often, even if it could. The impact of the change is more psychological. As Weiler has pointed out, while the Council used to negotiate "under the shadow of the veto" when it absolutely had to accommodate every member to get anything done, it is now negotiating "under the shadow of the vote," i.e. the chair can always call for a vote, if a country or a small group of countries is holding up a decision on selfish or otherwise unreasonable grounds. See Joseph H.H. Weiler, *The*

due to the unanimity requirement, the decision of whether or not to open negotiations with a candidate country, and whether or not to finish them with an agreement, is ultimately in the hands of each and every Member State, and its political leadership, and they have not been shy to make use of their leverage.

The early attempts at enlargement provide a case on point.³¹ When the European Coal and Steel Community (ECSC) with its innovative supranational elements was created in 1951, Britain's position was still that "no iota of British sovereignty" could possibly be negotiated away.³² Therefore, the UK wanted only intergovernmental cooperation for security and trade. Instead of focusing on Europe, Britain saw its future in its "special relationship" with the United States and its preferential trade arrangements with current and former colonies in the Commonwealth. However, by the late 1950s, it became increasingly clear that the British economy needed additional stimulation. From 1950 to 1958, the UK economy only grew by an annual average of 2.7%. By contrast, the economy of Germany had grown by an annual average of 7.8% during the same period and by 1958 Germany had surpassed Britain as

Transformation of Europe, 100 YALE L.J. 2403, 2460–83 (1991). In effect, the bar for what are "vital national interests" has been put significantly higher but by no means entirely out of reach. See also Renaud Dehousse & Giandomenico Majone, *The Institutional Dynamics of European Integration: From the Single Act to the Maastricht Treaty*, in THE CONSTRUCTION OF EUROPE: ESSAYS IN HONOUR OF EMILE NOËL 91 (Stephen Martin & Emile Noël eds., 1994); Pierre Pescatore, *Some Critical Remarks on the "Single European Act"*, 24 COMMON MKT. L. REV. 9 (1987).

31. Although the accession of Britain, Denmark, and Ireland in 1973 was the first actual enlargement, several countries knocked on the door in Brussels before Britain did. Israel inquired about membership in October 1958, Greece in June 1959, and Turkey, for the first time, in August 1959. See DEREK URWIN, *THE COMMUNITY OF EUROPE: A HISTORY OF EUROPEAN INTEGRATION SINCE 1945*, at 116 (2d ed. 1995).

32. The phrase is from a document the ruling Labour Party produced in 1950 entitled "European Unity" (here quoted from NORMAN DAVIS, *EUROPE: A HISTORY* 1065 (1996)). This did not change after the Conservatives, under Winston Churchill, took over in October 1951. Already in his famous Zurich speech on September 19, 1946, Churchill had advocated the "United States of Europe" as a construct for the Continent but not for UK inclusion. While this is the general interpretation of the Zurich speech, Churchill's biographer has a very interesting and more differentiated take on the subject. See ROY JENKINS, *CHURCHILL: A BIOGRAPHY* 813–19 (2002). The term "United States of Europe" was not of Churchill's invention. Napoleon Bonaparte may have been the first to use it around 1850–1852, although he had a somewhat different mechanism for unification in mind. See FELIX MARKHAM, *NAPOLÉON* 257 (1966). More importantly, Victor Hugo invoked "les États-Unies d'Europe" in a remarkably visionary speech at the International Peace Congress in Paris in 1849.

Europe's export champion.³³ Even Italy, at 5.8%, and France, at 4.6%, had consistently outperformed Europe's former industrial powerhouse.³⁴ Britain was at risk of being left behind. Therefore, Britain now wanted closer ties in Europe, but still resisted the transfer of authority to the European institutions with the potential of majority voting in the Council and binding judgments from the Court of Justice. Even while the ECSC countries were negotiating the European Economic Community (EEC) Treaty, the UK proposed a West European Free Trade Area as an alternative.³⁵ When Britain was unable to prevent "the inner six" from going forward with the EEC—or Common Market—it gathered the remaining "outer seven" into the European Free Trade Area ("EFTA"),³⁶ an intergovernmental organization where decisions were made by unanimity, if at all, and no uncontrollable commission of technocrats could try to challenge national sovereignty and interest.

British ambivalence, or rather the perpetual tug-of-war in Britain between pro-European leaders, who are willing to accept limited transfers of sovereignty to Brussels for the common goals of European integration, and Eurosceptics, who believe that Britain is better off outside the European Union,³⁷ has been the hallmark of the UK's relationship with "the Continent" ever since. Just over a year after founding EFTA and before the Common Market could really demonstrate that it was the

33. For an excellent discussion of German economic development after WWII, see WILLIAM I. HITCHCOCK, *THE STRUGGLE FOR EUROPE: THE TURBULENT HISTORY OF A DIVIDED CONTINENT 1945 TO THE PRESENT* 141–47 (2008); see also STEVEN OZMENT, *A MIGHTY FORTRESS – A NEW HISTORY OF THE GERMAN PEOPLE* 289–325 (2004).

34. See MARK GILBERT, *EUROPEAN INTEGRATION: A CONCISE HISTORY* 69 (2012); see also HITCHCOCK, *supra* note 33, at 232–33.

35. See TATHAM, *supra* note 2, at 8, with further references.

36. Besides the UK, the founding members of the EFTA were Austria, Denmark, Norway, Portugal, Sweden, and Switzerland, essentially a ring of mostly smaller countries in the periphery around the core formed by the EEC founders Belgium, France, Germany, Italy, Luxembourg, and Netherlands. The EFTA Treaty, the so-called Stockholm Convention, was signed in January 1960 and can be found at <http://www.efta.int/legal-texts/efta-convention>. It was overhauled in 2001 by the so-called Vaduz Convention. *Id.*

37. For in-depth analysis, see ANTHONY FORSTER, *EUROSCEPTICISM IN CONTEMPORARY BRITISH POLITICS: OPPOSITION TO EUROPE IN THE BRITISH CONSERVATIVE AND LABOUR PARTIES SINCE 1945* (2002).

economically superior model of integration,³⁸ Britain formally applied for membership in the EEC in August 1961. Negotiations for accession were promptly opened but before an agreement could be reached, the French President de Gaulle, on January 14, 1963, *de facto* vetoed UK accession.³⁹

While Andrew Moravcsik argues that de Gaulle's veto was mainly motivated by economic considerations, namely the incompatible British model of supporting its agricultural sector, and the British insistence on preferential trading rights for its Commonwealth partners, in particular relatively advanced economies like Australia, Canada, and New Zealand,⁴⁰ this is not borne out by de Gaulle's memoirs and biographers. Of course, the Commonwealth ties and the dispute over agriculture, where Britain would have offered a better and ultimately far less expensive alternative to the emerging CAP, did not help.⁴¹ And

38. The pioneers of analysis of different stages or models of economic integration are JAN TINBERGEN, *INTERNATIONAL ECONOMIC INTEGRATION* (1965); BELA BALASSA, *THE THEORY OF ECONOMIC INTEGRATION* (2d ed. 1961). For a specific comparison of the economics of free trade areas versus customs unions, see Anthony J. Venables, *The Economics of Preferential Trading Areas and Regional Integration*, in *THE ECONOMICS OF THE EUROPEAN UNION* 55 (Michael Artis & Frederick Nixon eds., 2007). The best overall analysis of the economics of European integration is provided by JACQUES PELKMANS, *EUROPEAN INTEGRATION: METHODS AND ECONOMIC ANALYSIS* (3d ed. 2006).

39. French President Charles de Gaulle, Veto on British Membership of the EEC (Jan. 14, 1963), <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=125401> [hereinafter de Gaulle Speech].

40. See ANDREW MORAVCSIK, *CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT* 189 (1998); Andrew Moravcsik, *De Gaulle Between Grain and Grandeur: The Political Economy of French EC Policy, 1958-1970 (Part 1)*, *J. COLD WAR STUD.*, Spring 2000, at 3; Andrew Moravcsik, *De Gaulle Between Grain and Grandeur: The Political Economy of French EC Policy, 1958-1970 (Part 2)*, *J. COLD WAR STUD.*, Fall 2000, at 4. For criticism of Moravcsik's thesis, see Robert Lieshout et al., *De Gaulle, Moravcsik and The Choice for Europe: Soft Sources, Weak Evidence*, *J. COLD WAR STUD.*, Fall 2004, at 89.

41. The pros and cons of the CAP, both in historical context when it was created and later, when it became an expensive millstone round the EU's neck, are well developed in DESMOND DINAN, *EVER CLOSER UNION: AN INTRODUCTION TO EUROPEAN INTEGRATION* 44-55, 59-68, 333-50 (2d ed. 1999); see also BERKELEY HILL, *UNDERSTANDING THE COMMON AGRICULTURAL POLICY* (2012); KIRAN KLAUS PATEL, *FERTILE GROUND FOR EUROPE? THE HISTORY OF EUROPEAN INTEGRATION AND THE COMMON AGRICULTURAL POLICY SINCE 1945* (2009); *POLICY-MAKING IN THE EUROPEAN UNION 181-205* (Helen Wallace et al. eds., 6th ed. 2010). Specifically for the context of enlargement, see Nicholas C. Baltas, *The Impact of Enlargement on EU Agriculture*, in *ADJUSTING TO EU ENLARGEMENT: RECURRING ISSUES IN A NEW SETTING*, *supra* note 29, at 46, with further references.

while these could conceivably be filed as questions whether Britain was “willing and able” to accept the conditions of membership, it is beyond doubt that de Gaulle’s main motivations were political.⁴² First, it is by now well documented that de Gaulle spent much energy and recurrent opportunities from 1959 to 1969 to contain American influence on Europe and other parts of the world.⁴³ De Gaulle was driven by his desire to re-establish France as a global power. His vision for Europe was one of a Europe of Nation States under the leadership of France.⁴⁴ He resented “Atlanticists” like Paul-Henri Spaak (Belgium), Josef Luns (the Netherlands), and Ludwig Erhard (Germany), because of their desire to tie Western Europe tightly to America and defend it via NATO against Soviet imperialism. He referred to the United Kingdom as “the Trojan Horse” that would bring the US into the European Common Market.⁴⁵ Second, de Gaulle did not want a dilution of French influence over the EEC, which he saw as inevitable with enlargement. His biographer reports that on December 16, 1962, in front of the British Prime Minister Macmillan and the French Prime Minister Pompidou, “the General insisted that the Common Market should remain as it was British adhesion would lead other countries to try to join, changing the nature of the organisation.”⁴⁶ Making it even clearer that this was not a

42. See the excellent biography, JONATHAN FENBY, *THE GENERAL: CHARLES DE GAULLE AND THE FRANCE HE SAVED* 486–88 (2012).

43. FENBY, *supra* note 42, at 516–523; *see also* de Gaulle Speech, *supra* note 39, in which he justified his veto on UK accession inter alia with the danger that the Community “would [become] a colossal Atlantic community under American dependence and direction.” This was also at the heart of the French withdrawal from NATO. Besides de Gaulle’s desire for France—instead of America—to play the first fiddle in Europe, there were also episodes in American politics, like McCarthyism and the Red Scare, that made the country look “politically immature” and “obsessed by Communism,” HITCHCOCK, *supra* note 33, at 156, potentially dragging the World into a military confrontation with the Russians and thus another World war.

44. De Gaulle told Dean Rusk around 1960 that France was “the heart and soul of European culture,” while “the British are not Europeans.” *See* DEAN RUSK, *AS I SAW IT* 270 (1990).

45. FENBY, *supra* note 42, at 472. This is confirmed in Stanley Hoffman, *De Gaulle, Europe and the Atlantic Alliance*, 18 *INT’L ORG.* 1, 14 (1964). Sure enough, the Americans did hope that British entry into the EC would take the “special relationship” into Western Europe as a whole. *See* RUSK, *supra* note 44, at 267.

46. FENBY, *supra* note 42, at 502. Indeed, the UK had been joined in its first application in August 1961 by Denmark and Ireland, and Norway followed suit on April 30, 1962. *See* MARK GILBERT, *EUROPEAN INTEGRATION: A CONCISE HISTORY* 70 (2012).

question of whether or not Britain met the conditions of membership, on January 14, 1963 de Gaulle confided to his aides that “Britain would not enter the Common Market in his lifetime.”⁴⁷ He delivered on his promise when a new Prime Minister in Britain, Harold Wilson, made a second attempt of bringing the UK into the EEC in 1967. De Gaulle’s biographer writes verbatim: “In the early summer [of 1967], . . . Harold Wilson renewed Britain’s bid to enter the Common Market, but got nowhere with the General [de Gaulle] who had already used a press conference to accuse the United Kingdom of lining up with Washington to subvert the continent.”⁴⁸ Only after de Gaulle finally stepped down on April 28, 1969, at the age of 79, the way became clear for a third British bid for membership in the EEC, and it did take until January 1973, indeed not during de Gaulle’s lifetime, for accession of Britain, Denmark, and Ireland to become effective.⁴⁹

C. The Southern Enlargements: Greece in 1981, Portugal and Spain in 1986

Barely enlarged from six to nine Member States, the EC had to deal with crises on several fronts. After building up large trade deficits with Germany and Japan, the United States had ended the convertibility of the dollar for gold on August 15,

47. FENBY, *supra* note 42, at 503. Harold Macmillan, in his memoirs, recalls a conversation with the French Minister of Agriculture pursuant to which France was then the only cock in the henhouse and would not accept another rooster on the dung heap. See HAROLD MACMILLAN, *AT THE END OF THE DAY 1961-1963*, at 365 (1973). In his own memoirs, de Gaulle claims that already on September 14, 1958, in his very first summit with Konrad Adenauer, he told the German Chancellor that he opposed British entry into the EEC. See CHARLES DE GAULLE, *MEMOIRS OF HOPE: RENEWAL AND ENDEAVOR 178* (Terence Kilmartin trans., 1972).

48. FENBY, *supra* note 42, at 551. Gilbert confirms Fenby’s analysis:

De Gaulle dismissed the second British attempt to gain membership – during the premiership of the Labour leader Harold Wilson in 1967 – almost contemptuously. In May 1967, de Gaulle warned of “destructive upheaval” if Britain succeeded in entering the EEC. A visit from Wilson in June 1967, at which the British prime minister bumptiously told de Gaulle that Britain would not “take no for an answer”, was to little avail. In November 1967, de Gaulle expressed his absolute opposition to British entry.

GILBERT, *supra* note 46, at 83–84 (footnote omitted).

49. The Act of Accession, the Treaty of Accession, and the Final Act and Declarations of the Treaty of Accession for the UK, Denmark, and Ireland can be found at <http://www.eurotreaties.com/eurotexts.html#ukaccession>.

1971. Subsequently, the dollar continued to fall against the European currencies but also exposed tension between the latter, ultimately wrecking early plans for some kind of monetary union. A second external shock was added when the Arab countries in the Organization of Oil Exporting Countries (OPEC) imposed an embargo against the United States and several European countries supporting Israel in the Yom Kippur War of October 1973. Egypt and Syria had launched the war to recapture territories lost in the 1967 Six Day War. Within days, the price of oil quadrupled in European markets and the first oil crisis of 1973 quickly exposed fundamental disunity between the foreign policy priorities of the nine EC Member States.

By the end of 1974, therefore, the grand design of the October 1972 Paris summit, of achieving a European Union [including monetary union] by the end of the 1970s, was looking somewhat battered.⁵⁰

With deepening of European integration on hold, an opportunity at widening soon presented itself. Greece returned from military dictatorship to democracy in July 1974 and within a year applied for full membership in the EC. It had been an associated country since 1961 and even back then, the Association Agreement had already pointed to the possibility of full membership.⁵¹ Any progress on membership negotiations was suspended, however, after the military coup of April 1967.

Having remained neutral in World War II, Spain and Portugal did not undergo fundamental reforms in the post-war period. They remained under fascist dictatorial rulers and their economies and standards of living remained stuck on the level of developing nations. Since democracy is one of the requirements for EU membership, it was easy to exclude Portugal and Spain after World War II from participating in the European integration process. A first application by Spain in 1962 received no formal response but triggered a discussion on the lack of democracy and liberty in that country. A second

50. GILBERT, *supra* note 46, at 103.

51. See Agreement Establishing an Association Between the European Economic Community and Greece art. 72, 1963 O.J. P 26. The Association Agreement with Greece was the first of its kind and the first to establish a so-called Association Council with actual decision-making powers for the implementation of the Agreement. It became the blueprint for many association agreements after it.

approach in 1964 at least led to the negotiation and ratification of a preferential trade agreement.⁵² The third attempt followed after the death of General Franco in 1975. At the same time, Portugal had finally shed the dictatorship in the Carnation Revolution of 1974 and held its first democratic elections in 1975.

Within a short timeframe, the EC received three applications for a substantial Southern Enlargement. A fourth country, Turkey, had been placed in a holding pattern in 1962⁵³ but had also been given a promise of accession by 1995. In a report to the European Parliament, the applications were described as follows:

On 12 June 1975 the Greeks submitted a formal application for full membership of the EEC. This application has been favourably received, *mainly for political rather than economic reasons*, and negotiations are presently in progress.

On 28 March 1977, Portugal lodged an official application for membership of the EEC; *Mainly for political reasons* this application has been generally welcomed by the present members of the Community although doubts have been expressed concerning the Portuguese economy's ability to withstand the pressures EEC membership will bring.

The Association Agreement signed between the EEC and Turkey in 1962 envisages eventual full membership in 1995 . . .

The Spanish government [submitted a formal application on 28 July 1977].⁵⁴

The argument that rapid integration would be highly desirable to strengthen the infant democracies should have been equally relevant in all three and maybe all four candidate

52. See Agreement Between the European Economic Community and Spain, 1970 O.J. L 182 .

53. See Agreement Establishing an Association Between the European Economic Community and Turkey, 1964 O.J. 217.

54. See EC-Accession of Four Mediterranean Countries and Regional Policy, EUR. PARL. DOC. PE 49.154 3 (1977) (original underlining removed, emphasis added). Royo confirms that "it is generally acknowledged that the underlying reasons for the integration of Portugal and Spain in the European Community were political." See Sebastián Royo, *The Experience of Spain and Portugal in the European Union: Lessons for Latin America* 9 (Miami Eur. Union Ctr., Working Paper Series No. 2, 2002), with further references.

countries. Indeed, democracy in Spain almost fell victim to a military coup in February 1981.⁵⁵ However, the negotiations with Greece were substantially quicker than the ones with Portugal and Spain, and Turkey was not even considered for 23 years. We will try to show that this was only partly due to issues with objective criteria and conditions.

The Commission *avis* on the Greek application was lukewarm.⁵⁶ On the one hand, the Commission recommended that accession negotiations should be opened. On the other hand, the Commission proposed a pre-accession period during which Greece would receive financial aid to prepare itself for membership, in particular by growing its economy and making various institutional and structural reforms. Furthermore, the Commission predicted various transitional periods after accession.⁵⁷ Greece was not happy with the cautionary recommendations of the Commission, which were seen as an attempt at delaying Greek accession indefinitely.⁵⁸ When the Commission also suggested that Greece and Turkey should find “a just and lasting solution” to their differences,⁵⁹ the Greeks complained about political meddling outside of Commission competences.⁶⁰

The decisive Council meeting provides a lesson on decision-making by consensus. The Council could not agree

55. Colonel Tejero launched the failed attempt—often referred to as “El Tejerazo”—by taking the delegates of the Spanish Parliament and a number of cabinet members hostage in the evening of February 23, 1981. The rebels managed to occupy strategic points in the city of Valencia with tanks but a similar attempt failed in Madrid. The rebellious elements in the Spanish army were protesting against political and economic instability as well as separatist tendencies, in particular in the Basque region. After the King refused to endorse the coup and insisted on return of the democratically elected Government, the coup collapsed and its leaders were sentenced to lengthy prison terms.

56. Tsalicoglou commented that “the clarity of [the Commission] affirmation left a lot to be desired.” See IACOVOS S. TSALICOGLU, *NEGOTIATING FOR ENTRY: THE ACCESSION OF GREECE TO THE EUROPEAN COMMUNITY* 30 (1995).

57. See Opinion on Greek Application for Membership, E.U. BULL. No. 2/76 (1976).

58. See Susannah Verney, *The Dynamics of EU Accession: Turkish Travails in Comparative Perspective*, 9 J. S. EUR. & BALKANS 307, 311 (2007).

59. In 1974, Cypriot nationalists with support from the military junta in Athens had deposed the Cypriot President Makarios triggering a Turkish invasion in northern Cyprus for the protection of the Turkish minority on the island. For a while it seemed that Greece and Turkey might go to war against each other.

60. Verney, *supra* note 58.

unanimously on the innovative strategy suggested by the Commission⁶¹ and, because no Member State government wanted to be seen as the one opposing Greek accession, fell back on the default model and decided by consensus⁶² to open the accession negotiations without delay. Nevertheless, what eventually became the “good neighbourliness” criterion, remained a constant element in the procedure, to the point that Greece had to commit itself not to block Turkish accession at a later stage.⁶³ Negotiations with Greece were initiated on July 27, 1976. Halfway through the negotiations, Portugal and Spain applied. In particular Spain, with its much larger agricultural sector, was not going to be so easily digested into the EU.⁶⁴

The problem with Spain, in particular, was not only the cost of including the Spanish farmers in the CAP. France and, to a lesser extent, also Italy and Greece, feared the competition in the markets for vegetables, fruit, olive oil, and other Mediterranean agricultural products.⁶⁵ Spanish producers enjoy a climatic advantage allowing them to bring their produce earlier in the season to the northern markets. Their cost of production, hence the prices for their agricultural products, were also noticeably lower than in the EC. As a consequence, riper, tastier, and cheaper fruit and vegetables from Spain come to France and other northern countries in the spring and continue to displace local produce well into the summer, to the great frustration of the local farmers.⁶⁶ Another contentious

61. While the pre-accession/post-accession strategy was ultimately not used for Greece, it was “dusted down” for the negotiations with the CEECs in the 1990s. *See* TATHAM, *supra* note 2, at 31.

62. The reader should note the important difference between a unanimous decision and a decision by consensus. The former requires a vote where everybody says yes. The latter merely requires an end to the conversation with nobody saying no.

63. *See* Verney, *supra* note 58, at 312.

64. To put things into perspective: Spanish accession was to increase the overall land area used in the EC for agricultural production by 30%, and the population living off the land by 31%. *See* TATHAM, *supra* note 2, at 37.

65. *See, e.g.*, JAMES D. GAISFORD ET AL., *ECONOMIC ANALYSIS FOR EU ACCESSION NEGOTIATIONS: AGRICULTURE ISSUES IN THE EU’S EASTWARD EXPANSION* 11 (2003).

66. These effects continue today. Possible consequences are nicely illustrated by the dispute that led to the Judgment of the European Court of Justice of December 9, 1997 in *Commission of the European Communities v. French Republic (Coordination Rurale)*, Case C-265/95, [1997] E.C.R. I-6959. French farmers had adopted guerilla tactics, attacking and torching Spanish trucks loaded with agricultural produce at the toll stations on the French highways. For maximum publicity effect, the

issue with Spain was the division of the fishing quotas. The Spanish fishing fleet at the time was larger than the entire fishing fleet of the EU.⁶⁷ Accession should normally have given the Spanish fishermen access to the common fishing grounds in the North Sea, in competition with British, Dutch, Irish, and other fishermen. To mediate this impact, France, in particular, pursued a policy of delaying the entry of Spain and Portugal. Greece was ultimately able to avoid “the globalization” of the Southern Enlargement package and moved ahead with the conclusion of the Accession Treaty on May 28, 1979. Greek accession became effective on January 1, 1981, although a general transition period of five years for the application of the *acquis* by Greece was also provided, as well as restrictions on the free movement of Greek workers and tomatoes to the old Member States until the end of 1987.⁶⁸

Caught up in a tight race toward the presidential elections, President Valéry Giscard d’Estaing *de facto* made the Iberian

strikes were announced in advance and the media were invited. Instead of protecting the property of the Spanish traders, the French government declined to intervene and instead paid compensation. After the case was brought by the EU Commission, the Court of Justice ruled that France had a positive obligation to protect the free movement of goods against private disruptions.

67. See Royo, *supra* note 54, at 17. The problem was initially resolved by dividing the European fishing opportunities into national quotas. While all fishing fleets could work the common areas in the Atlantic and elsewhere, they were not allowed to exceed their quota and, at least in theory, had to leave the rest for the other Member States. In practice, the EU experienced perpetual problems with the enforcement of the quotas. See, e.g., Spain v. Commission, Case C-179/97, [1999] E.C.R. I-1264; see also Commission v. Netherlands, Case 290/87, [1989] E.C.R. 3101; Commission v. France, Case C-62/89, [1990] E.C.R. I-946; Commission v. France, Case C-244/89, [1991] E.C.R. I-186; Commission v. Netherlands, Case C-52/91, [1993] E.C.R. I-3092; Commission v. France, Case C-52/95, [1995] E.C.R. I-4443; Commission v. France, Case C-333/99, [2001] E.C.R. I-1039; Commission v. United Kingdom, Case C-454/99, [2002] E.C.R. I-10351; Commission v. United Kingdom, Case C-140/00, [2002] E.C.R. I-10379; Commission v. France, Joined Cases C-418 & C-419/00, [2002] E.C.R. I-3969. Another crisis was triggered when Spanish fishermen registered their boats in the UK in order to exploit the British quota. This “quota hopping,” and the British countermeasures, made several trips to the European Court of Justice in Luxembourg. See, for example, Agegate, Case C-3/87, [1989] E.C.R. 4459; Jaderow, Case C-216/87, [1989] E.C.R. 4509; Commission v. Ireland, Case C-93/89, [1991] E.C.R. I-4569; Commission v. United Kingdom, Case C-279/89, [1992] ECR I-5817, as well as the famous “Factortame” decision: The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and Others, Case C-213/89, [1990] E.C.R. I-2433, about interim relief against an Act of Parliament in the UK.

68. TATHAM, *supra* note 2, at 33.

enlargement hostage to the EU budget negotiations with the UK.⁶⁹ Once the agricultural issues and the budgetary questions were settled at the European Council summit in Fontainebleau in June 1984, the road seemed clear for Portugal and Spain to join in 1986. At the last minute, Greece used the need for unanimity in the approval of the accession treaties to extract compensation for the anticipated loss in sales of its Mediterranean agricultural products to Spanish competition.⁷⁰ Even after accession in 1986, Spain was given a transition period of seven, and for some products ten years, before it would have full access to the internal market for its agricultural products.

D. *The EFTA Enlargement: Austria, Finland and Sweden in 1995*

The completion of the Internal Market at the end of 1992 elevated the EU to the next level of economic integration and widened the gap with the countries remaining in the European Free Trade Area (EFTA). To alleviate fears in these countries that the Internal Market would become a “Fortress Europe”⁷¹ with high barriers to entry for outsiders, the EU negotiated the European Economic Area (EEA) Agreement with its EFTA neighbors to provide mutual access not only for trade in goods but for all factors of production, as well as a level of harmonization of laws.⁷² In many ways, the EEA ended up providing for almost all obligations of full membership in the EU and most of the rights, but without the crucial access to the institutions and the decision-making procedures in the EU. EEA

69. Royo, *supra* note 54, at 18.

70. TATHAM, *supra* note 2, at 43.

71. Although coined already during World War II, the term gained notoriety after the conclusion of the Schengen Agreement in 1985, which brought about the replacement of internal border controls between the Member States with enhanced controls at the outer borders of the so-called Schengen Area. After ratification by Belgium, Germany, France, Luxembourg, and the Netherlands, the Agreement entered into force in 2000. *See* 2000 OJ L 239/13. Since then, the following countries have joined the Schengen Area: Austria, Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Malta, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland. Of the current EU Member States, Ireland and the United Kingdom have declined to join and Bulgaria, Romania, and Croatia are candidate countries.

72. *See* The Agreement on the European Economic Area, 1994/17, 1994 O.J. L 1/3, available at <http://www.efta.int/eea/eea-agreement>; *see also* ACCORD EEE: COMMENTAIRES ET REFLEXIONS (Olivier Jacot-Guillarmod ed., 1992).

members would have to apply much of EU law, without having a voice and a vote in the making of that law.⁷³ Therefore, it was not a particularly popular agreement, even among the EFTA governments that had asked for it as an alternative to membership without obvious transfers of sovereignty.⁷⁴ Even without institutional membership, however, the EAA Agreement went too far for the Swiss electorate and was rejected in a referendum on December 6, 1992. Switzerland had been a driving force behind the EAA and in many ways the Agreement was tailored for Swiss needs more than the other EFTA countries. Without Swiss membership, the EAA lost even more of its appeal. At the same time, the design of the EU's Common Foreign and Security Policy (CFSP) in the Maastricht Treaty turned out to be sufficiently flexible to allow for membership by neutral countries. Last but not least, the fall of the iron curtain ended certain restrictions on the international relations of Austria⁷⁵ and Finland.⁷⁶ All this combined motivated Austria, Finland, Norway and Sweden to seek full membership in the EU.⁷⁷

73. Hundreds, if not thousands, of EU regulations and directives, in particular those relating to the internal market, state in their header that they are a "Text with EEA relevance." *See, e.g.*, Directive 2005/36 on the Recognition of Professional Qualifications, 2005 O.J. L 255/22. Naturally, the non-EU members of the EEA were not included in the Council or EP meetings that led to the finalization of the drafts and certainly did not get to vote on the document itself.

74. Tatham writes, "By the end of the negotiations in 1991, most of the EFTA States had come to share the Austrian viewpoint, viz., that the EEA was merely a step in the process to full EEC membership." *See* TATHAM, *supra* note 2, at 60.

75. Pursuant to the Staatsvertrag betreffend die Wiederherstellung eines unabhängigen und demokratischen Österreich [State Treaty for the Re-establishment of an Independent and Democratic Austria], May 15, 1955, 217 U.N.T.S. 223, the Four Allied Powers prohibited Austria from any form of union with Germany. The Soviet Union used this Treaty for decades to prevent Austrian ambitions of joining the EU.

76. Finland and the Soviet Union had entered into an Agreement of Friendship, Cooperation, and Mutual Assistance ("YYA Treaty") in 1948. Under this Agreement, it was Finnish policy not to seek Western alliances in order to maintain friendly relations with the Soviets. The policy ended only in 1992, after the disintegration of the Soviet Union.

77. Austria had already applied on July 17, 1989, but had not pursued the application during the negotiations for the EEA. Sweden had also applied earlier, on July 1, 1991. Finland applied on March 18, 1992. Even Norway applied on November 25, 1992, right before the Swiss rejection of the EEA, although the outcome of the Swiss referendum was not at all clear at that time.

For the EU, this was a welcome development. The EFTA partners were known to be stable democracies, reliable trading partners, and above all relatively wealthy, in particular when compared to the countries of the Southern Enlargements of 1981 and 1986 and the prospective candidates in Central and Eastern Europe, all of which turned out to be net-recipients of EU funds. Negotiations began in February 1993 and were concluded after just a little over a year. The Accession Treaties were signed at the European Council meeting in Corfu on June 24, 1994. By this time, however, accession was not particularly popular any more among the people in the candidate countries. Therefore, the required referenda were staged in such a way that the partners tried to build momentum. Austria went first on June 12, 1994 and secured 66.4% of the popular vote for membership.⁷⁸ Finland was second on October 16, 1994 and still got a respectable 56.9% in support. Then came Sweden. The national debate in Sweden had been particularly acrimonious and the government had been accused of having sold out on Swedish interests. Nevertheless, on November 13, 1994, 52% of Swedes voted in favor of EU membership. This rather narrow result was enough for Sweden but not to sway the sceptics in Norway. On November 28, 1994, 52.5% of Norwegians voted against membership in the EU and the country had to withdraw its accession agreement for a second time.

III. THE GREAT EASTERN ENLARGEMENT 2004–2007

While the EU was still finalizing the accession of the EFTA group, the fall of the Iron Curtain and the reforms in Central and Eastern Europe had already yielded a number of additional applications for membership.⁷⁹ Thus, it was clear that the EU

78. In the negotiations, Austria had used a model of large delegations. Where the other candidates sent only a small number of experts from the respective ministries to the negotiations on a particular chapter of the *acquis*, Austria sent large delegations including politicians from opposition parties and even representatives of employer associations, trade unions, and civil society organizations. While this often produced a level of ridicule in Brussels, it worked like a charm in the campaign before the referendum, with different organizations all confirming that the overall package deal was a good one even if some elements did not seem ideal.

79. Hungary (March 31, 1994) and Poland (April 5, 1994) had already formally applied. Other pending applications included Turkey (April 14, 1987), Malta (July 3, 1990), and Cyprus (July 3, 1990). More importantly, it was clear that other CEECs, who

had to take a position first, *whether* to plan for accession of the Central and Eastern European Countries (CEECs) and second, *how* to integrate countries that were still very different from the Western European states. In particular, the CEECs did not share the same post-World War II history, did not have stable and functioning democracies, had limited experience with market economy, and even less experience with respect of human rights and rule of law.⁸⁰

Prior to Gorbachev's policy shift in 1986 toward Glasnost (openness) and Perestroika (restructuring), the EU had very little contact and experience with the CEECs. The Soviet Union had created its own integrated market with the Eastern European satellite states, the COMECON or CMEA.⁸¹ The EU and the CMEA did not have direct relations, only indirectly via their member governments. Since the CMEA countries were also not members of the GATT and, therefore, subject to high import duties and frequent antidumping procedures on their (industrial) exports to the West, trade between the two blocks was limited. The motives for Gorbachev's policy shift will never be fully clear. Arguably, he just wanted to improve the efficiencies of the socialist economies to better keep up with the West, in particular after Reagan accelerated the arms race in 1979 and the Soviet Union fell more and more behind. However, after a landmark speech by the Soviet leader at the UN

had already achieved or were negotiating association agreements with the EU, were in the process of preparing formal applications for membership.

80. Specifically with regard to rule of law, see Frank Emmert, *Rule of Law in Central and Eastern Europe*, 32 *FORDHAM INT'L L.J.* 551, 553, 578–80 (2009); Zdeněk Kühn, *European Law in the Empires of Mechanical Jurisprudence: The Judicial Application of European Law in Central and Eastern Europe Candidate Countries*, 1 *CROATIAN Y.B. EUR. L. & POL'Y* 55, 55 (2005). More generally Zdeněk Kühn, *World Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement*, 52 *AM. J. COMP. L.* 531 (2004); see also SLAVENKA DRAKULIĆ, *CAFÉ EUROPA—LIFE AFTER COMMUNISM* (1996).

81. This "Council for Mutual Economic Assistance" was actually larger than the EU at the end of the 1980s. It also included six founding members as of 1949 (Bulgaria, Czechoslovakia, Hungary, Poland, Romania, and the Soviet Union) and then grew to include Albania, East Germany, Mongolia, Cuba, Vietnam, and a couple of observers, with a total of 450 million people on three continents, compared to about 350 million people in the twelve Western European Member States of the EU. However, as the CMEA was based on non-market economies, production and prices were centrally planned, mostly in Moscow, and this created the well-known inefficiencies of the socialist economies. The CMEA ended in 1991.

in December 1988,⁸² Soviet control over the CEECs quickly disintegrated and the Communist regimes in Poland,⁸³ Hungary,⁸⁴ East Germany,⁸⁵ Czechoslovakia,⁸⁶ Bulgaria,⁸⁷ and Romania⁸⁸ all fell within months of each other in 1989-1990.

82. In this speech he announced a reduction of Soviet troops in the CEECs by 500,000 over the next two years and declared "that force and the threat of force can no longer be, and should not be instruments of foreign policy." Insofar, the speech would still be consistent with the view that he was mainly concerned about losing the arms race and wanted to focus limited resources more effectively. However, he also mentioned "[f]reedom of choice" as "a universal principle" in the context of countries pursuing "both the capitalist and socialist systems." Intended or not, this was interpreted as a signal in the CEECs that the Soviet Union would no longer resort to force to prevent a re-orientation of these societies. Mikhail Gorbachev, Soviet Gen. Sec'y, Address at the 43rd United Nations General Assembly Session (Dec. 7, 1988), *available at* http://isc.temple.edu/hist249/course/Documents/gorbachev_speech_to_UN.htm.

83. Round-table negotiations between the communist Government and the Solidarity trade union began on February 6, 1989 and by August 24, 1989. Tadeusz Mazowiecki was the first freely elected non-communist prime minister in an Eastern block country.

84. As of the early summer 1989, Hungary no longer prevented East German tourists from climbing over the fence of the West German embassy in Budapest to seek asylum there. This triggered a flood of thousands and later tens of thousands of East Germans trying to reach West Germany via Hungary and on September 11, 1989, Hungary simply opened its border to the West. On October 23, 1989, Hungary itself adopted a new constitution providing for free elections, which were held in May 1990.

85. The situation of the East German regime became completely untenable after Hungary opened its borders and thousands of East Germans left for West Germany literally every day as of September 1989. General Secretary Honecker was ousted on October 18, 1989 and, in an effort to regain control over daily demonstrations, new "travel regulations" were adopted on November 9, 1989, that the crowds immediately interpreted to the effect that force would no longer be used at the border of West Germany. The wall came down that very night, a caretaker government was installed by early December, and less than a year later, on October 3, 1990, East Germany was no more.

86. The so-called Velvet Revolution started with student protests on November 17, 1989, which quickly grew into large daily demonstrations in the center of Prague. By November 24, the communist leadership had resigned and within a month, Alexander Dubček (speaker of parliament) and Václav Havel (president) took over as elected leaders. The first free elections were held in June 1990.

87. Inspired by the uprisings in other CEECs, regular demonstrations started in Bulgaria in November 1989 and by December 11, 1989, the communist government had to resign. Like in Czechoslovakia, the first free elections were held in June 1990.

88. Romania experienced the highest level of violence in the context of the 1989 uprisings. Large scale demonstrations started on December 16, 1989 in Timișoara and spread to Bucharest the next day. President Ceaușescu brought in the military to contain the protests and over 1100 died in street fighting in the following days. This caused increasing defections in the armed forces and on December 22 the dictator and his wife were arrested and, after a trial that lasted all of two hours, both were sentenced to death and immediately executed on December 25, 1989. The revolution in Romania

Even the once mighty Soviet Union itself ceased to exist at the end of 1991, triggering the independence of the three Baltic States and eleven other nations.

As a first step in formalizing totally new relations with the newly independent CEECs, the EU offered Trade and Cooperation Agreements on a bilateral basis. EU Commission President Jacques Delors, still riding a wave of support for the success of the 1992 Internal Market program, carved out a lead role for the EU Commission by coordinating the aid from the Western industrialized countries (G24) to the CEECs. This led to the establishment of the EU's PHARE program (Pologne-Hongrie Assistance à la Restructuration des Économies)⁸⁹ and the European Bank for Reconstruction and Development ("EBRD") in London.⁹⁰ Although large amounts

was not only much more violent than in the other CEECs, it was also less successful. After the ouster of Ceaușescu, the "National Salvation Front," essentially a gathering of mid-level communist bureaucrats, took over at first provisionally and then managed to win several elections and dominate Romanian politics for more than a decade.

89. See Council Regulation 3906/89, Economic Aid to the Republic of Hungary and the Polish People's Republic, 1989 O.J. L 375/11 (EC). In English, the acronym PHARE stands for "Poland and Hungary Assistance for Restructuring the Economies;" it was subsequently expanded to all ten candidate countries. PHARE was amended in 1999, see Council Regulation 1266/1999 on Coordinating Aid to the Applicant Countries in the Framework of the Pre-accession Strategy and Amending Regulation (EEC) No 3906/89, 1999 O.J. L 161/68, and supplemented with SAPARD, the Special Accession Programme for Agriculture and Rural Development. See Council Regulation 1268/1999, Community Support for Pre-Accession Measures for Agriculture and Rural Development in the Applicant Countries of Central and Eastern Europe in the Pre-Accession Period, 1999 O.J. L 161/87, at 89. Together with SAPARD, the EU added ISPA, the Instrument for Structural Policies for Pre-Accession, with a focus on infrastructure development. See Council Regulation 1267/1999, Establishing an Instrument for Structural Policies for Pre-Accession, 1999 O.J. L 161/73. In 2000, another program was added specifically for the Western Balkans, see Regulation 2666/2000 on Community Assistance for Reconstruction, Development, and Stabilisation (CARDS), 2000 O.J. L 306/1. All earlier instruments were replaced in 2006 by a unified Instrument for Pre-Accession Assistance ("IPA"), see Council Regulation 1085/2006 Establishing an Instrument for Pre-Accession Assistance (IPA), 2006 O.J. L 210/82, and the implementing Commission Regulation 718/2007 Implementing Council Regulation (EC) No 1085/2006 Establishing an Instrument for Pre-accession Assistance (IPA), 2007 O.J. L 170/1. From 2007 to 2014, a total of EU€11.5 billion were made available for the Western Balkans and Turkey under the IPA.

90. By being open to membership of the United States, Japan, and others, the EBRD channeled aid from outside the EU into the CEECs. Nowadays, its mandate is expanded to include Central Asia and the Eastern Mediterranean. See *The History of the EBRD*, EUR. BANK FOR RECONSTRUCTION & DEV. (Dec. 18, 2012), <http://www.ebrd.com/pages/about/history.shtml>.

of money and innumerable trips by Western experts were deployed to support the transition in the CEECs, the results were a bit mixed.⁹¹

From early on this approach established an asymmetrical relationship, in which the EC set the conditions for assistance, and ultimately for accession. . . . [The] focus on assistance [also] revealed a perception of transition as a predominantly technical problem, solvable through a transfer of expertise and financial resources.⁹²

Increasingly, the EU came to recognize, however, that forty and more years of socialism had deformed not only the economies but also the way things were done—or not done—in the CEECs. Soviet central planning and command economy had always been unpopular among the majority of politicians and administrators in the satellite states. With time, they had learned to meet the targets of the recurrent five year plans without breaking their backs, i.e. to meet them on paper and not necessarily in reality.⁹³ This skill came in handy now, as the CEECs were faced with reform pressure from the EU.

91. For the period 2000 to 2006 alone, the EU budget provided pre-accession assistance for a total of EU€18.430 billion (PHARE, ISPA and SAPARD together). See EU COMM'N, DIRECTORATE-GEN. FOR THE BUDGET, EU BUDGET 2008 FINANCIAL REPORT 82 (2009), available at http://ec.europa.eu/budget/library/biblio/publications/2008/fin_report/fin_report_08_en.pdf. The lion's share of this went to PHARE. Nevertheless, an internal review of PHARE done in 2007 concludes that "[on] the whole, the results and impacts of Phare support were rather mixed . . . Prospects for sustainability are also mixed" and "the absence of an overall support strategy turned Phare into an essentially reactive, activity-focused instrument which did not sufficiently address the interdependence between the political and economic criteria and the acquis." See EU COMM'N, DIRECTORATE-GEN. ENLARGEMENT, SUPPORTING ENLARGEMENT—WHAT DOES EVALUATION SHOW?, at I, II (2007), available at http://ec.europa.eu/enlargement/pdf/financial_assistance/phare/evaluation/consolidated_summary_report_phare_ex_post_eval.pdf.

92. Ulrich Sedelmeier & Helen Wallace, *Eastern Enlargement: Strategy or Second Thought?*, in POLICY-MAKING IN THE EUROPEAN UNION 427, 434 (Helen Wallace & William Wallace eds., 4th ed. 2000). For a critical review of the typical EU expert training in Central and Eastern Europe in those early years, based on first-hand experience of the authors, see Frank Emmert, *Introducing EU Competition Law and Policy in Central and Eastern Europe: Requirements in Theory and Problems in Practice*, 27 FORDHAM INT'L L.J. 642, 671–73 (2004).

93. See, in particular, Frank Emmert, *Administrative and Court Reform in Central and Eastern Europe*, 9 EURO. L.J. 288 (2003).

As Brussels came to understand that successful reforms in the region would be inevitable⁹⁴ but would also require a coherent long-term strategy, it began to develop a new policy, a veritable *pre-accession strategy*. Thus, as the next step in the development of closer relations with the CEECs, the EU negotiated a series of association agreements. Although called “Europe Agreements”⁹⁵ and thus at least potentially distinct from “normal” association agreements, they were focused on a gradual opening of market access for goods and to a lesser extent the other factors of production (services, establishment, and capital). Free movement of workers was not provided, only non-discriminatory treatment of those nationals from the CEECs who were already lawfully employed in the EU and vice versa. Like in other association agreements, Association Councils were created as joint decision-making bodies for certain matters falling under the Agreements.⁹⁶ However, the Europe Agreements were still intentionally vague on the *whether* and *how* of full membership.⁹⁷ The Gordian knot was cut at the meeting of the European Council in Copenhagen in June 1993. The heads of state and government of the twelve decided as follows:

The European Council today agreed that the associated countries in Central and Eastern Europe that so desire shall become members of the European Union. Accession will take place as soon as an associated country is able to assume

94. Failure in the CEECs was not an option. Unless the West was going to export stability and progress to the East, the East would start exporting instability and other problems to the West. To continue on its mission of securing peace and prosperity for Europe, the EU now had to do so for all of Europe.

95. The Agreement with Poland was approved on December 13, 1993, by the Council after ratification by the twelve Member States of the EC, the EEC, the ECSC, and Euratom, as well as Poland. See 1993 O.J. L 348/1. For the agreement with Hungary, see 1993 O.J. L 347/1; for the agreement with Romania, see 1994 O.J. L 357/1; for Bulgaria, see 1994 O.J. L 358/1; for the Slovak Republic, see 1994 O.J. L 359/1; for the agreement with the Czech Republic, see 1994 O.J. L 360/1; for the agreement with Latvia, see 1998 O.J. L 26/1; for the agreement with Lithuania, see 1998 O.J. L 51/1; for the agreement with Estonia, see 1998 O.J. L 68/1; for the agreement with Slovenia, see 1999 O.J. L 51/3.

96. For more detailed discussion of the Europe Agreements, see TATHAM, *supra* note 2, at 76–82.

97. In the preambles, there was a passage “Recognizing the fact that the final objective of [the associated country] is to become a member of the Community and that this association, in the view of the Parties, will help to achieve this objective.” See, e.g., 1993 O.J. L 348/3 (referring to Poland). Beyond that, no promises were made, however.

the obligations of membership by satisfying the economic and political conditions required.

Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.

The Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries.⁹⁸

Pursuant to this mandate, the Commission developed "The Europe Agreements and Beyond: a Strategy to Prepare the Countries of Central Europe for Accession" in July 1994,⁹⁹ and then the White Paper on the "Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union" in May 1995.¹⁰⁰ Next came the even more comprehensive "Agenda 2000 for a Stronger and Wider Union" of July 1997¹⁰¹ which addressed the mutual dependency of widening and deepening. Step by step, this took accession from a *procedure* to a fully fledged enlargement *policy*.

On the inside, the EU had to get ready for the biggest and most challenging enlargement in its history by making numerous adjustments to the decision-making procedures. From the outset, small Member States have been structurally over-represented in the institutions. For example, until and

98. These are the so-called "Copenhagen Criteria." See Presidency Conclusions, Copenhagen European Council 13 (June 21-22, 1993).

99. The Europe Agreements and Beyond: A Strategy to Prepare the Countries of Central and Eastern Europe for Accession, COM (1994) 320 final (July 13, 1994). This was by and large adopted at the European Council in Essen on December 9-10, 1994.

100. Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union, COM (1995) 163 final (May 3, 1995). For analysis see, for example, Marc-André Gaudissart & Adinda Sinnaeve, *The Role of the White Paper in the Preparation of the Eastern Enlargement*, in ENLARGING THE EUROPEAN UNION: RELATIONS BETWEEN THE EU AND CENTRAL AND EASTERN EUROPE 41 (Marc Maresceau ed., 1997).

101. E.U. BULL., no. 5 (1997).

including the EFTA enlargement in 1995, Germany as the largest Member State had 99 seats in the European Parliament and 10 votes in qualified majority voting in the Council of Ministers. By comparison, Luxembourg as the smallest Member State had 6 seats in the European Parliament and 2 votes in the Council. Given the fact that the German population of around 82 million is about 200 times larger than Luxembourg's population of less than 500,000, per capita, the Luxembourgers are about twelve times better represented in the Parliament and have about 40 times greater voting power in the Council. Given the very significant difference in population size, there is no easy solution to this imbalance. For example, if the electoral districts for the European Parliament were to be of equal size to make the vote of each European have equal weight, the size would have to be equal to the smallest Member State. This would give Luxembourg one single delegate in the European Parliament while Germany would get to send almost 200. If all German members of the EP were to vote in the same way - by nationality rather than political affiliation, which is unlikely but not impossible - all delegates of all small Member States¹⁰² might as well stay at home because they would collectively number only to about 180.¹⁰³ The unequal voting power of the citizens in different EU Member States has already triggered several challenges against German allegiance to the EU Treaties before the German Constitutional Court. In 1995, in an unusual exercise of self-restraint, the Bundesverfassungsgericht still held that German standards for equality of the vote could not be

102. For the present purposes, the "small" Member States are those with populations of around 15 million and less, i.e. the Netherlands (16.5 million), Greece (11.2 million), Belgium (10.7 million), Portugal (10.6 million), Sweden (9.2 million), Austria (8.3 million), Denmark (5.5 million), Finland (5.3 million), Ireland (4.5 million), and Luxembourg (0.5 million). Among the 15 Members at the time, only Spain was medium sized (45.8 million), and the others were large Members, namely Germany (82 million), France (64.3 million), the United Kingdom (61.7 million), and Italy (60 million). See *EU Member Countries*, EU, <http://europa.eu/about-eu/countries/member-countries> (last visited June 3, 2014).

103. For analysis, see Frank Emmert, *Die institutionelle Reform der Europäischen Union und die künftige Rolle des Europäischen Parlaments*, in *DEMOCRACY AND FEDERALISM IN EUROPEAN INTEGRATION* 63 (J.H.H. Weiler et al. eds., Swiss Papers on European Integration, 1995).

applied to the elections to the European Parliament¹⁰⁴ and that the specific nature of the European Union as “a union of sovereign Member States” could justify a different approach.¹⁰⁵

However, the problem with the structural over-representation of the small Member States was going to get much worse with the Great Eastern Enlargement, since nine of the ten candidates in Central and Eastern Europe and both Mediterranean islands were going to be small, with only Poland as a medium sized Member.¹⁰⁶ Since the members of the European Parliament have an independent mandate and are not subject to instructions from their home countries, the four large old Member States were much more interested in the dilution of their voting power in the Council with the addition of all the new small countries than in their representation in the European Parliament. This was the most difficult issue to be resolved in two subsequent treaty reforms. A first but insufficient step was taken with the signing of the Treaty of Amsterdam on 2 October 1997. On the bright side, Amsterdam moved more of the Council’s decisions into genuine co-decision with the European Parliament as per Article 294 TFEU. On the dark side, Amsterdam also effected the first re-numbering of all articles in

104. While Article 38(1) of the German *Grundgesetz* (Constitution) mandates that elections for the German *Bundestag* (Parliament) have to be “general, direct, free, equal, and secret” (official translation by the Press and Information Office of the Federal Government, emphasis added), Article 39(2) of the Charter of Fundamental Rights of the Union requires only “direct universal suffrage in a free and secret ballot” without a requirement of strict equality.

105. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 31, 1995, 2 BvR 635/95 (Ger.), as quoted in II THE RELATIONSHIP BETWEEN EUROPEAN COMMUNITY LAW AND NATIONAL LAW: THE CASES 255 (Andrew Oppenheimer ed., 2003). When the *Bundesverfassungsgericht* had a chance to rule on Germany’s ratification of the Lisbon Treaty of December 13, 2007, it abandoned the self-restraint and complained bitterly that the European system did not follow the German principles of equal voting power. See BVerfG, June 30, 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, and 2 BvR 182/09. For a very critical review of the latter decision, see EUROPEAN PARLIAMENT, DIRECTORATE-GEN. FOR INTERNAL POLICIES, POLICY DEPARTMENT CITIZEN’S RIGHTS AND CONSTITUTIONAL AFFAIRS, CITIZENS’ WEIGHT OF VOTE IN SELECTED FEDERAL SYSTEMS, PE 453.168 (April 2011), available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453168/IPOL-AFCO_ET\(2011\)453168_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453168/IPOL-AFCO_ET(2011)453168_EN.pdf)

106. Poland (38.1 million), Romania (21.5 million), Czech Republic (10.5 million), Hungary (10 million), Bulgaria (7.6 million), Slovakia (5.4 million), Lithuania (3.3 million), Latvia (2.3 million), Slovenia (2 million), Estonia (1.3 million), Cyprus (0.8 million), and Malta (0.4 million). See *EU Member Countries*, supra note 102.

the two main Treaties, not exactly helping to bring the EU closer to the citizens. Since many important questions remained unresolved, another intergovernmental conference was launched almost immediately and resulted, on 26 February 2001, in the signing of the Treaty of Nice, which brought the breakthrough in the voting mechanisms in the Council of Ministers by adding a population threshold¹⁰⁷ and thus ensuring that many small Member States would never be able to dictate what a handful of large Member States would have to do—and pay for.¹⁰⁸

On the inside the EU was now ready for the Big Bang or Great Eastern Enlargement.¹⁰⁹ Of course, in parallel to these

107. See TFEU, *supra* note 2, art. 238(2)–(3), 2012 O.J. C 326, at 153–54. For further analysis, see, for example, Eric Philippart & Monika Sie Dhian Ho, *Peddalling Against the Wind—Strategies to Strengthen the EU's Capacity to Act in the Context of Enlargement* (WRR Scientific Council for Government Policy, Working Document W115, The Hague 2001).

108. Seventy-one percent of the EU budget in 2012 came from GNI-based contributions of the Member States and 10.7% came from VAT-based contributions of the Member States. In both categories, the large Member States tend to make much larger contributions than the small Member States. The rest of the budget came from customs duties (12%) and other own revenue sources of the EU (6.2%). See *Financial Programming and Budget: EU Expenditure and Revenue*, EU, http://ec.europa.eu/budget/figures/interactive/index_en.cfm (last visited June 3, 2014).

109. It would be beyond the scope of the present Article to also discuss in detail the problems faced by the old Member States with regard to the costs of enlargement, respectively the reform of the Common Agricultural Policy and the structural funds. In a nutshell, if the CEECs were to be integrated into the old rules of the CAP, the budget for agricultural support measures would have to be doubled because of the relatively large share of the population, in particular in Poland, living off the land, and their relatively low level of income. Similar problems existed with regard to the structural funds because very nearly all regions in the new Member States would have qualified for the highest level of support under the old rules. The resolution in the end took three elements. First, a new financial framework was agreed at the special European Council meeting in Berlin in March 1999. Second, it was agreed that the farmers in the CEECs would not receive fully equivalent levels of subsidies from day one of membership on the basis of the lower levels of income and prices and thus higher value of those subsidies in the CEECs. By phasing-in the support payments from a level of 40% of Western subsidies, the cost of the agricultural component of enlargement was immediately cut in half. See, e.g., W. Münch, *Effects of CEEC-EU Accession on Agricultural Markets in the CEEC and on Government Expenditure*, in *CENTRAL AND EASTERN EUROPEAN AGRICULTURE IN AN EXPANDING EUROPEAN UNION* 113 (S. Tangermann & M. Banse eds., 2000). Third, the CEECs were also going to be treated differently with regard to payments under the structural funds. For the period 2007–2013, the so-called policy of economic and social cohesion had a budget allocation of some EU€300 billion, the bulk of which was spent in regions with a GDP per capita of less than 75% of the EU average. Had they been treated equally, Romania, for example, would have been

efforts at deepening the integration process and streamlining the decision-making, the efforts at widening, i.e. the preparations of and negotiations with the candidates, had continued at full speed. In spite of the somewhat mixed results of the PHARE and other pre-accession support instruments, the CEECs had made remarkable progress with regard to the re-orientation of their economies from East to West. In their race for opportunities, international and domestic investors became early movers and essentially treated the CEECs as if they already enjoyed the political stability and legal certainty that EU membership was going to provide. On the institutional front, the CEECs became partners in the Structured Relationship and the Political Dialogue postulated in the Europe Agreements, providing for ever more bilateral and multilateral meetings. In the old Member States, these meetings were able to build a level of comfort with and trust in the candidates, while the latter were learning the rules of the games played in the halls of power in Brussels, Strasbourg and Luxembourg, which in turn had an effect of stabilization and moderation on the governments in the CEECs.¹¹⁰ Progress was not even across the CEECs, however. Already in the Agenda 2000, the Commission had emphasized that each country would be evaluated on its own merits—the so-called regatta approach—and had proposed that accession

eligible for up to EU€400 per capita or almost EU€9 billion per year. This could have amounted to as much as 36% of GDP in EU support payments. However, economists have shown that countries can typically not absorb more than about 4% of GDP in foreign aid without serious problems of duplication, waste, and corruption. See STUART CROFT ET AL., THE ENLARGEMENT OF EUROPE 75–77 (1999) (citing K. Hughes, *Managing the Costs of Enlargement: The Structural Funds* (presented at the conference “Enlarging the European Union: The Way Forward,” Birmingham, AL, July, 1–2, 1997)). By capping the structural fund payments at 4% of GDP the cost of this component of enlargement also became instantly more manageable. In the end, countries like Romania were not even able to absorb that 4% of GDP—i.e. to propose and manage deserving projects for the use of the funds. For example, in 2007 Romania was able to absorb only 21.7% of the reduced funding it would have been eligible for. This meant, inter alia, that Romania in some years ended up paying more into the EU budget than it got out of the EU budget. See Iulian Viorel Braşoveanu et al., *Structural and Cohesion Funds: Theoretical and Statistical Aspects in Romania and EU*, 11 TRANSYLVANIAN REV. ADMIN. SCI. 30 (2011); Georghe Zaman & George Georgescu, *Structural Fund Absorption: A New Challenge for Romania?*, 10 ROMANIAN J. ECON. FORECASTING, 136.

110. See, e.g., Barbara Lippert, Gaby Umbach & Wolfgang Wessels, *Europeanization of CEE Executives: EU Membership Negotiations as a Shaping Power*, 8 J. EURO. PUB. POL'Y 980 (2001).

negotiations should first be opened with the Czech Republic, Hungary, Poland, Slovenia, and Estonia, while the other candidates would first have to make more progress in their economic, legal, and political reforms. To monitor each country's progress and to emphasize areas that were not advancing in a satisfactory manner, the Commission issued regular Progress Reports for each candidate country. The screening process determining the status quo of the candidate countries' legislative and administrative structures and their compatibility with the *acquis communautaire* for the CEECs started in the summer of 1998 and the first chapters for the negotiations were opened soon thereafter. From 2000, accession of a first group by the year 2002 seemed realistic and that group kept growing, eventually including all candidates except Bulgaria, Romania, and Turkey. To facilitate the timetable, the Commission prepared a roadmap suggesting priorities and potential obligations that could be subject to transitional arrangements after accession. The roadmap was endorsed by the Nice European Council in December 2000 and the goal of accession before the next European Parliament elections in June 2004 was set.¹¹¹ Negotiations with Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, and Malta were concluded in December 2002, the European Parliament gave its assent to the accession treaties on April 9, 2003, and then the respective treaties went to the 15 EU Member States and the 10 candidate countries for ratification. Bulgaria and Romania, however, were given an additional three years to complete their preparations for membership, and Turkey was not given any specific dates. As is well known, eight CEECs and two Mediterranean islands joined the EU on 1 May 2004, bringing the membership of the Union from 15 to 25, while Bulgaria and Romania finally joined in 2007. Turkey, by contrast, has been repeatedly sidelined for largely political reasons and is still on and off in negotiations today.

What this all shows is that to outsiders, whether they are candidates for accession or countries seeking association or other bilateral agreements, the EU is "a tough and unyielding

111. For details, see ALLAN F. TATHAM, *ENLARGEMENT OF THE EUROPEAN UNION* 84-98 (2009).

partner because 95% of its agenda is immovable.”¹¹² On the one hand, the EU generally does not re-negotiate the *acquis*. Any candidate for membership has to take it over lock stock and barrel and, at best, can hope to negotiate some transitional periods. On the other hand, any agreement with the EU requires unanimity on the side of all existing Member States. De facto, the candidate has to please everyone and make promises it may neither be willing nor able to keep. Indeed, Maggie Thatcher is supposed to have given the following advice to Spanish Prime Minister Felipe Gonzalez in the 1980s: accession negotiations consist of “agreeing to a whole lot of things to get in and then, once in, trying to undo all the amazing things you agreed to do in the first place.”¹¹³ After six rounds of enlargements and plenty of promises, many kept, some not so much, it will not surprise anyone that the EU is trying ever harder to front-load the accession procedure and require and verify that most of the promises are already delivered before a country is given the keys to the kingdom and the power to start undoing.

IV. THE NEGOTIATIONS WITH CROATIA

A. Brief History of Croatia’s Negotiations with the EU

Becoming an EU Member State has been the key strategic goal of Croatia ever since its international recognition as an independent state after the dismemberment of Yugoslavia. However, domestic and international circumstances, most notably the 1991-1995 war with Serbia,¹¹⁴ and the composition

112. HEATHER GRABBE, CTR. FOR EUR. REFORM, WHEN NEGOTIATIONS BEGIN: THE NEXT PHASE IN EU-TURKEY RELATIONS 2 (2004), available at http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2011/essay_turkey_hg_nov04-2169.pdf.

113. Susannah Verney, with help from J.I. Torreblanca, dug this up in the *Financial Times* of May 9, 1991. See Verney, *supra* note 58, at 317.

114. Chris Patten, then Commissioner for External Relations, stated on the occasion of the Commission’s presentation of Croatia’s Avis to the European Parliament on April 20, 2004: “Had it not been for the legacy of war, [Croatia] might well have got to this stage on the road to membership much earlier.” Rt. Hon Chris Patten, Commissioner for External Relations, Commission’s presentation of Croatia’s Avis to the European Parliament, European Parliament Plenary Session, Strasbourg (Apr. 20, 2004), available at http://europa.eu/rapid/press-release_SPEECH-04-185_en.htm. Anyone wanting to understand the background to the violent dissolution of

and priorities of several successive Croatian governments, did not allow the country to be part of the fifth and sixth enlargements of 2004 and 2007. The EU complained, in particular, that the Croatian governments and the way they went about their business, did not provide sufficient guarantees for democracy, respect of human rights and rule of law, and effective combat of corruption. The breakthrough occurred when the Stabilisation and Association Agreement (“SAA”)¹¹⁵ was signed with the EU on October 29, 2001. Croatia was the second country to sign an SAA with the EU, after Macedonia, and that agreement represented the first formal contractual step in institutionalizing the relationship of Croatia with the EU. The agreement entered into force on February 1, 2005 following the ratification by the EU Member States, the EU itself, and Croatia.¹¹⁶

Even before the entry into force of the SAA, Croatia had applied for full EU membership on February 21, 2003, and the European Commission issued on April 20, 2004 a positive *avis* on the application of Croatia and recommended that negotiations for accession to the European Union should be opened. While generally positive, the Commission *avis* did recall some remaining legacies of the war with Serbia, in particular Croatia’s failure to locate and arrest a military leader indicted in front of the International Criminal Tribunal for the former Yugoslavia (“ICTY”)¹¹⁷:

Yugoslavia should read, in this order, REBECCA WEST, *BLACK LAMB AND GREY FALCON—A JOURNEY THROUGH YUGOSLAVIA* (1942); MISHA GLENNY, *THE FALL OF YUGOSLAVIA—THE THIRD BALKAN WAR* (1992); PAUL MOJZES, *YUGOSLAVIAN INFERNO—ETHNORELIGIOUS WARFARE IN THE BALKANS* (1994); SABRINA P. RAMET, *THE THREE YUGOSLAVIAS—STATE BUILDING AND LEGITIMATION, 1918-2005* (2006).

115. Stabilization and Association Agreements were used for the Western Balkan countries instead of the “Europe Agreements” used for the CEECs.

116. Stabilisation and Association Agreement between the European Communities and Their Member States, of the One Part, and the Republic of Croatia, of the Other Part, 2005 O.J. L 26/3.

117. The official name is “International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991.” The tribunal is a specialized court of the United Nations; its judges have the same status as the judges on the International Court of Justice. For more information, see *About the ICTY*, ICTY, <http://www.icty.org/sections/AbouttheICTY> (last visited Apr. 18, 2014).

Croatia is a functioning democracy, with stable institutions guaranteeing the rule of law. There are no major problems regarding the respect of fundamental rights. In April 2004, the ICTY Prosecutor stated that Croatia is now cooperating fully with ICTY. Croatia needs to maintain full cooperation and take all necessary steps to ensure that the remaining indictee is located and transferred to ICTY. Croatia needs to make additional efforts in the field of minority rights, refugee returns, judiciary reform, regional co-operation and the fight against corruption. On this basis, the Commission confirms that Croatia meets the political criteria set by the Copenhagen European Council in 1993 and the Stabilisation and Association Process conditionalities established by the Council in 1997.

Croatia can be regarded as a functioning market economy. It should be able to cope with competitive pressure and market forces within the Union in the medium term, provided that it continues implementing its reform programme to remove remaining weaknesses.

Croatia will be in a position to take on the other obligations of membership in the medium term, provided that considerable efforts are made to align its legislation with the *acquis* and ensure its implementation and enforcement. However full compliance with the *acquis* in the field of environment could be achieved only in the long term and would necessitate increased levels of investment.¹¹⁸

These concluding remarks encompass the core elements which were evaluated regarding the country's readiness to start negotiations on accession to the EU. They remain very important for future applicants, naturally taking into account different and/or additional elements, depending on the circumstances of each individual case.¹¹⁹

118. Communication from the Commission, Opinion on Croatia's Application for Membership of the European Union, at 120–21, COM (2004) 257 final (Apr. 20, 2004).

119. See Communication from the Commission, Commission Opinion on Montenegro's Application for Membership of the European Union, COM (2010) 670 final (Nov. 9, 2010); Communication from the Commission, Commission Opinion on Serbia's Application for Membership of the European Union, at 11–12, COM (2011) 668 final (Oct. 12, 2011). The Opinion on Serbia's application contains also the element of its relations with Kosovo. On the other hand, the Opinion on Albania's application naturally did not contain the section on cooperation with the International Criminal Tribunal for the former Yugoslavia; see Communication from the Commission, Commission Opinion on Albania's Application for Membership of the

On the basis of the Commission's Opinion, Croatia was granted candidate country status by the European Council on June 18, 2004¹²⁰ and a date for the beginning of accession negotiations was originally set for March 17, 2005. However, one day before that date, the EU postponed the commencement of negotiations because the ICTY Chief Prosecutor Carla del Ponte had meanwhile assessed the Croatian efforts to capture the fugitive General Ante Gotovina, the above-mentioned indictee, as neither timely nor sufficient.¹²¹ Eventually, after Croatia was able to persuade the Chief Prosecutor that it was fully cooperating and not responsible for the failure to arrest General Gotovina,¹²² the negotiations commenced with the first Intergovernmental Conference on Accession Between Croatia and the EU on October 3, 2005,¹²³ the same day the EU started the accession negotiations with Turkey.

For the negotiations with Croatia, the *acquis* was divided into 35 chapters,¹²⁴ four more than the usual 31, since some

European Union, at COM (2010) 680 final (Nov. 9, 2010). Equally, the Opinion on Iceland's application was drafted in the same format, reflecting essentially the same elements but with substantially different wording, which is the consequence of Iceland's membership in the European Economic Area and its existing application of relevant parts of the *acquis*; see Communication from the Commission, Commission Opinion on Iceland's Application for Membership of the European Union, COM (2010) 62 final (Feb. 24, 2010).

120. See Presidency Conclusions, Brussels European Council, (June 17–18, 2004), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/81742.pdf.

121. See Rep. of the Int'l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, ¶ 188, U.N. Doc. A/60/267 (Aug. 17, 2005).

122. This is a rare but not the only case in which the EU based its decision regarding the opening of accession negotiations on the opinion of a third party and not on its own evaluation. One can regard it as an example of the irony of history that General Gotovina, after having being arrested on December 7, 2005, in Spain, was tried before the ICTY for war crimes. His 2011 conviction was eventually overturned by the ICTY Appeals Chamber on November 16, 2012, and Gotovina was immediately released. Croatia still lost half a year on its accession negotiations and suffered considerable international embarrassment. The full judgment in the Gotovina case is available at http://www.icty.org/x/cases/gotovina/acjug/en/121116_judgement.pdf.

123. Actually the negotiations started shortly after midnight, i.e. only on October 4, 2005, but since the agenda was adopted on October 3 and the conference started that day, history would record that October 3, 2005, was the day of the beginning of the negotiations. The Council decision is available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/86442.pdf.

124. 1. Free Movement of Goods; 2 Freedom of Movement for Workers; 3. Right of Establishment and Freedom to Provide Services; 4. Free Movement of Capital; 5.

parts of European law which had previously been in one chapter were divided into several chapters. The decision to break up certain chapters was based on the experience in previous negotiations where these chapters had proven to be especially large and troublesome. The so-called screening process began on October 20, 2005, with the chapter on “Science and Research.” During this procedure, the Commission, in close cooperation with the candidate country, essentially compiles the *status quo ante* of the candidate country’s legislative, regulatory, and administrative structures in order to determine the necessary changes to implement the *acquis communautaire* and to ensure the administrative and institutional capacity for its application. The screening procedure is concluded with a screening report from the Commission to the Member States which recommends either that accession negotiations can be opened, or that they should not be opened until certain benchmarks have been met, or that they should not be opened at all at the present time.¹²⁵ In the case of Croatia, the process of

Public Procurement; 6. Company Law; 7. Intellectual Property Law; 8. Competition Policy; 9. Financial Services; 10. Information Society and Media; 11. Agriculture and Rural Development; 12. Food Safety, Veterinary and Phytosanitary Policy; 13. Fisheries; 14. Transport Policy; 15. Energy; 16. Taxation; 17. Economic and Monetary Policy; 18. Statistics; 19. Social Policy and Employment; 20. Enterprise and Industrial Policy; 21. Trans-European Networks; 22. Regional Policy and Coordination of Structural Instruments; 23. Judiciary and Fundamental Rights; 24. Justice, Freedom and Security; 25. Science and Research; 26. Education and Culture; 27. Environment; 28. Consumer and Health Protection; 29. Customs Union; 30. External Relations; 31. Foreign, Security and Defence Policy; 32. Financial Control; 33. Financial and Budgetary Provisions; 34. Institutions; 35. Other Issues. For more information, see *Negotiations Chapters*, DELEGATION OF THE EUROPEAN UNION TO THE REPUBLIC OF CROATIA (June 30, 2011), <http://www.delhrv.ec.europa.eu/?lang=en&content=67>.

125. For example, in the case of Turkey, on December 11, 2006, the Council decided that eight chapters will not be opened and no chapter will be provisionally closed until Turkey agrees to apply to Cyprus the Additional Protocol to the Ankara Agreement. The Ankara Agreement is the Agreement Establishing an Association Between the European Economic Community and Turkey signed in Ankara on September 12, 1962; Commission Regulation 3026/77, Agreement Between the European Economic Community and Turkey Consequent on the Accession of New Member States to the Community, 1977 O.J. L 361/1. The Additional Protocol of November 23, 1970 provides for the transition from the preparatory stage to the gradual application of the internal market rules and the creation of the customs union as of January 1, 1996; see 1972 O.J. L 293/3-56. Additionally, in 2007, France decided to block the opening of five chapters in the negotiations with Turkey and in December 2009, Cyprus announced that it would block the opening of six chapters. For details, see *infra* Part V.C.; *Turkey-EU Relations*, REPUBLIC OF TURKEY MINISTRY OF FOREIGN

screening national compatibility with the 35 *acquis* chapters was completed on October 18, 2006.¹²⁶ Croatia then presented its “negotiating positions” for each chapter and the Commission responded with the negotiating positions of the EU. In the EU positions, the Commission provided opening benchmarks for various chapters, i.e. conditions to be met by Croatia before the negotiations on a particular subject would even be opened. Opening benchmarks typically include the adoption of certain laws or policies or the establishment or enhancement of certain administrative bodies or structures. Once a particular chapter is opened, the negotiations can take from several weeks¹²⁷ to many months or even years and the Commission often develops closing benchmarks, i.e. conditions to be met before the negotiations on the subject are declared successfully completed. Even after chapters are provisionally closed, they can be re-opened at any time as long as negotiations in other chapters continue, as the Commission and/or the Member States see fit.

Originally Croatia had aimed to complete the negotiations in time to be able to accede to the EU in 2007, together with Romania and Bulgaria. However, the negotiations turned out to be tougher than expected on various points. To some extent, Croatia is to blame for this, in particular because of insufficient administrative capacities, i.e. various state institutions were not ready and not reacting in due time to various requests of the EU. Although the Croatian government and the negotiating team were highly motivated and focused, this was not necessarily the case for all ministerial and sub-national administrative units. In a way, the country was mentally not quite ready. These difficulties and the ensuing lengthy duration of the negotiations can be connected to the *acquis*, the sheer quantity and complexity of the material to be covered. However, the duration of the negotiations is also to blame on circumstances for which Croatia is at best partly responsible and even some that have little or nothing to do with the *acquis* and the country’s

AFFAIRS, <http://www.mfa.gov.tr/reasons-between-turkey-and-the-european-union.en.mfa> (last visited Apr. 18, 2014).

126. See *supra* note 124 and accompanying text.

127. In the case of Croatia, the negotiations on Chapter 25 Science and Research and on Chapter 26 Education and Culture were opened and—successfully—closed on the same day. This is possible if there are no differences in the positions of the EU and the candidate country, i.e. the candidate accepts the EU position.

fulfillment of any of the conditions of membership. For example, the negotiations were blocked for ten months by Slovenia due to a border dispute between Croatia and Slovenia. In September 2009, Slovenia removed the restraints on Croatia's negotiations with the EU without prejudice to the international arbitration on the border dispute. Naturally, Slovenia neither had to justify why it had held up the negotiations nor was there any form of reprimand or sanction. This is simply part of the prerogatives of the Member States, those that are in versus those that are not,¹²⁸ because the opening and closing of chapters and even the setting of opening and closing benchmarks requires a Commission proposal and a unanimous decision by the Council.¹²⁹

While a single Member State can hold back a candidate, a consensus between the Member States and the Commission can also accelerate the negotiating process with a country, at least potentially creating exceptions to some of the normal procedural steps. For example, after Iceland applied for membership in July 2009 in the wake of its financial meltdown, several Council members and the Commission publicly contemplated that the accession negotiations with Iceland could be fast-tracked to the extent that Croatia and Iceland could join the European Union together as early as 2011.¹³⁰

128. The Commission tried but was unable to persuade Slovenia to give up its blockade. Only after a number of Member States intervened, was it possible to resolve the issue and move on with the negotiations.

129. By contrast, suspension of negotiations for a serious and persistent breach of the values on which the Union is based, can be proposed by the Commission but also by a third of the Member States, and can be decided by qualified majority vote in the Council. Thus, suspension has a lower threshold.

130. Ollie Rehn, at the time the EU Commissioner in charge of Enlargement, told journalists on January 29, 2009, that "[t]he EU prefers two countries joining at the same time rather than individually. If Iceland applies shortly and the negotiations are rapid, Croatia and Iceland could join the EU in parallel." The reason for this view was not just that joint accession is making the institutional adjustments a bit easier for the EU, otherwise the same logic should have worked for Bulgaria and Romania in 2004 and for Turkey in 2013. However, Iceland was welcome as "one of the oldest democracies in the world and [having a] strategic and economic position [that] would be an asset to the EU." See Ian Traynor & Valur Gunnarsson, *Iceland to be Fast-Tracked into the EU*, GUARDIAN, Jan. 29, 2009, <http://www.theguardian.com/world/2009/jan/30/iceland-join-eu>. In short, many things are possible if they are in the interest of the EU and none of the Member States object.

Croatia ultimately finished its accession negotiations on June 30, 2011 and the Treaty of Accession was signed in Brussels on December 9, 2011.¹³¹ Croatia held a national referendum on accession on January 22, 2012 where 66.25% voted in favor, and 33.13% against. The whole ratification process in Croatia was completed on April 4, 2012. Some of the Member States took considerably longer. Therefore, Croatia became the twenty-eighth Member State of the EU only on July 1, 2013, following the ratification of the Accession Treaty by all 27 Member States.

B. *What Really Are Negotiations on Accession?*

As one can read in any textbook on the EU, accession negotiations are the process by which a candidate country accedes to the European Union and adopts the whole body of European law, the famous *acquis communautaire*. As mentioned above, the main elements of the continuously evolving and expanding *acquis* are the treaties as primary legislation, the regulations, directives, decisions, recommendations and opinions as secondary legislation, as well as other sources of law, in particular the decisions of the European Court of Justice, certain general principles of law, international agreements involving the EU, and other acts (resolutions, declarations, recommendations, guidelines, joint actions, joint positions, etc.). Although the EU has gone through 660 simplification initiatives and has repealed almost 6000 legal acts since 2006, the overall volume of the *acquis* has recently been estimated to have grown to some 160,000 pages. In addition to the sheer quantity, the biggest challenge with the adoption of the *acquis* by a negotiating country, which was also the case with Croatia, is that the *acquis* does not stop evolving and expanding. Rather, it is constantly being amended and supplemented from the

131. To be precise, the Council called on the Commission to complete the negotiations on June 24, 2011, the negotiations were completed with the closing of all chapters on June 30, 2011, and the Commission issued its positive *avis* on October 12. See *Commission Opinion on the Application for Accession to the European Union by the Republic of Croatia*, at 3, COM (2011) 667 final (Oct. 12, 2011). The European Parliament voted its assent on December 1, 2011, the Council unanimously approved the status of Croatia as an acceding country on December 5, 2011, and the Accession Treaty was signed on December 9, 2011.

moment the negotiations with a candidate country begin, all the way until that country joins and beyond. Thus, a negotiating country is supposed to harmonize its legislation with a moving target. In some cases that is extremely difficult, especially if the deadline for the transposition of a particular legal instrument—usually a directive—into the national legislation of the Member States is after the date when a negotiating country is expected to have its legislation harmonized with the *acquis* in that subject area. In such a case, if a candidate country is asked to transpose a directive into its legislation before the Member States have to do the same, the candidate country is faced with the clear goal but without tools and direction how to proceed.¹³² It is then crucial that the members of the negotiating team and the state administration of the negotiating country are inventive and understand the expectations of the Commission. It becomes almost like schoolwork, when a negotiating country drafts provisions on amending a particular legal act, taking into account the directive which is to be transposed, submits the draft to the Commission and awaits whether it will get a failing or a passing grade. If the grade is positive, the negotiating team and its government then have to proceed with the even harder task of persuading the national parliament that the legislation has to be adopted literally in the wording as agreed, without any changes that could jeopardize the Commission's consent. Finally, following adoption of the national law, the negotiating team still has to prove to the Commission that the legislation is actually and completely and correctly implemented in practice, although this may not at all be the case in at least some of the Member States.¹³³ The negotiating country is consequently required to

132. On one occasion, a Commission representative said to the members of the Croatian negotiating team, "We are guests in a restaurant, you are chefs, so make us something nice and tasty. It is up to you to choose what and how to prepare the meal."

133. Christophe Hillion spelled out the phenomenon that "the EU demands on candidates are different from the ones they face once they are accepted as members" and called it "double-standards ('do as I say, not as I do') that have . . . undermined the credibility of the Union's commitments to the norms and values it [advocates] vis-à-vis the applicants." See CHRISTOPHE HILLION, THE CREEPING NATIONALISATION OF THE EU ENLARGEMENT POLICY 15–16 (Swedish Inst. for European Policy Studies, Report No. 6, Nov. 2010). One of the troublesome consequences is a compliance drop in at least some countries after accession and, as a reaction, calls for special post-accession monitoring because the normal instruments of the Commission and the European Court of Justice for ensuring Member State compliance with all elements of the *acquis*

submit evidence that the national legislation is fully harmonized with the *acquis* and completely and correctly applied before accession, even when that accession to the EU is still remote and—because of political reasons and the requirement of a referendum—basically uncertain.

Participants in the negotiating process are the candidate country on one side and the EU Member States on the other. In the course of the negotiations, the negotiating positions of the EU are represented by the Presidency of the Council of the European Union, on behalf of the Member States, while negotiations are conducted on behalf of the candidate country by the State Delegation for Negotiations. Negotiations are conducted within the framework of a bilateral Intergovernmental Conference held by representatives of the EU Member States on one side and representatives of the candidate country on the other.

Technically, however, the negotiations are substantially between the negotiating team of the candidate country and the representatives of the European Commission which negotiates under the mandate given to it by the European Council. In that

are not always fast and effective, to say it politely. The compliance drop—while widely acknowledged—is neither automatic nor found across all countries, as Epstein and Sedelmeier have shown. *See* INTERNATIONAL INFLUENCE BEYOND CONDITIONALITY: POSTCOMMUNIST EUROPE AFTER EU ENLARGEMENT (Rachel Epstein & Ulrich Sedelmeier eds., 2013).

The suggestion that the requirements for candidate countries are tougher than for Member States is disputed by Giedrė Vinikienė Stonyte, Head of EU Law Implementation Division at the European Law Department of the Lithuanian Ministry of Justice. According to Ms. Vinikienė, the Member States have to adopt their implementing acts for EU Directives without much or any guidance by the EU. As a result, the Commission often demands changes in the language of the implementing act, if it considers that the implementation is not sufficiently precise. This causes major problems when the implementation was done in the form of legislation by the national parliament. In theory, since the Member States participated in the adoption of the EU Directive itself, they should be perfectly aware how it has to be understood and implemented at home. In practice, according to Ms. Vinikienė, the majority of EU Member States still have not figured out how to link the decision-making process at the EU level with the decision-making process at the national level in such a way that congruence is always assured. Another problem noted by Ms. Vinikienė is the fact that the Commission liberally sets deadlines for Member State authorities to respond and act while the Commission itself is not subject to any deadlines whatsoever. In sum, Ms. Vinikienė suggests that the candidate countries should look at the accession negotiations as a kind of pre-school for the life as a Member State because things are not getting any easier any time soon (communication on file with authors).

sense, the Commission has a crucial and pivotal role in the negotiating process on the legal and technical level. In this respect, the speed and ultimately the fairness of the negotiations largely depends on the preparedness, general and inter-personal qualifications, and the substantive knowledge and experience of the individual representatives of the Commission and the members of the negotiating team of the candidate country, and their ability to understand the context and logic of the *acquis* and the reasons behind occasional hold-ups.

The negotiating structure for the accession of the Republic of Croatia to the European Union was established by decision of the Government of the Republic of Croatia of April 7, 2005. This Decision set down the composition of the bodies that formed the structure for the negotiations and assigned the role of competent bodies of individual negotiating chapters to state administrative bodies and other bodies or institutions. In the Croatian negotiating process the following bodies were established: the State Delegation of the Republic of Croatia for Negotiations on the Accession of the Republic of Croatia to the European Union (essentially a political body led by the minister responsible for European integration), the Coordinating Committee for the Accession of the Republic of Croatia to the European Union (an inter-ministerial body consisting of the ministers or their plenipotentiaries responsible for the issues which were negotiated within particular negotiating chapters), the Negotiating Team for the Accession of the Republic of Croatia to the European Union, numerous Working Groups for the Preparation of Negotiations on Individual Chapters of the *acquis communautaire*, the Office of the Chief Negotiator, and the Secretariat of the Negotiating Team. The members of the bodies of the negotiating structure were also appointed by the Decision of the Government.

The Negotiating team consisted of the chief negotiator and fifteen members. Most of them remained as members of the negotiating team throughout the entire negotiating process and only a few of them were exchanged, in particular because some initial members took up functions incompatible with their membership of the negotiating team (e.g. one became a minister, another became a judge of the constitutional court). Each member of the negotiating team was responsible for several

negotiating chapters and his/her task was to coordinate the work among the working groups for those chapters and to be responsible to the government for the progress of the negotiations in those chapters. The negotiating team had regular meetings, at least once a month and more often when necessary, in total almost 100 formal meetings.

The 'immediate' work in every chapter was conducted by the Working Groups for the Preparation of Negotiations on Individual Chapters. Thus, there were 35 working groups lead by the heads of the working groups. Membership in the working groups depended on the structure and content of an individual chapter. Generally, a typical working group—if there was such a thing—would consist of 20-40 persons. However, in some working groups, e.g. for agriculture, several hundred people were involved. In total, more than 1500 members were included in the work of the working groups, mostly high-ranking officials of the state administration, up to the level of deputy ministers, but also representatives of non-governmental organizations, professional chambers, trade unions, associations of entrepreneurs, and the academic community.

Since domestic political support for the negotiations and the many changes to the national laws and institutions is critical for success, the members of the negotiating team also have to be part of an information and public relations campaign at home. In this regard, it is important to note that the members of the negotiating team and the heads of the working groups were not all members of the state administration. This peculiarity of the Croatian negotiating process proved to be more burdensome and difficult at the beginning of the negotiations but eventually more productive and efficient. Those participants in the negotiating process who were not members of the state administration found it initially more difficult to penetrate the often slow, inert, and quiescent state administrative structure (including but not limited to questions like "Who are you" and "What do you want?"). Nevertheless, their primary advantage was that they were not part of and therefore not burdened by the administrative hierarchy and consequently were more independent in presenting their views to the public, which many times were not necessarily in line with the views of the governmental bodies. For this kind of structure to work it was

indispensable that all members of the team, even at times when they did not agree with certain points of the official strategy, enjoyed the full and not only declaratory support of the state government. Since every single member of the negotiating team and every head of a working group had been hand-picked and agreed by all major parliamentary parties in the process of their appointment, they were fully trusted and supported not only by the government but also by the main parties in opposition. This turned out to be an essential element for the success of the whole negotiating process.

In accordance with the Parliamentary Declaration on the Principles of the Negotiations, the Parliament was also involved in the negotiation procedure in all its stages and not only at the time of the ratification of the Accession Treaty. For that purpose, a National Committee was established as a parliamentary working body with the task of following the negotiations. While membership of the National Committee reflected primarily the political parties represented in the Parliament, it also included representatives of the associations of entrepreneurs, trade unions, universities and the Office of the President of Croatia. The president of the National Committee was always a member of the opposition. Over the years, it was interesting to observe that the voting in the National Committee on most issues was unanimous, irrespective of otherwise fierce political fights among the political parties in the government and in the opposition.

Accession negotiations are not considered to be negotiations in the classical sense, but a process of harmonization on the part of the candidate country to the values and to the legal, economic and social system of the European Union. The candidate country does not negotiate the *acquis communautaire* itself, but rather the conditions and ways for its own legislation to be harmonized with the *acquis* and the means for its implementation. The negotiations are focused not only on the harmonization of the legislation of a candidate country with the *acquis communautaire* but also, and even more

importantly, with its administrative and judicial capacity for the effective implementation of the *acquis*.¹³⁴

As mentioned above, negotiations in every chapter are initiated by screening, which is the analytical overview and evaluation of the degree of harmonization of national legislation with the *acquis communautaire*. The main purpose of the screening process is to determine the differences that exist between the national legislation and the *acquis*, and the changes that will be necessary before the national legislation can be said to be fully harmonized with every chapter of the *acquis* and thus ready for accession. On the basis of the analysis, the candidate country is required to state whether it will be able to fully harmonize national legislation and institutions with the *acquis* by the anticipated date of accession, which is of course not known at the time of screening, or whether the candidate country expects to need transitional periods after accession.

Depending on the results of the screening, i.e. the readiness of the candidate country to apply the *acquis*, the EU Member States decide on the opening of negotiations in individual chapters. While this is formally a decision of the Council of the EU, the proposal to open the negotiations or to request further assurances from the negotiating country before opening the negotiations in an individual chapter is made by the Commission. With the opening of negotiations for individual chapters, the substantive phase of the negotiations begins. Negotiations are conducted on the basis of the negotiating position of the European Union—referred to as the “common position”—and the position of the candidate country, which are prepared for each negotiating chapter after the screening results.

If there is a view that a candidate country still has to fulfil certain conditions before the negotiations in a particular chapter may be opened, i.e. if the country is not sufficiently prepared to start the negotiations immediately following the screening, the Commission sets the benchmarks to be met by the candidate country before negotiations will be opened. Benchmarks were introduced by the Commission’s 2006

134. On this subject, see Frank Emmert, *Administrative and Court Reform in Central and Eastern Europe*, 9 *EUR. L.J.* 288 (2003); TATHAM, *supra* note 2, at 355–97.

Enlargement Strategy and defined as “a new tool introduced as a result of lessons learnt from the fifth enlargement.”¹³⁵ Their purpose is to improve the quality of the negotiations, by providing incentives for the candidate countries to undertake necessary reforms *at an early stage*. Benchmarks are measurable and linked to key elements of the *acquis* chapter.”¹³⁶

Besides the opening benchmarks, which have to be met before opening the negotiations in a particular chapter, the EU may, in its common position, also table closing benchmarks that have to be met before a chapter will be (provisionally) closed. As stated explicitly in the 2006 Enlargement Strategy, if a candidate country no longer fulfils the opening benchmarks in a chapter that is under negotiation, the Commission may propose that negotiations be suspended on that chapter. Likewise, if a candidate country no longer fulfils the closing benchmarks in a chapter that has been provisionally closed, the Commission may propose to the Member States that accession negotiations on that chapter be re-opened.

In the course of the negotiations, Croatia had to fulfill 23 opening benchmarks set in 11 negotiating chapters, while negotiations in 22 chapters were opened without benchmarks.¹³⁷ In two chapters, “Institutions” and “Other Issues”, there were no negotiations with the candidate country. Croatia was also given a total of 104 closing benchmarks across 31 chapters. The number of opening benchmarks in individual chapters was from 1 to 4 (in Chapters 8. Competition Policy, and 12. Food Safety, Veterinary and Phytosanitary Policy) and of closing benchmarks from 1 to 10, with the highest numbers in Chapter 23. Judiciary and Fundamental Rights and Chapter 24. Justice, Freedom and Security. That was not surprising since Chapters 23 and 24 cover the political criteria for EU membership and fulfillment of the conditions therein should ensure that a candidate country will,

135. *2006 Enlargement Strategy*, *supra* note 6, at 6. Kochenov argues that the conditions of “stable institutions guaranteeing democracy” and “rule of law” as part of the Copenhagen Criteria were ultimately too vague and impossible to measure during the negotiations with the CEECs prior to the big bang enlargements of 2004 and 2007. See DIMITRY KOCHENOV, *EU ENLARGEMENT AND THE FAILURE OF CONDITIONALITY: PRE-ACCESSION CONDITIONALITY IN THE FIELDS OF DEMOCRACY AND THE RULE OF LAW* (2008).

136. *2006 Enlargement Strategy*, *supra* note 6, at 6

137. A list of all chapters is included in *supra* note 124.

as a Member State, contribute to the development of the Union as an area of freedom, security and justice. These matters are also horizontally affecting all other chapters because the judiciary and justice system has to ensure the application of the *acquis* while also securing respect for human rights and fundamental freedoms, as well as equality before the law. The establishment of an independent and efficient judiciary is of paramount importance, and impartiality, integrity and a high standard of adjudication by the courts are essential for safeguarding the rule of law. In addition, a candidate country must submit evidence that a functioning system for the fight against corruption is in place. That is in line with the political “Copenhagen criterium” requiring “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.” It is essential for the candidate country to provide evidence that the democratic system and the rule of law are fully functioning, meaning that the principles are actually implemented in practice.¹³⁸

If one were to ask which are the most difficult chapters to negotiate, one should not only take into account the number of opening or closing benchmarks. It is also necessary to evaluate what the benchmarks are. They may be the adoption of an action plan or strategy, the enactment of a legislative measure, the establishment of an agency, institution or other state administrative or judicial body, or the providing of a track record of implementation of the *acquis*. For a negotiating country, it may be relatively easy or very difficult to meet a particular benchmark. However, the question of whether a benchmark is more or less difficult to meet also depends on the question of how the Commission will determine whether it has been accomplished.

Naturally, the difficulty of complying with a particular chapter of the *acquis* is primarily determined by internal factors in the negotiating country. Harmonization with EU law

138. In the case of Croatia, an important piece of evidence demanded by the EU Commission to show that the required conditions were fully met was the arrest of and commencement of criminal proceedings against the former prime minister on several charges related to corruption and abuse of official position. This was the same prime minister who was in office at the beginning and throughout most of the duration of the Croatian negotiations with the EU.

sometimes requires the repeal of measures protecting the state's nationals and discriminating against nationals of other EU member states, notably undertakings. The more a candidate country protects certain markets, the more difficult the negotiations in that area will be. In Croatia this was true, for example, regarding the chapters on Agriculture and Rural Development, as well as Competition Policy. Another problem area concerned the chapter on Fisheries, which for obvious reasons will be of no concern for Macedonia or Serbia. In addition, a chapter may be perceived as difficult if it requires changes that impose substantial financial burdens on the negotiating country or its citizens or undertakings as harmonization with EU law may demand the introduction of new rules and practices that have not been employed previously. Such chapters are for example those on Environment and Energy.

After agreement has been reached between the EU and the candidate country on a particular chapter of the negotiations, and once any and all benchmarks have been met, the respective chapter is considered provisionally closed. While this indicates satisfactory progress in the respective area, a chapter may be re-opened as long as the negotiations on other chapters are continuing, if the negotiating country does not honor the obligations undertaken during the negotiations. Only when the negotiations for all chapters of the *acquis* are at least provisionally closed, will the results of the negotiations be incorporated into the provisions of a draft of the Accession Treaty, i.e. an international agreement between the EU (its institutions and Member States) and the candidate country. Once the details and language of the Accession Treaty have been agreed and the Treaty has been signed, the candidate country is regarded as an acceding country pending all required ratifications.

When a former negotiating country becomes an acceding country, its obligations may be equally burdensome as during the negotiations. While there are no benchmarks to be met, an acceding country actually has to behave as if it already was a Member State, as regards its obligations to comply with the ever evolving *acquis* that is being adopted after the signing of the accession treaty. However, while the acceding country has all the

obligations under the new EU laws, it has none of the rights, neither when it comes to participating in the negotiations that led to the adoption of the new laws, nor when it comes to their enforcement against the EU institutions and/or the Member States. This dichotomy between rights and obligations in the acceding period can be very frustrating. The point can be illustrated as follows: Although the Croatian Treaty on Accession does not foresee any specific type of *post-accession* monitoring – formally called “Mechanism for Cooperation and Verification” – as exist for Bulgaria and Romania,¹³⁹ the Treaty provides that the Commission shall closely monitor all commitments undertaken by Croatia in the accession negotiations, including those which must be achieved *before or by the date of accession*, and that in the autumn of 2011, the Commission shall present a Progress Report to the European Parliament and the Council, and that in the autumn of 2012, it shall present a Comprehensive Monitoring Report to the European Parliament and the Council. The monitoring was to focus in particular on commitments undertaken by Croatia in the area of the judiciary and fundamental rights, including the continued development of track records on judicial reform and efficiency, impartial handling of war crimes cases, and the fight against corruption. The Commission’s monitoring was to focus also on the area of freedom, security and justice, as well as on commitments in the area of competition policy. The Commission was to issue

139. See Protocol Concerning the Conditions and Arrangements for Admission of the Republic of Bulgaria and Romania to the European Union, art. 36–39, 2005 O.J. L 157/29, 40–41; see also Commission Decision 2006/928 of 13 December 2006, Establishing a Mechanism for Cooperation and Verification of Progress in Romania to Address Specific Benchmarks in the Areas of Judicial Reform and Fight Against Corruption, 2006 O.J. L 354/56; Commission Decision 2006/929 of 13 December 2006, Establishing a Mechanism for Cooperation and Verification of Progress in Bulgaria to Address Specific Benchmarks in the Areas of Judicial Reform and the Fight Against Corruption and Organised Crime, 2006 O.J. L 354/58. The mechanism is still in place and the Commission continues to report “under the Cooperation and Verification Mechanism every 6 months on progress with judicial reform, the fight against corruption and, concerning Bulgaria, the fight against organised crime.” See *European Commission, Mechanism for Cooperation and Verification for Bulgaria and Romania: The reports on progress for Bulgaria and Romania*, EUROPEAN COMMISSION (Jan. 29, 2014), http://ec.europa.eu/cvm/progress_reports_en.htm#thirteen. The most recent set of reports was approved by the Commission on January 22, 2014.

six-monthly assessments up to the accession of Croatia on the commitments undertaken by Croatia in these areas.¹⁴⁰

Consequently, after the Accession Treaty was signed and before Croatia became a member, there were three monitoring reports, in April 2012, October 2012 and March 2013.¹⁴¹ The first two stated that Croatia was generally on track with its preparations for EU membership, nevertheless the Commission identified a limited number of issues requiring further efforts. This wording was the reason why several Member States waited for the final monitoring report and expected it to be unequivocally positive as to Croatia's success in completing the remaining work before it would be considered fully ready for EU membership. Indeed, the March 2013 report did state that the Commission was confident that Croatia would be ready for membership on July 1, 2013, removing the final obstacle.

V. LESSONS FOR ONGOING AND FUTURE NEGOTIATIONS WITH MONTENEGRO AND OTHER CANDIDATES

A. General Remarks

Croatia is the only country to have successfully completed accession negotiations with the EU under the new 2006 Enlargement Strategy. Negotiations with Turkey started on the same day as with Croatia, but in the meantime they have been going at a very slow pace. This is partly due to the recent cooling in the relationship between the EU and Turkey but more substantially due to the never ending debate within the EU concerning *whether* Turkey should become a Member State in the first place.¹⁴² After rather expedient initial negotiation process, Iceland decided to dissolve the negotiating team and no to proceed with the negotiations, unless and until so approved

140. See Act Concerning the Conditions of Accession of the Republic of Croatia, 2012 O.J. L 112, 21, 31.

141. See Communication from the Commission, Monitoring Report on Croatia's Accession Preparations, COM (2012) 186 final (Apr. 24, 2012); Communication from the Commission, Main Findings of the Comprehensive Report on Croatia's State of Preparedness for EU Membership, COM (2012) 601 final (Oct. 10, 2012); Communication from the Commission, Monitoring Report on Croatia's Accession Preparations, COM (2013) 171 final (Mar. 26, 2013)

142. For further discussion see *infra*, Part V.C.

via a referendum. This has not taken place as yet.¹⁴³ Consequently, following the big bang enlargements of 2004 and 2007, to which the 2006 Enlargement Strategy did not apply, conclusions and predictions on future enlargements processes may be drawn primarily from the Croatian experience.

At the same time, the negotiating framework for the countries next in line, most likely Montenegro and Serbia, are already different from the negotiating framework applied for Croatia and thus, even the Croatian experience can be used as a model only to a limited extent. In addition, it seems fair to say that the negotiating experience of the Member States that took part in the fifth and sixth enlargements can definitely not be referred to as the standard that would be followed in future negotiations on enlargement. It is true, the basic criteria for membership embodied in Article 49 of the TEU and the Copenhagen Criteria as reinforced and/or amended by the conclusions of the 1995 Madrid Council remain the same. Notwithstanding that, countries referred to by the EU as the Western Balkans and approved as (potential) candidates for membership, were given additional criteria arising out of the stabilization and association process, in particular concerning regional cooperation and good neighborly relations.¹⁴⁴ Beyond that, countries who were part of the former Yugoslavia were given the supplementary condition of full cooperation with the ICTY.

B. “*Benchmarks*” as the Key Word of the Negotiating Process

The key word to be accentuated from the experience of the Croatian negotiations is “benchmarks”, i.e. detailed conditions for specific chapters of the *acquis*. The Croatian experience shows that benchmarks are an excellent instrument, in

143. The most current evaluation of the status of the Icelandic accession negotiations was presented on February 18, 2014, by the Institute of Economic Studies at the University of Iceland in a report to the Ministry of Foreign Affairs. A summary in English is available at <http://www.mfa.is/news-and-publications/nr/7960>.

144. Regional and cross-border cooperation with neighboring countries was mentioned in such explicit terms for the first time in the conclusions of the 1999 Helsinki European Council. See Presidency Conclusions, Helsinki European Council (Dec. 10–11, 1999). Turning “good neighbourly relations” into explicit conditions for membership for the countries of the Western Balkans is a response to the problems experienced in the breakup of Yugoslavia.

principle, both for the EU and for the negotiating country, but they do need some adjustment and fine tuning.

Since they are conditions to be met before starting or closing negotiations in a particular chapter, the purpose of benchmarks is to evaluate whether the negotiating country is sufficiently prepared—“willing and able”—to apply the *acquis* completely, correctly, and effectively and become a Member State of the EU. The wording of the 2006 Enlargement Strategy, referring to lessons learnt from previous enlargements, makes it clear that the primary idea of benchmarks is to communicate that promises are not sufficient and that the EU needs to see *actual compliance with the acquis* to conclude that a country is properly prepared to function as a Member State.¹³⁵ As the terms suggest, however, there should be a difference between opening and closing benchmarks, i.e. the determination which benchmarks should logically be imposed at what stage of the negotiating process. Meeting the closing benchmarks should ensure that at a time close to accession, a negotiating country is definitely prepared for membership. The same level of preparedness would not seem necessary for the mere opening of the negotiations in a chapter, which typically happens years before accession. Yet, in practice, this does not mean that opening benchmarks are necessarily less stringent and less closely monitored by the EU than closing benchmarks. The Commission justifies this with the goal of using benchmarks to provide “incentives for the candidate countries to undertake necessary reforms *at an early stage*.”¹⁴⁶ While this can be useful for reforms that objectively serve the candidate country regardless of subsequent accession, it is not always clear that the Commission, to say it diplomatically, is willing and able to make a case why some reforms should come before others and why and how the ones it demands early on are objectively benefitting the candidate country. For future negotiations, this will be one of the challenges for the candidate country negotiating teams, to make their case why some reforms should *not* be conditioned *at an early stage*.¹⁴⁷

145. See 2006 Enlargement Strategy, *supra* note 6, at 6.

146. *Id.* (emphasis added).

147. Whether this can ultimately be successful remains to be seen. There are good reasons—some of which have been pointed out in the present Article—why Ellison

One of the basic innovations in the approach to benchmarks introduced after the end of negotiations with Croatia is the general introduction of opening benchmarks for Chapter 23 Judiciary and Fundamental Rights, as well as Chapter 24 Justice, Freedom and Security. Before the EU will open negotiations with any candidate country in these areas, it now requires the adoption of action plans on bringing the national structures fully in line with the *acquis*, with clear time frames and deadlines, authorities responsible for the implementation, reliable estimation of the costs and financial sources for covering the costs, and a measurable result. Action plans are expected to be precise, realistic and progress is being monitored by the Commission with the help of “interim benchmarks” and, where necessary, “updated benchmarks” which may require new and amended action plans.¹⁴⁸ The reason behind this decision is the importance of those areas for the functioning of the EU, the same reason that in the case of Croatia made the negotiations most complex exactly in those chapters. Without doubt, this new approach of the EU is a result of the lessons learnt during the Croatian negotiations.

Benchmarks should be clear, effective, logical and measurable and not go beyond what is reasonably possible to achieve and should not be used as a method of political pressure by individual Member States in bilateral relations with the negotiating country. Benchmarks should not go beyond what is expected from the Member States themselves. Of course, what is expected by the *acquis* from the Member States is by no means

characterizes the accession negotiations as “an intense struggle to preserve and safeguard the interests of the old member states” resulting in “a string of dramatic concessions on the part of the new members” because of structural “bargaining asymmetries.” “Bluntly put, the ability of the old member states to design and manage the process of EU enlargement has led to a less than ideal outcome for the new members.” See David L. Ellison, *Divide and Conquer: The European Union Enlargement’s Successful Conclusion?*, 8 INT’L STUD. REV. 150, 151 (2006).

148. See Council of the European Union, Ministerial Meeting Opening the Intergovernmental Conference on the Accession of Montenegro to the European Union: General EU Position, Mar. 29, 2012, paras. 21–23, 2012 (8339/12). Interim benchmarks of December 12, 2013, for Chapter 23 can be found at <http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=AD%2017%202013%20INIT>. The corresponding interim benchmarks of December 17, 2013, for Chapter 24 are found at <http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=AD%2018%202013%20REV%201>.

always in line with the actual practice in the Member States, but this discrepancy is supposed to be remedied by the EU instruments and institutions themselves. At the very least, however, Member States should not impose benchmarks on candidates which are even at face value going beyond the obligations of their own. The imposition of such double standards is not only a violation of the principle of sovereign equality of nations. It causes considerable frustration in the candidate countries and influences public opinion towards an unfavorable view of the EU accession negotiations. Ultimately, it damages the credibility of the entire negotiating process, makes reforms in the candidate country and the final ratification of the accession treaty unpredictable and more difficult. The EU should not forget that at the other side of the negotiating table is not some unaccountable bureaucracy but the representatives of the citizens of the candidate country and these citizens can hardly be expected to support the importation of European values if they feel that they are being harassed with benchmarks that are inappropriately sequenced, unproductive, or even completely irrational.¹⁴⁹

The same critique applies not only to the benchmarks themselves but also to the method of evaluation of their fulfillment. The benchmarks should be drafted in a manner which makes it objectively possible to determine whether they have been met. This is particularly important for the requirement that action plans have to be adopted and implemented, for example to improve the administrative and judicial capacities of the candidate country. If the benchmarks are formulated in a way that leaves plenty of room for purely discretionary or arbitrary appraisals, this makes it difficult for the candidate country to have a clear picture what is expected from it, which in turn can only slow down and damage the pace of reform. Moreover, unclear benchmarks provide room for abuse as tools for exerting pressure on the negotiating country for purposes which have nothing to do with the benchmark itself, which may

149. See Christophe Hillion, *The Creeping Nationalisation of the EU Enlargement Policy* (Swedish Institute for European Policy Studies (Sieps), 2010:6), available at <http://www.wider-europe.org/sites/default/files/attachments/events/SIEPS%20report.pdf>.

of course be the very point of formulating the benchmarks in an unclear way in the first place.

Benchmarks should also not be used to experiment whether a particular legal instrument may work in practice. To be very clear, benchmarks should not be construed to turn the candidate country into a guinea pig. On the contrary, benchmarks have to be the logical consequence of the experience with application of the *acquis* in the Member States.

Well designed and persuasive benchmarks can be a powerful tool for reform, not only serving the negotiating country to fulfill the criteria for membership, but helping it in making its economy and government more efficient, more just, and more transparent, or in other ways improve the lives of its citizens. In short, they can support the development of a better state and a better society regardless of the perspective of accession. To that end, benchmarks may internally be used to put pressure on the parliament and the administration to make indispensable but politically controversial or painful reforms. Of course, the line between benchmarks that are unpopular because they are painful but good medicine and those that are unpopular because they are inappropriate, unproductive or irrational is not always easy to draw. Although candidate countries cannot re-negotiate the *acquis* itself, the substance and the sequencing of the benchmarks should be subject of real negotiations. And given the unequal bargaining power in these negotiations, one could very well argue that in extreme cases the candidate countries should be able to call on the European Court of Justice to review whether a particular requirement is indeed justified or not.

In the end, the negotiating process itself, including the development of benchmarks and the assessment whether they have been duly met, is rather technical. On the other hand, the opening and closing of chapters and the initial and final decisions on acceptance of a candidate country are highly political decisions. The purpose of the benchmarks is to make the entire process more predictable and to provide for more thorough analysis and preparation. By and large, the procedure developed since 2006 is successfully promoting this goal. However, there is certainly still room for improvement.

C. *Some Remarks and Recommendations for Iceland, Montenegro, Turkey and Other Actual and Potential Candidates*

As we have shown, each enlargement of the EU has added complexity for subsequent candidates. On the one hand, the EU has learned from bad experience with criteria that were met only on paper and promises that were not kept after accession and increasingly insists that candidates have to meet all conditions of membership before the negotiations will even be completed. On the other hand, since each candidate has to get an affirmative vote from each existing Member State, each additional country in the club is another opportunity for bilateral score settling and political posturing.

One of the conditions for accession – at least in theory – is the settlement of any disputes with third countries, including border disputes.¹⁵⁰ Consequently, France did not agree to opening the accession negotiations with Cyprus until the territorial conflict with Turkey would be settled. At some point, the EU essentially told the Greek and Turkish communities in Cyprus to do whatever it would take to end the territorial division of the island and that the EU would pay for any reasonable solution. However, the Greek Cypriots had a champion on the inside and were thus immune to any real threats regarding the delay or denial of accession. In 1998, the Greek Government in Athens made it abundantly clear that it would block any enlargement unless Cyprus was going to be part of the package. Later Greece again used its leverage as an insider to ensure the conclusion of the negotiations with Cyprus in exchange for accepting Turkey as a candidate country.¹⁵¹

Another example is the blockade by Italy of the opening of association negotiations with Slovenia from 1994 to 1995. The background were claims by ethnic Italians to land in the Istria

150. See EU Commission, *Agenda 2000 for a Stronger and Wider Union*, E.U. BULL., no. 5, at 51 (1997) (“Enlargement should not mean importing border conflicts. . . . The Commission considers that, before accession, applicants should make every effort to resolve any outstanding border dispute among themselves or involving third countries. Failing this they should agree that the disputes be referred to the International Court of Justice.”).

151. See Arjan Uilenreef, *Bilateral Barriers or Good Neighbourliness? The Role of Bilateral Disputes in the EU Enlargement Process* 10–11 (Clingendael Working Paper, June 2010).

peninsula, partly in Slovenia, partly in Croatia. The Italians had been displaced at the end of World War II and various claims between Italy and Yugoslavia had been settled in a series of treaties between 1947 and 1988. However, at the time when Slovenia was supposed to open negotiations with the other CEECs for association with the EU, the neo-fascist party was part of the ruling coalition in Italy and under Gianfranco Fini decided to use its leverage to force Slovenia to recognize the rights of the displaced Italians or rather their descendants.¹⁵²

The third example is a dispute between Slovenia and Croatia over the border demarcation in the Bay of Piran. After the breakup of Yugoslavia, the two countries initially agreed to maintain the existing borders. However, about a year after independence, Slovenia started claiming the entire Bay of Piran and some land along the Dragonja River that had been part of the Yugoslav Republic of Croatia. The issue seemed settled in July 2001 when the Slovenian and Croatian prime ministers, Janez Drnovšek and Iviča Račan reached a compromise solution and concluded the Drnovšek-Račan Agreement. However, Croatia failed to ratify the agreement and the issue remained contentious until 2007 when both sides agreed to submit the matter to the International Court of Justice in The Hague. By now, of course, Slovenia was a member of the EU while Croatia was hoping to conclude its accession negotiations. Although Slovenia had agreed not to use membership negotiations to settle bilateral scores, it blocked the opening and closing of further chapters in the negotiations with Croatia from December 2008 to September 2009 and to some extent into 2010.¹⁵³

Our fourth example is the famous dispute between Greece and the Former Yugoslav Republic of Macedonia (FYROM) over the name of that country. When Macedonia gained

152. At a party rally in October 1994, Fini said that “those who knock on Europe’s door must make a gesture of repentance.” See Andrew Geddes & Andrew Taylor, *Those Who Knock on Europe’s Door Must Repent? Bilateral Border Disputes and EU Enlargement* 8–9, (Freie Universität Berlin, KFG Working Paper No. 54, November 2013).

153. In January 2009, some political forces in Slovenia unsuccessfully tried to gather enough signatures to force a referendum on Croatia’s accession to NATO. See Geddes & Taylor, *supra* note 152, at 10–12; Uilenreef, *supra* note 151, at 15–22; Matej Avbelj & Jernej Letnar Čerņič, *The Conundrum of the Piran Bay: Slovenia v. Croatia—The Case of Maritime Delimitation*, 5 J. INT’L L. & POL’Y 6 (2007).

independence from Yugoslavia in 1991, it adopted a constitution pursuant to which the official name would be “Republic of Macedonia.” Ever since, it has been accused by Greece of violating international law and good neighborly relations because the name Macedonia is claimed exclusively by Greece for its northern province. De facto, Greece has been blocking Macedonia’s accession to NATO and the opening of accession negotiations with the EU since 1995.¹⁵⁴ Some elements of the story have “overtones of a Marx Bros film,”¹⁵⁵ for example when it came to finding a seat for Macedonia in the General Assembly of the UN. Greece rejected seating the country under “M”, while Macedonia rejected “F” for FYROM. The compromise was a seat under “T” for “The Former Republic.”¹⁵⁶

More of these kind of disputes can safely be expected because there are numerous unresolved issues of border delimitation and/or settlement of claims remaining from the breakup of Yugoslavia.¹⁵⁷ And should we ever run out of those, there is always the question of Cyprus or one of the other EU Member States blocking Turkey’s accession for good or not so good reasons.

However, there is considerable fatigue on behalf of some Member State governments and, in particular, on behalf of the Commission, with these bilateral issues, which are in essence abusing the accession process to settle old scores between neighbors. Indeed, at the end of the negotiations with Croatia, a proposal was briefly fielded to include in the Accession Treaty with Croatia a clause that would prohibit the country from blocking subsequent enlargements – Serbia being the elephant

154. Of course, the Macedonian government in Skopje is not exactly helping its cause by keeping a document on the website of the Ministry of Foreign Affairs which claims that there are 750,000 Macedonians living in Bulgaria and another 700,000 in Greece, thus implicitly making territorial claims to the homelands of these compatriots. See *Appetite for EU Enlargement Hits All Time Low*, EURACTIV (Oct. 17, 2013, 9:03 AM), <http://www.euractiv.com/enlargement/eu-appetite-enlargements-hits-ti-news-531142>. It may also be safely assumed that Macedonia, by keeping the official name as “Former Yugoslav Republic of Macedonia FYROM”—instead of changing it to something permanent like “Utopia”—is holding open the door to going back to just “Macedonia” as soon as the accession to the EU is accomplished and Greece does not hold the same leverage over the issue.

155. Geddes & Taylor, *supra* note 152, at 13.

156. *Id.*

157. See Geddes & Taylor, *supra* note 152; Uilenreef, *supra* note 151.

in the room – due to unresolved bilateral issues. However, the idea was quickly dropped after Croatia committed via a statement at the intergovernmental conference not to block anyone for unresolved bilateral issues.¹⁵⁸ We can only speculate that the Member States were happy to get rid of the idea because each of them ultimately likes the power it can wield via the unanimity requirement and would not want to see the process move into a direction of majority voting or at least a situation where the majority could decide whether opposition from a single country was well founded or not.¹⁵⁹

As long as the unanimity requirement remains, every actual or potential candidate must know that every round of enlargements also enlarges the pool of countries that will have to agree to any subsequent accessions and thus will have to be pleased by the later applicants. This alone should be the most powerful argument against the UK exit from the EU: Should the UK indeed get out and then change its mind at a later time, it will have to run the gauntlet and unless there was some miraculous change in the relative desirability of British membership, it will certainly not be able to maintain its famous Thatcher discount on membership fees and various other privileges. Similarly, Serbia is sure to face some headwind simply because a number of countries that it waged war on in the context of the breakup of Yugoslavia made it into the EU before. Last but not least, the Swiss vote against continuation of the bilateral agreement on free movement of persons on February 9, 2014 is virtually certain to come back to haunt the country, not only if one day it

158. In response, the Croatian parliament adopted a Declaration on October 21, 2011, pursuant to which “Croatia firmly believes that outstanding issues between states which are of a bilateral nature, such as border issues, must not obstruct the accession of candidate countries to the European Union from the beginning of the accession process until the entry into effect of the Accession Treaty.” *Declaration on the Promotion of European Values in Southeast Europe*, Official Journal of the Republic of Croatia, No. 121 of 21 October 2011, available at: <http://www.sabor.hr/Default.aspx?art=47289&sec=765>.

159. Therefore, it remains to be seen whether the Croatian government will remember this declaration—or whether it can be held to it, for example by a candidate country—now that Croatia has moved from out to in, and thus from the receiving end of bilateral grief to, at least potentially, the giving end. Arguably, Croatia should not be bound if the other Member States, such as Greece or Cyprus, continue their bilateral blockades. After all, Greece also once promised not to use or abuse its membership to block the application of Turkey, something it prefers to forget today; *see supra* note 63.

decides to revive its application for membership but also because any new bilateral agreements also require unanimity on the side of the EU members and a country that is deemed to be a difficult and unreliable partner will not be a priority for flexible negotiations on the side of the EU.

In addition to bilateral score settling and a certain level of enlargement fatigue on the side of the Member State *governments*, there are increasing concerns about resentments against specific countries and/or general enlargement fatigue among the *people* in the Member States. For example, in a recent survey conducted by the Österreichische Gesellschaft für Europapolitik (ÖGfE), only 24% of Austrians wanted further enlargement of the EU and only Iceland, the very country that put its negotiations on hold of its own motion, was considered a desirable new member.¹⁶⁰ Similar results can be found EU-wide.¹⁶¹ Of course, the opinion of the public has often been somewhat ambivalent in matters of European integration and one could be tempted to ignore it in the good old tradition of the intergovernmental conferences for amendment of the founding treaties.¹⁶² However, the need or the temptation of

160. Austrian Society for European Policy, survey results published on October 16, 2013: support for accession of Iceland (55%), Macedonia (28%), Montenegro (26%), Bosnia and Herzegovina (26%), Serbia (24%), Albania (20%), Kosovo (19%), Turkey (15%). See *ÖGfE Survey: Austrians Don't See EU Enlargement as a Priority—Closer Cooperation Between the EU Countries Is a Priority*, ÖGfE [AUSTRIAN SOCIETY FOR EUROPEAN POLITICS] (Oct. 16, 2013), [http://www.oegfe.at/cms/index.php?id=63&L=0&tx_ttnews\[backPid\]=113&tx_ttnews\[tt_news\]=647&cHash=23ad61132a](http://www.oegfe.at/cms/index.php?id=63&L=0&tx_ttnews[backPid]=113&tx_ttnews[tt_news]=647&cHash=23ad61132a).

161. Eurobarometer has been tracking EU citizens' attitude towards enlargement for many years. One recent report showed general support for enlargement still above 50% in 2007 and opposition below 40%. However, since then the numbers are rather the other way around, with about 50% opposing further enlargement in 2011 and only 40% supporting it. A closer look reveals that the attitude differs notably, depending on the candidate country. While Norway and Switzerland had still almost 80% support rates in 2010, and Iceland was not far behind with some 75%, the actual and potential candidates in Eastern Europe and the Western Balkans all had below 50% support and Turkey was trailing with a mere 30% across all EU Member States. See Danilo Di Mauro & Marta Fraile, *Who Wants More? Attitudes Towards EU Enlargement in Time of Crisis*, EUDO SPOTLIGHT 1, 3 (Oct. 2012), available at <http://www.eui.eu/Projects/EUDO/Documents/2012/Spotlight4.pdf>; see also *supra* note 4.

162. Indeed, the only time the EU tried a more open process of treaty amendment, namely with the Convention on the Future of Europe, which brought together representatives not only from Member State governments but also from opposition political parties, as well as a multitude of civil society organizations, under the chairmanship of former French President Giscard d'Estaing, to write a Constitution for the EU, the process still failed and the Constitution was rejected by referendum in

certain Member State governments to put certain questions of European importance to national referenda presents a point of caution. Populist politicians in Austria have long threatened to hold a referendum before signing an accession agreement with Turkey and with opinion polls reporting up to 80% of Austrians opposed to Turkey as a Member State,¹⁶³ it will take something close to a miracle for Turkey to pass the additional hurdle.¹⁶⁴ Of course, Austria might yet be persuaded that there is something fundamentally wrong with the population of one Member State arrogating for itself the power to decide the fate of another would be Member State, in particular if that country objectively meets all proper membership criteria. However, others have toyed with the same idea. The Dutch were contemplating for a while to hold a referendum and the matter is probably not yet off the table since it takes only 40,000 signatures in a citizen's initiative to force the second chamber of the Dutch parliament to deal with an issue.¹⁶⁵ France went even further and introduced in 2005 a constitutional amendment that would have mandated a referendum over any new accessions to the EU.¹⁶⁶

France and in the Netherlands. *See generally* JO SHAW ET AL., *THE CONVENTION ON THE FUTURE OF EUROPE: WORKING TOWARDS AN EU CONSTITUTION*, (2007); CLIVE H. CHURCH, *UNDERSTANDING THE EUROPEAN CONSTITUTION: AN INTRODUCTION TO THE EU CONSTITUTIONAL TREATY* (2006).

163. *See Austria Signals Referendum on Turkey's EU Accession*, EURACTIV (Aug. 25, 2008, 12:55 PM) <http://www.euractiv.com/enlargement/austria-signals-referendum-turkey-eu-accession/article-174868>.

164. The Negotiating Framework for Turkey adopted by the EU Member States anyways includes a number of unusual passages almost as if it wanted to prepare Turkey for a negative outcome of the accession negotiations. *See* Christophe Hillion, *Negotiating Turkey's Membership to the European Union: Can the Member States Do As They Please?*, 3 *EUR. CONST. L. REV.* 269 (2007); *see also* HARUN ARIKAN, *TURKEY AND THE EU: AN AWKWARD CANDIDATE FOR EU MEMBERSHIP?* (2d ed. 2006); Ebru S. Canan-Sokullu, *Turcoscepticism and Threat Perception: European Public and Elite Opinion on Turkey's Protracted EU Membership*, 16 *S. EUR. SOC'Y. & POL.* 483, (2011); Paul Kubicek, *Turkish Accession to the European Union: Challenges and Opportunities*, 168 *WORLD AFF.* 67 (2005); Verney, *supra* note 58.

165. *See The Netherlands: Petition for a Referendum on the EU*, PRESSEUROPEU (Jan. 28 2013), <http://www.presseurop.eu/en/content/news-brief/3329741-petition-referendum-eu>. At a certain point, a constitutional amendment was pending in the Netherlands that would have required a qualified majority vote in parliament not only for substantive EU Treaty amendments but also for the ratification of accession treaties. *See* Kamerstukken TK, 2006-2007, 30 874, Nos. 1-3. The latter is not as dangerous as a referendum but still an elevated hurdle which could be abused.

166. *See* Article 88-5, introduced by President Chirac on 1 May 2005, pursuant to which "Tout projet de loi autorisant la ratification d'un traité relatif à l'adhésion d'un

Fortunately, this requirement was dropped in 2008, not least because it had caused considerable irritation in Franco-Turkish relations.¹⁶⁷

In effect, holding a referendum in an old Member State about the accession of a new Member State is not only wrong in principle, it holds the enlargement process hostage to the political mood in that particular country at the respective time. Especially in countries that—unlike Switzerland—do not have a habit of regular consultation of the citizens via referendum, there is always a risk that the vote of the people will have more to do with the current economic situation in that country, the satisfaction of the electorate with the current government, and/or a current mood or perception on issues such as immigration, globalization, and the like.¹⁶⁸ An example on point was provided when Estonia prepared for its referendum on joining the EU. During the negotiations for membership of the CEECs, Eurostat and other polling organizations provided regular reports how the citizens would vote on their country's

Etat à l'Union européenne est soumis au référendum par le Président de la République." ("Any government bill authorizing the ratification of a treaty pertaining to the accession of a state to the European Union shall be submitted to referendum by the President of the Republic.").

167. See *France Scraps Referendum on Turkey's EU Bid*, EURACTIV.COM (June 25, 2008, 8:45 AM), <http://www.euractiv.com/enlargement/france-scraps-referendum-turkeys-news-220068>. To achieve this goal, a second paragraph has been added to Article 88-5: "Toutefois, par le vote d'une motion adoptée en termes identiques par chaque assemblée à la majorité des trois cinquièmes, le Parlement peut autoriser l'adoption du projet de loi selon la procédure prévue au troisième alinéa de l'article 89." ("Notwithstanding the foregoing, by passing a motion adopted in identical terms in each House by a three-fifths majority, Parliament may authorize the passing of the bill according to the procedure provided for in paragraph three of article 89."). President Sarkozy originally wanted to scrap Article 88-5 entirely to avoid problems for Turkish accession to the EU. However, this effort failed. With the 2008 amendment, there is now a choice between the referendum and the vote in both houses of parliament. Whether it will make a difference in practice remains to be seen because, at least at the present time, a majority of French delegates is opposed to Turkish accession so that a three-fifths majority in both houses seems almost as remote as a majority of the popular vote. Furthermore, President Hollande seems to have a preference for the referendum, as indicated at a press conference in Ankara on January 27, 2014. See *Turkey's EU Bid Will Go to Referendum: Hollande*, LOCAL: FRANCE'S NEWS IN ENGLISH (Jan. 27, 2014, 4:38 PM), <http://www.thelocal.fr/20140127/turkey-wants-french-support-for-its-eu-bid>.

168. For an analysis of twenty-five referenda on matters associated with EU membership between 1972 and 2000, see Patricia Roberts-Thomson, *EU Treaty Referendums and the European Union*, 24 J. EUR. INTEGRATION 105 (2001).

accession. These polls showed a very high initial level of support in most of the CEECs, up to 80% and beyond, in particular in Poland and Lithuania. Estonia, however, enjoyed an early *Wirtschaftswunder* at the time and the national mood was more in line with the slogan, “we just got out of one union, why join another in a hurry?” Consequently, the polls showed only about 1/3 of the Estonian voters in support of EU membership, with another 1/3 against and 1/3 undecided. These poll results held steady over many months as the date of the referendum came closer, in spite of ever greater efforts by the EU and the Estonian government at informing the citizens about the many benefits of membership. In fact, it sometimes seemed that the information campaign was almost counterproductive, with the voters suggesting that if their politicians wanted the EU so badly, it had more to do with lucrative positions for them in Brussels than with actual benefits for the average person in Estonia. At one point, we were joking with Kristiina Ojuland, at the time the Estonian Minister of Foreign Affairs in charge of the accession negotiations, that the most persuasive argument to convince the Estonians to support EU membership might be the proposal that otherwise Latvia might come in first. One of the most important factors changing the mood “for Europe” was the victory of the Estonian team in the Eurovision Song Contest in 2001 and the subsequent hosting of the event in Tallinn in 2002 and another stellar performance by the singer competing for Estonia.¹⁶⁹ Lukewarm support turned into a solid majority and the Estonians voted on September 14, 2003 with 66.9% for membership in the EU.¹⁷⁰

If a generational question can be decisively influenced by a pop contest, the entire idea of direct democracy on matters of great complexity and potentially permanent consequences ought to be re-considered! The very reduction of complex questions that may require nuance and compromise to yes-or-no alternatives really only works for populist politicians, the great

169. The fact that singer Anna Cecilia Sahlin was actually Swedish did not dampen the enthusiasm of Estonian TV viewers.

170. The outcome of all referenda held in the big bang countries is reported in *Strategy Paper and Report for [sic] the European Commission on the Progress Towards Accession by Bulgaria, Romania and Turkey*, at 22 COM (2003) 676 final.

simplifiers.¹⁷¹ Thus, the cure for the malaise of our democracies should not simply be more democracy and certainly not a dumbing down of democracy.¹⁷² At the purely internal national level, arguably, those who go after more direct democracy will have only themselves to blame if some decisions turn out to be less than wise.¹⁷³ At the European level, however, if one country votes on the future of another country, it can inflict long-term damages with impunity.¹⁷⁴ This simply can't be right.

CONCLUSIONS AND FUTURE OUTLOOK

“It has been said that democracy is the worst form of government except all the others that have been tried.”

–*Winston Churchill*

“Europe is not about material results,
it is about spirit.
Europe is a state of mind.”

–*Jacques Delors*¹⁷⁵

Indeed, Europe – the EU as we know it – is a state of mind, a matter of faith, not of science. In that, it is a bit like democracy, imperfect in so many ways, yet still better than all

171. In this we disagree with General Colin Powell who said that “Great leaders are almost always great simplifiers, who can cut through argument, debate, and doubt to offer a solution everybody can understand.” He may have said this when he was still supporting President George W. Bush. He might not want to repeat it today. For us, great leaders are those who can inspire trust and confidence so that they don't have to simplify everything beyond recognition but can take care of government in all its complexity while enjoying broad support of the electorate.

172. For further background reading, see Russell J. Dalton et al., *Public Opinion and Direct Democracy*, 12 J. DEMOCRACY 141 (2011).

173. Switzerland is again a case on point, having excluded itself time and again from more meaningful participation at the European level. In particular, the outcome of the referendum of February 9, 2014 is widely considered a disaster by the Swiss business sector. See Michael Rasch, *Wirtschaft fordert grosszügigere Umsetzung [Responses to immigration initiative: Business Calls for More Generous Implementation]*, NEUE ZÜRCHER ZEITUNG (Feb. 10, 2014, 2:16 PM), <http://www.nzz.ch/wirtschaft/wirtschafts-und-finanzportal/zurueckhaltende-reaktionen-aus-der-wirtschaft-1.18239972>.

174. One may wonder, for example, what the British would say if their potential vote in 2017 whether to remain or exit from the EU was subject to a German referendum whether or not they would be allowed to go.

175. As quoted in TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945*, at 504 (2006).

the alternatives. Eurosceptics have often said that yes, of course, they are in favor of Europe, just not this one.¹⁷⁶ As if we were standing in a well-stocked supermarket in front of a shelf full of cereals and we could simply pick “the other one” if we get tired of the old brand. But we don’t. Just ask any of those Eurosceptics to come up with an alternative model that would a) avoid the real and the alleged pitfalls of the current model, b) still provide the benefits of securing peace and prosperity among its members and for its neighbors for longer than ever before in the history of Europe, and c) be more popular or at least more acceptable to 28 Member State governments, and their 500 million people, and the multitude of public and private corporations and associations that define our economies and societies. We would quickly see that it is a lot easier to criticize than to create, to destroy than to build.¹⁷⁷

The fact that European integration as it stands is a hard fought and hard won compromise, decades in the making, is driven home by the subject of enlargement. Although the very rudimentary rules in the Treaties have been fleshed out with

176. This message is heard almost everywhere and anytime the citizens of the Member States are polled or voting on matters related to the EU. *See, e.g.*, Henry Milner, “YES to the Europe I want; NO to This One.” *Some Reflections on France’s Rejection of the EU Constitution*, 39 *PS: POL. SCI. & POL.* 258 (2006).

177. Those who try to offer an alternative model, like the CHARTER OF PRINCIPLES FOR ANOTHER EUROPE, available at http://www.europe4all.org/english/download/CHARTER_english.pdf, use a lot of beautiful words like “peace” and “freedom” and “justice” but they do not demonstrate that they have a comprehensive, workable, and above all widely acceptable model. This Charter, for example, includes the cute idea of “citizenship based on place of residence,” which would surely trigger a veritable avalanche of anti-foreign and anti-immigrant euroscepticism. As Reid summarized:

If a camel is a horse designed by a committee, as the old joke goes, then the ridiculously complicated structure of European Union councils, commissions, courts, committees, and Parliament scattered around various European cities makes up a huge camel of a government – an awkward and ugly beast that somehow manages to perform its necessary functions in a difficult environment. Nobody would have deliberately designed a government as complex and as redundant as the EU. Rather, the union’s unwieldy architecture simply evolved, the product of decades of treaties and agreements involving hundreds of compromises along the way. As Robert Schuman predicted in his May 9, 1950, declaration, the New Europe was created not according to some grand overall plan but rather piece by piece, as necessity and experience suggested.

T.R. REID, *THE UNITED STATES OF EUROPE: THE NEW SUPERPOWER AND THE END OF AMERICAN SUPREMACY* 272 (2004). Those who claim that they can do better than that have yet to deliver.

additional criteria and conditions over time, the entire process continues to be a political process, an art, not a science.