

CHAPTER 11

CROATIA

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Relevant documents:

- 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, *OJ* 2005 L 26/3.
- Protocol to the 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, to take account of the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Hungary, the Republic of Latvia, the Republic of Lithuania, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, *OJ* 2005 L 26/222.
- Council Decision 2006/145/EC on the principles, priorities, and conditions contained in the accession partnership with Croatia, *OJ* 2006 L 55/30.
- Framework Agreement between the European Community and the Republic of Croatia on the general principles for the participation of the Republic of Croatia in Community programmes, *OJ* 2005 L 192/16.
- Council Regulation (EC) No. 2257/2004 amending Regulations (EEC) No. 3906/89, (EC) No. 1267/1999, (EC) No. 1268/1999 and (EC) No. 2666/2000, to take into account of Croatia's candidate status, *OJ* 2004 L 389/1.
- Communication from the Commission, Opinion on Croatia's Application for Membership of the European Union, COM (2004) 257 final, 20 April 2004, Brussels.
- Decision No. 1/2002 of the Interim Committee between the European Community, of the one part, and the Republic of Croatia, of the other part, of 19 April 2002 concerning the adoption of its rules of procedure, *OJ* 2002 C 227/2.
- Interim Agreement on trade and trade-related matters between the European Community, of the one part, and the Republic of Croatia, of the other part, *OJ* 2001 L 26/3.
- Zakon o potvrđivanju Sporazuma o stabilizaciji i pridruživanju između Republike Hrvatske i Europskih zajednica i njihovih država članica (Law on the Ratification of the 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, *Narodne novine - Međunarodni ugovori* [Official Gazette - International Treaties] No. 14/2001 of 27 December 2001.

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1. RELATIONS BETWEEN THE EUROPEAN COMMUNITY/UNION AND CROATIA: FROM ISOLATION TO CANDIDACY

On 25 June 1991, the Croatian Parliament, implementing a constitutional provision of what was then Article 140 of the Constitution (enabling withdrawal from the Socialist Federal Republic of Yugoslavia) and following the referendum on sovereignty and independence held on 19 May 1991, adopted the Constitutional Decision on Sovereignty and Independence and the Declaration on the Sovereign and Independent Republic of Croatia.¹ Two days later, the Serbian dominated 'federal' army (JNA) started its military intervention in Slovenia, which subsequently spread to Croatia and other post-Yugoslav states.² The European Communities extended diplomatic recognition to Croatia on 15 January 1992.³ Unlike Slovenia and other post-Communist countries of Central and Eastern Europe, which started to develop contractual relations with the European Union and ultimately became members on 1 May 2004, relations between the European Union and Croatia were characterised by a long period of stagnation and exclusion from the mainstream integration process. In this period, the relationship between the European Union and Croatia was burdened with the realities of a war of independence and attempts by the country to regain control over its Serb-held territory. While Croatia engaged in legal and structural reforms on its own,⁴ their scope and outcome was limited, as they were pursued in the absence of contractual relations with the European Union. Instead, the Community extended its general system of preferences to Croatia on similar terms to those granted to the former SFR Yugoslavia.⁵ At that time, in the absence of a more developed relationship,

¹ Deklaracija o proglašenju suverene i samostalne Republike Hrvatske [Declaration on Sovereignty and Independence of the Republic of Croatia], *Narodne novine* [Official Gazette] No. 31/1991 of 25 June 1991. See also S. Sokol and B. Smerdel, *Ustavno pravo* (Zagreb, Informator 1998).

² For an historical and political account of the dissolution of Yugoslavia and the war in Bosnia, see L. Silber and D. Little, *The Death of Yugoslavia*, 2nd edn. (London, Penguin 1996); and M. Glenny, *The Fall of Yugoslavia*, 3rd edn. (London, Penguin 1996).

³ On 17 December 1991, the Council of Ministers adopted the Declaration on the Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union and the Declaration on Yugoslavia, see *Bull. EC* 12-1991, points 1.4.5. and 1.4.6, which formed the mandate of the so-called Badinter Arbitration Commission. In Opinion No. 5 delivered on 11 January 1992, the Badinter Commission stated that Croatia was not fully in compliance with the provisions proposed by the EC concerning the special status of minorities, but that it otherwise 'meets the necessary conditions for its recognition.' For the text of the opinion, see 31 *ILM* (1992) p. 1488. For background information on the creation, work and impact of the Badinter Commission, see S. Terrett, *The Dissolution of Yugoslavia and the Badinter Arbitration Commission: A Contextual study of Peace-making Efforts in the Post-Cold War World* (Aldershot, Ashgate 2000).

⁴ See Government of the Republic of Croatia, Office for European Integration, Action Plan for European Integration (September 1999). This 564-page volume attempted to replicate the screening process without the assistance of the EC.

⁵ Council Regulation (EEC) No. 3567/91 of 2 December 1991 concerning the arrangements applicable to the import of products originating in the Republics of Bosnia-Herzegovina, Croatia,

the European Union used these trade preferences as a mechanism of influence linked to respect for fundamental principles of democracy and human rights and readiness to allow the development of economic relations with other countries in the region.⁶ Subsequent extensions of exceptional trade measures to countries in the region, including Croatia, were based on the conclusions of the Lisbon European Council of 23 and 24 of March 2000, which concluded that the establishment of free trade areas between the countries in the region 'should be preceded by asymmetrical trade liberalisation.'⁷ The Feira Council noted the democratic progress and proceeded with asymmetric trade liberalisation.⁸ Accordingly a large segment of imports from Croatia and other ex-Yugoslav countries to the European Union was liberalised while Croatia and other beneficiary states were allowed to keep their customs protection. This mechanism, which was subsequently integrated into the contractual relations with the European Communities is widely understood as an instrument that allows more advanced states in the region to get closer to EU trade standards while allowing them to develop or maintain patterns of trade among themselves.

In the early 1990s, the relationship with the European Community/Union was burdened by the arms embargo imposed on Yugoslavia by the Member States on 5 July 1991 and renewed in subsequent years.⁹ Non-discriminatory at first sight, the arms embargo in effect left Croatia to the mercy of the JNA and Serb irregulars. The arms embargo was not lifted in respect of Croatia until 20 November 2000.¹⁰ In Croatia, the arms embargo was widely understood as a policy choice by

Macedonia and Slovenia, *OJ* 1991 L 342/1. The granting of GSP aid is subject to conditionality. See chapter 10 in this volume and my contribution in N. Horn, J.S. Baur and K. Stern, eds., *Zukunftsprobleme der Europäischen Union – Erweiterung nach Osten oder Vertiefung, oder Beides – Die kroatische Perspektive*, Schriften des Rechtzentrums für Europäische und Internationale Zusammenarbeit (R.I.Z.) (Berlin and New York, Walter de Gruyter 1997) pp. 125-138.

⁶ *Bull. EU* 4-1997, point 2.2.1.

⁷ 13 *CEPS Europa South-East Monitor* (July 2000) p. 4.

⁸ Council Regulation (EC) No. 2007/2000 of 18 September 2000 introducing exceptional trade measures for countries and territories participating in or linked to the SAP, *OJ* 2000 L 240/1. See also Explanatory Memorandum, 13 *CEPS Europa South-East Monitor* (July 2000) p. 3 et seq.; and see chapter 10 in this volume.

⁹ See, e.g., Council Common Position 96/184/CFSP concerning arms exports to the former Yugoslavia, *OJ* 1996 L 58/1 (as amended): 'The Council of the European Union therefore decides that: (i) during the period of the deployment of IFOR and UNTAES, as well as other operations including IPTF, the EU embargo on arms, munitions and military equipment will be maintained towards Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia'. At first, the Community's arms embargo fell within the Member States' scope of competence. This changed with the Treaty of Maastricht. See S. Blockmans, 'The European Union's Troubled Relations with the Federal Republic of Yugoslavia (1991-2001)', in J. de Zwaan, et al., eds., *The European Union: An Ongoing Process of Integration – Liber Amicorum Alfred E. Kellermann* (The Hague, T.M.C. Asser Press 2004) pp. 337-356 at p. 341.

¹⁰ Council Common Position 2000/722/CFSP amending Common Position 96/184/CFSP concerning arms exports to the former Yugoslavia, *OJ* 2000 L 292/1.

the European Union to 'let might make right'. Negative attitudes towards the European Union generated in the early 1990s are still relevant on the political scene in Croatia.

The first major shift in the Union's policy concerning Croatia was designed by the Commission in 1996,¹¹ when conditionality or, as it is sometimes called, the *regional* approach governing the development of the European Union's relations with 'certain countries of south-east Europe', Croatia included, was framed. On 29 April 1997, following the Commission's report, the EU General Affairs Council adopted a regional approach introducing political and economic conditionality for the development of relations with countries in the region.¹² This approach was further developed in June 1999, following the Commission's proposal of 26 May for the creation of a Stabilisation and Association Process (SAP) for the countries of South-Eastern Europe,¹³ Croatia included.¹⁴ The main conditions to be complied with by those countries were specified as compliance with democratic principles, human rights and rule of law, respect for and protection of minorities, market economy reforms, regional cooperation and compliance with obligations under international peace agreements (Dayton/Paris¹⁵ and Erdut¹⁶). Compliance with the above-mentioned criteria may qualify the countries concerned for:

- a Stabilisation and Association Agreement (SAA);
- autonomous trade measures and other economic and commercial relations;
- economic and financial assistance;
- aid for democratisation and civil society;

¹¹ Report from the Commission to the Council and the European Parliament, Common principles for future contractual relations with certain countries in South-Eastern Europe, COM (1996) 476 final of 2 October 1996; see also Commission Staff Working Paper on the EU Stabilisation and Association Process for countries of South-Eastern Europe, SEC (2000) 168.

¹² Council conclusions on the principle of conditionality governing the development of the European Union's relations with certain countries of south-east Europe, *Bull. EU* 4-1997, point 2.2.1.

¹³ Conclusions of the General Affairs Council of 21 June 1999, based on the Commission Communication to the Council and the European Parliament on the Stabilisation and Association Process for countries of South-Eastern Europe, COM (1999) 235 of 26 May 1999. See also COM (1996) 476 and *Bull. EU* 10-1996, point 1.4.65.

¹⁴ Council conclusions on the development of a comprehensive policy based on the Commission communication on the Stabilisation and Association Process for countries of south-eastern Europe, *Bull. EU* 6-1999, point 1.3.91.

¹⁵ The General Framework Agreement for Peace, initialled in Dayton on 21 November 1995, signed in Paris on 14 December 1995 and consolidated in Rome on 18 February 1996, is published in 35 *ILM* (1996) p. 75.

¹⁶ The Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium, signed in Erdut and Zagreb (Croatia) on 12 November 1995 is published in US Institute of Peace, *The United States and Croatia: a documentary history, 1992-1997* (Vienna, USIA Regional Program Office 1997) pp. 270-271, also available at: <http://www.usip.org/library/pa/croatia/croatia_erdut_11121995.html>.

- humanitarian aid for refugees, returnees and others;
- cooperation on justice and home affairs;
- development of political dialogue.

The creation of the SAP indicated that the European Union's relations with Croatia were formally taking a path different from the one offered to the countries that joined the European Union in May 2004. The perspective of EU membership was blurred, and relations with the European Union were tied to closer cooperation with other countries in the region.

Following a series of ups and downs prompted partly by the political landscape in Croatia, which was characterised by an authoritarian right-wing government and partly by turbulent post-conflict developments in the region, a new stage in the relations between the European Union and Croatia commenced following the general elections held in January 2000 and the political shift introduced by the new centre-left parliamentary majority, allied in a six-party coalition led by Social Democrats. Soon after the elections, the presidential system was dismantled by constitutional amendment and replaced by parliamentary government.¹⁷

On 24 May 2000, as a consequence of the changed political environment in Croatia, the Commission adopted a positive feasibility study for opening the negotiations for conclusion of a Stabilisation and Association Agreement with Croatia.¹⁸ The feasibility report was introduced as part of the SAP for the countries of South-Eastern Europe in 1999 as an additional test of compliance with democratic criteria. According to the study, the parameters of the future SAA were to include: formalisation and enhancement of political dialogue, improvement and consolidation of regional cooperation, liberalisation of the trade regime in industrial goods, agriculture and fisheries, services and the right of establishment, current payments and movement of capital, approximation of legislation in the areas of technical standards and certification, competition and state aids, public procurement, intellectual, industrial and commercial property, telecommunications and the information society, consumer protection, labour law and equal opportunities for men and women, cooperation in the area of justice and home affairs, as well as economic and financial cooperation in numerous areas.¹⁹ On 24 May 2000, the European Commission subsequently adopted a feasibility study and proposed to the Council on the opening of negotiations on the conclusion of

¹⁷ Promjena Ustava Republike Hrvatske [Amendment of the Constitution of the Republic of Croatia], *Narodne novine* No. 113/2000.

¹⁸ Report from the Commission on the feasibility of negotiating a Stabilisation and Association Agreement with the Republic of Croatia, COM (2000) 311 final of 24 May 2000.

¹⁹ Such as statistics, industry, customs and taxation, education and training, environment, etc. These areas were indeed incorporated into the SAA.

an SAA between the European Communities and its Member States, of the one part, and Croatia, of the other.²⁰ The negotiations on the SAA opened on 24 November 2000 at the EU-Balkans summit in Zagreb. The occasion was used to mark the end of negotiations between the European Union and FYR Macedonia.²¹ Croatia completed the negotiations during the Swedish Presidency (i.e., by 1 July 2001) and the agreement – the second of its kind – was signed on 29 October 2001.²²

The term ‘Stabilisation and Association Agreement’ was coined by the Feira European Council in accordance with the name of the process and was designed to be its main individualised legal instrument, possibly leading to a closer relationship with the European Union.²³ Its nature is clearly stated in a later document,²⁴ which describes it as a ‘... fundamental element of a multi-faceted EU strategy designed to favour a progressive process of integration of the countries of the Western Balkans into the EU.’ In Feira, the European Council for the first time mentioned the possibility of EU membership for the countries concerned, baptising them *potential candidates* for membership.²⁵ In that way, the SAP was clearly differentiated from enlargement and was tucked away under the external relations competence of the European Communities, while at the same time leaving the door open for possible candidacy. Since Feira, potential candidate status has been mentioned in many subsequent documents and has become part of the standard preambular wording of the SAAs.²⁶

²⁰ Report from the Commission on the feasibility of negotiating a Stabilisation and Association Agreement with the Republic of Croatia, COM (2000) 311 final, Brussels, 24 May 2000.

²¹ For the final declaration of the Zagreb Summit, see 9 *Euroscope* (2000) pp. 51-52.

²² COM (2001) 371 final, Brussels, 9 July 2001. On the same day, Macedonia and the European Union also signed an Interim Agreement allowing the parties to put into force the trade and trade-related aspects of the SAA as of 1 June 2001 without having to wait for the ratification of the SAA by the EU Member States. On the occasion of the signing of the SAA, Swedish Foreign Minister Anna Lindh said: ‘This is an historic day for FYROM and for the European Union. It signifies a major step towards the gradual integration of FYROM into the European Union.’ Source: <http://www.eu2001.se/eu2001/news/news_read.asp?iInformationID=13885>.

²³ Presidency Conclusions, 19-20 June 2000, *Bull. EU* 6-2000, point I.49.67: ‘The European Council confirms that its objective remains the fullest possible integration of the countries of the region into the political and economic mainstream of Europe through the Stabilisation and Association Process, political dialogue, liberalisation of trade and cooperation in Justice and Home Affairs.’

²⁴ ‘On the road to Europe: First Stabilisation and Association Agreement to be signed on 9 April 2001 with the former Yugoslav Republic of Macedonia’, MEMO/01/127 – Brussels, 6 April 2001.

²⁵ See chapter 10 in this volume.

²⁶ See, e.g., preamble to the SAA Croatia: ‘Recalling the European Union’s readiness to integrate to the fullest possible extent Croatia into the political and economic mainstream of Europe and its status as a potential candidate for EU membership on the basis of the Treaty on European Union and fulfilment of the criteria defined by the European Council in June 1993, subject to the successful implementation of this Agreement, notably regarding regional cooperation.’

The SAA was framed as a new form of bilateral agreement between the European Union and third countries that were not automatically recognised as candidates for EU membership, namely Albania, Bosnia-Herzegovina, Croatia, Macedonia and the Federal Republic of Yugoslavia. Designed as a mixed agreement, in order to become effective, the SAA had to be ratified by the Croatian Parliament (*Sabor*), the European Parliament and by the Member States of the European Union according to their constitutionally provided procedures. The *Sabor* ratified the agreement on 5 December 2001,²⁷ the European Parliament on 12 December 2001,²⁸ while the last ratification by one of original fifteen Member States came from Italy in October 2004.²⁹ In the meantime, on 28 January 2002, pending the entry in force of the SAA, the Council of Ministers adopted the Interim Agreement giving effect to the trade-related provisions of the SAA.³⁰ Croatia ratified the Interim Agreement on 5 December 2001.³¹

Croatia presented its application for membership of the European Union on 21 February 2003, and the procedure was initiated by the Council of Ministers on 14 April 2003. The strongest statement opening the path to EU membership for all countries in the region came from the EU-Western Balkans Summit in Thessaloniki on 21 June 2003. The Thessaloniki Council, the venue for the signing of the Accession Treaty with the ten CEECs, was used as a backdrop for opening the door of the European Union to the countries of South-Eastern Europe. As stated in the Declaration of the Summit,

²⁷ See Zakon o potvrđivanju Sporazuma o stabilizaciji i pridruživanju između Republike Hrvatske i Europskih zajednica i njihovih država članica [Law on Ratification of the Stabilisation and Association Agreement Between the Republic of Croatia and the European Communities and its Member States], *Narodne novine - Međunarodni ugovori* [Official Gazette - International Treaties] No. 14/2001 of 27 December 2001.

²⁸ European Parliament legislative resolution on the proposal for a Council and Commission decision on the conclusion of the 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 (11172/2001-COM(2001)371 – C5-0565/2001 – 2001/0149 (AVC)). The final decision of the Council and the Commission on the conclusion of the SAA was adopted on 13 December 2004: Council and Commission Decision 2005/40/EC, Euratom of 13 December 2004 concerning the conclusion of the 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, *OJ* 2005 L 26/1.

²⁹ Austria ratified the SAA on 21 February 2002, Ireland on 17 April 2002, Denmark on 30 April 2002, Germany on 12 July 2002, the Netherlands on 10 September 2002 (but it withheld notification until 30 April 2004), Spain on 19 September 2002, Sweden on 19 February 2003, France on 4 March 2003, Luxembourg on 3 June 2003, Greece on 5 June 2003, Portugal on 1 July 2003, Belgium on 11 December 2003, Finland on 19 December 2003, United Kingdom on 3 September 2004 and Italy on 8 October 2004.

³⁰ Council Decision 2002/107/EC on the conclusion of an Interim Agreement on trade and trade-related matters between the European Community, of the one part, and the Republic of Croatia, of the other part, *OJ* 2002 L 40/9. For the text of the Interim Agreement, see *OJ* 2001 L 330/3.

³¹ *Narodne novine - Međunarodni ugovori* No. 15/2001. The Agreement entered into force on 1 March 2002, subject to a notice of the Ministry of Foreign Affairs of 5 February 2002, *Narodne novine - Međunarodni ugovori* No. 3/2002 of 22 February 2002.

The EU reiterates its unequivocal support to the European perspective of the Western Balkan countries. The future of the Balkans is within the European Union. The ongoing enlargement and the signing of the Treaty of Athens in April 2003 inspire and encourage the countries of the Western Balkans to follow the same successful path. Preparation for integration into European structures and ultimate membership into the European Union, through adoption of European standards, is now the big challenge ahead. The Croatian application for EU membership is currently under examination by the Commission. The speed of movement ahead lies in the hands of the countries of the region.³²

While the Thessaloniki Council declared Croatia's path towards membership open, several obstacles had to be overcome. For instance, Croatia's application for membership was clouded by the reluctance of the United Kingdom and the Netherlands to ratify the SAA, due to their doubts concerning the full cooperation of Croatia with the ICTY. On 1 May 2004, ten new states joined the European Union and the SAA had not entered in force. When ratification by the fifteen Member States was completed on 8 October 2004, the new Member States still had to accede to the agreement, either by ratification, or in the manner envisaged by Article 6 of the Act of Accession, that is, by conclusion of a protocol to the SAA between the Council, acting unanimously on behalf of the Member States, and Croatia.³³ The so-called Enlargement Protocol was signed by the Commission and Croatia on 21 December 2004 and was submitted to the Council for adoption. It entered into force at the same time as the SAA itself, namely on 1 February 2005.³⁴

Another obstacle concerned the dilemma whether a positive opinion of the Commission and the commencement of membership negotiations could be achieved in the face of the doubts that had held up the ratification of the SAA. Although the two are not directly related, the political intention behind them was the same: using a national voice in different stages of *rapprochement* in order to achieve foreign policy goals – in the case of Croatia, full cooperation with the ICTY. On 20 April 2004, regardless of the described political stance, the European Commission adopted an opinion recommending to the Council of Ministers to extend candidate country status to Croatia and commence membership negotiations.³⁵ Two months later, on 17-18 June 2004, the European Council declared

³² Thessaloniki, 21 June 2003, 10229/03 (Presse 163).

³³ Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, *OJ* 2003 L 236/33.

³⁴ Council Decision 2005/205/EC concerning the conclusion of the Enlargement Protocol to the SAA Croatia, *OJ* 2005 L 68/30. For text of the Protocol, see *OJ* 2005 L 26/222.

³⁵ Communication from the Commission, Opinion on Croatia's Application for Membership of the European Union, Brussels, 20 April 2004, COM (2004) 257 final.

Croatia a candidate country for membership of the European Union.³⁶ In the same suit, and based on Council Regulation (EC) No. 533/2004 of 22 March 2004 on the establishment of European Partnerships in the framework of the SAP,³⁷ the Council of Ministers adopted the first European Partnership for Croatia on 13 September 2004.³⁸

Finally, driven by the mandate to devise a pre-accession strategy for Croatia and to closely define the priorities and the framework for the membership negotiations, the European Commission adopted the pre-accession strategy on 6 October 2004, extending pre-accession financial instruments to Croatia.³⁹ In designing the negotiation framework, the Commission reiterated the conditionality approach, this time underpinned with a suspension clause according to which accession can be suspended ‘... in the case of a serious and persistent breach of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law on which the Union is founded.’⁴⁰ Finally, the Brussels European Council of 17-18 December 2004 invited the Commission to present to the Council a proposal for a framework for negotiations with Croatia, taking full account of the experience of the fifth enlargement. It requested the Council to agree on that framework with a view to opening the accession negotiations on 17 March 2005, provided that Croatia cooperated fully with the ICTY.⁴¹ As apparent from political statements, the last outstanding issue of full cooperation with the Tribunal was the apprehension and surrender of one remaining indictee.⁴² On 16 March 2005, the Ministers were not unanimous that

³⁶ Presidency Conclusions, 17-18 June 2004, *Bull. EU* 6-2004, point I.7.31: ‘The European Council welcomes the Commission Opinion on Croatia’s application for EU membership and the recommendation that accession negotiation should be opened. The European Council considered the application on the basis of the Opinion and noted 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. It decided that Croatia is a candidate country for membership and that the accession process should be launched.’

³⁷ *OJ* 2004 L 86/1. The basic Regulation indicated that the partnerships ‘... will identify priorities for action in order to support efforts to move closer to the European Union while serving as a checklist against which to measure progress. They will be adapted to the countries’ specific needs and respective stages of preparation, and to the specificities of the Stabilisation and Association Process, including regional cooperation.’

³⁸ Council Decision 2004/648/EC on the principles, priorities and conditions contained in the European Partnership with Croatia, *OJ* 2004 L 297/19, repealed and replaced by Council Decision 2006/145/EC on the principles, priorities, and conditions contained in the *accession* partnership with Croatia, *OJ* 2006 L 55/30 (emphasis added), so as to reflect the new status of Croatia as a candidate for EU accession.

³⁹ Communication from the Commission to the Council and to the European Parliament, Strategy Paper of the European Commission on progress in the enlargement process, SEC (2004) 1199, 1200, Brussels, 6 October 2004, COM (2004) 657 final, *OJ* 2004 C 117/11.

⁴⁰ *Ibid.*, pt. 3.2.

⁴¹ See *Bull. EU* 12-2004, point I.6.16.

⁴² See, e.g., ‘EU and NATO tell Croatia “Gotovina is final issue”’, 13 *New Europe*, No. 615, 6-12 March 2005, p. 9.

there was full cooperation with the Tribunal and the negotiations were postponed. However, the Council adopted the negotiating framework and cleared the way for the commencement of negotiations as soon as it would be satisfied that Croatia had met the remaining requirement.⁴³ The Ministers agreed to appoint a ‘task force’ comprising a representative from the EU presidency, a delegate from the European Commission and representatives from the United Kingdom and Austria, to evaluate Croatia’s cooperation with the ICTY as a condition for starting EU accession negotiations. On 3 October 2005, the task force adopted a positive opinion following a positive report from the ICTY’s Chief Prosecutor who was satisfied that Croatia was fully cooperating with the Tribunal. Subsequently, on the same day, the General Affairs and External Relations Council concluded that negotiations should be opened.⁴⁴ The negotiations were opened in the early morning hours of 4 October 2005. The formal start of the accession negotiations was followed by the opening of the so-called ‘screening process’ by the Commission on 20 October 2005. Former Croatian army general Ante Gotovina was eventually arrested in Spain on 7 December 2005 and was subsequently transferred to the ICTY in The Hague.

2. SAA CROATIA – THE MAIN LEGAL INSTRUMENT

As can be easily noted, the SAA Croatia bears significant similarities to the Europe Agreements – the Association Agreements that were concluded with the CEECs that joined the European Union in May 2004.⁴⁵ This primarily refers to their structure, institutional framework, free movement provisions, approximation of laws and cooperation policies. On the other hand, differences can be detected in respect of the aims of association, political dialogue and conditionality requirements. Nevertheless, bearing in mind that both generations of the agreement are sensitive to the wider political context, their object and purpose are susceptible to change. In fact, the perspective of EU membership for the signatories of the Europe Agreements emerged only later, as a result of the Copenhagen European Council in 1993,⁴⁶ and for countries of South-Eastern Europe after the Feira European Council in 2000.⁴⁷

⁴³ Council Conclusions of 16 March 2005, Press Release No. 6969/05 (Presse 44). The Council referred to the importance of full cooperation with the ICTY as an essential requirement for closer relations with the European Union.

⁴⁴ Council Conclusions of 3 October 2005, Press Release No. 12514(05) (Presse 241). The Council reiterated that ‘sustaining full cooperation with the ICTY would remain a requirement for progress throughout the accession process’ and invited the Commission to closely monitor it.

⁴⁵ See, e.g., D. Phinnemore, ‘Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?’, 8 *EFA Rev.* (2003) p. 77 at p. 80.

⁴⁶ M. Maresceau, ‘A Legal Analysis of the Community’s Association Agreements with Central and Eastern European Countries: General Framework, Accession Objectives and Trade Liberalization’,

2.1 Preamble and political context

The preamble of the SAA Croatia takes the above-mentioned contextual sensitivity into account, thereby expressing the dynamic nature of the SAP. The Union reiterates its 'readiness to integrate to the fullest possible extent Croatia into the political and economic mainstream of Europe and its status as a potential candidate for EU membership.'⁴⁸ However, potential membership depends on acceptance of values specified by Article 6 TEU, fulfilment of the criteria defined by the Copenhagen European Council in 1993, as supplemented by the Madrid European Council in December 1995,⁴⁹ and the successful implementation of the agreement, notably in the area of regional cooperation. So far, the preamble does not add anything new to the Presidency Conclusions adopted in Feira. When read together with other relevant provisions, the preamble designates the SAA as an acceleration lane taking Croatia closer to the European Union, where EU membership is not explicitly mentioned but has to be drawn out of the political context. The described vagueness of terms generated fears that the agreement with Croatia was framed in a way that was substantially different to the Europe Agreements, with the consequence that Croatia would be left outside the European Union for a longer period of time. This fear was fuelled by the exclusion of Croatia from key political events and documents. For example, while the Nice IGC paved the way for the Eastern enlargement of the European Union, and even allocated seats in Community institutions to prospective members, Croatia, being absent not just from the negotiating table but also from the minds of European leaders, was not included in the allocation.⁵⁰ While this is not unusual, comparatively speaking, and can be solved by adding a protocol to the eventual accession treaty, the psychological consequences of such an exclusion are obvious.

On the other hand, explicit provisions in Association Agreements referring to EU membership are more the exception than the rule. In fact, early drafts of Europe Agreements⁵¹ did not employ provisions directly referring to accession to

in S.V. Konstadinidis, ed., *The Legal Regulation of the European Community's External Relations after the Completion of the Internal Market* (Dartmouth 1996) pp. 125-129; see also Phinnemore, loc. cit. n. 45, at p. 79.

⁴⁷ See n. 23 *supra*.

⁴⁸ 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, *OJ* 2005 L 26/3.

⁴⁹ In Madrid, it was added that the candidate country must have created the conditions for its integration through the adjustment of its administrative structures. EU law transposed into national legislation has to be implemented effectively through appropriate administrative and judicial structures. See Madrid European Council, 15 and 16 December 1995, Presidency Conclusions, pt. III.A.

⁵⁰ See Protocol on the Enlargement of the European Union attached to the Treaty on European Union and of the Treaty Establishing the European Community (consolidated version), *OJ* 2002 C 325/01.

⁵¹ The Europe Agreements were concluded between the European Communities and their Member States, on the one hand, and each of the following countries of Central and Eastern Europe, on

the European Union. Those provisions were negotiated under pressure of some states and even then are phrased in relatively vague terms.⁵² Moreover, not even an explicit reference to the future membership of the European Union in the Europe Agreements would amount to a guarantee of membership.⁵³ The main difference in this respect between the SAAs and the Europe Agreements seems to lie in an enhanced degree of conditionality, corresponding to the needs of democratic and economic reforms that have to be implemented before political commitment to membership is made by the European Union. This leads to the conclusion that the commitment of EU membership does not seem to be an inherent part of the SAAs in terms of their legal characteristics, such as legal basis, structure or teleology,⁵⁴ but that it is contingent on political developments and instruments, such as Presidency Conclusions, accession partnerships, pre-accession strategies, and so forth. Second, the legal basis for the signing of the SAAs, which – just like the Europe Agreements – are negotiated on the legal basis of the provisions of Article 300 TEC and concluded on the legal basis of Article 310 TEC, is a necessary but not sufficient condition for further progress towards EU membership. In short, progress towards membership depends primarily on political assessment and not on contractual commitments.

the other: Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, the Slovak Republic and Slovenia.

⁵² Maresceau, loc. cit. n. 46. The Opinion of AG Mayras in *Haegeman* is also worth noting: 'But Article 238 does not define the association and does not particularise in any way the possible contents of an Association Agreement. It follows that such a type of agreement may lead to the establishment of a very close institutional cooperation between the Community and the associated country without going as far as the unconditional accession of that country.' ECJ, Case 96/71 *Haegeman v. Belgium* [1972] ECR 1005, at 1023.

⁵³ As noted by Smit and Herzog, 'association signifies close and continuous cooperation with the Community. [A]n interest only in financial or trade arrangements, let alone mere consultation agreements is not enough. Agreements seeking this involve only exchanges of reciprocal advantages, while association implies common goals and institutional framework.' H. Smit and P. Herzog, *The Law of the European Economic Community: A Commentary on the EEC Treaty*, Vol. G 6 (New York, Bender 1976-1995). Frank S. Benyon, 'Community Association Agreements: From the Sixties to the Nineties', in S.V. Konstadinidis, ed., *The Legal Regulation of the European Community's External Relations After the Completion of the Internal Market* (Aldershot, Dartmouth 1996) pp. 51-52.

⁵⁴ As far as the inherent elements of Europe Agreements are concerned, Macleod, Hendry and Hyett have outlined the following key elements: close relationship between the parties, extending to a participation of the associated country in certain of the objectives of the EC treaty; the content of association which goes beyond merely commercial matters and covers a number of fields of Community activity; the institutions created, which are highly developed and include organs endowed with decision-making power; and the permanent nature of links and indefinite or extended periods of application. Most of these elements can indeed be found in the text of the SAAs concluded so far. None of them, however, provide a firm guarantee of membership, either by themselves or taken together. I. Macleod, I.D. Hendry and S. Hyett, *The External Relations of the European Communities* (Oxford, Oxford University Press 1996) p. 370 et seq.

2.2 Aims

The aims of the association are recited in Article 1 of the SAA. They are:

- to provide an appropriate framework for political dialogue, allowing the development of close political relations between the parties;
- to support the efforts of Croatia to develop its economic and international cooperation, also through the approximation of its legislation to that of the Community;
- to support the efforts of Croatia to complete the transition to a market economy, to promote harmonious economic relations and gradually develop a free trade area between the Community and Croatia; and
- to foster regional cooperation in all the fields covered by the agreement.

When compared with the aims of the Europe Agreements, for example the EA Slovenia, the SAA Croatia differs to a certain extent. The most obvious difference noted by commentators is the absence in the SAA Croatia of the aim to ‘... provide an appropriate framework for gradual integration into the European Union’, which is included in the Europe Agreements. This led Phinnemore to speculate about the ‘lesser status’ of the SAAs compared to the Europe Agreements.⁵⁵ While such an explanation precisely addresses Croatia’s fears, the missing aim is built into provisions on political dialogue that explicitly refer to ‘Croatia’s full integration into the community of democratic nations and gradual rapprochement with the European Union’.⁵⁶ In other words, the perspective of joining the European Union, subject to compliance with the criteria described in section 1 *supra*, brings the SAA close to the Europe Agreements. A diligent interpretation of its provisions must not underestimate the combined weight of the preamble, the aims and provisions on political dialogue and their role in shifting the aims of the agreement towards potential and eventually actual membership. However, every stage in the process towards membership has to be triggered by a political decision and an assessment of compliance by the Commission.

2.3 Institutional framework

The institutional framework established by the SAAs is very similar to that applied in the earlier instance of the Association Agreements. The institutions concerned are highly developed and include organs endowed with decision-making power.⁵⁷

⁵⁵ See, e.g., Phinnemore, loc. cit. n. 45, at p. 84.

⁵⁶ Art. 7 SAA Croatia.

⁵⁷ See Macleod, Hendry and Hyett, op. cit. n. 54.

In line with the well-established practice of other Association Agreements, which was also followed in the case of the Europe Agreements, the SAAs establish an association council, this time under the name of Stabilisation and Association Council (SAC). The SAC has the power to make decisions within the scope of the SAA that are binding on the parties, which shall take the necessary measures to implement the decisions taken.⁵⁸ The SAC can delegate any of its powers to a Stabilisation and Association Committee (hereinafter, the Committee), a permanent body responsible for the preparation of the meetings of the SAC that can comprise members of the European Commission. However, the legal effects of the above-mentioned decisions, whether taken by the SAC or the Committee, may be different in the Community and in Croatia. This issue requires additional clarification and will be discussed below in section 2.4.

Pending the entry into force of the SAA Croatia, an Interim Committee was established under the Interim Agreement.⁵⁹ Its powers correspond to those of the SAC, but within the scope of the Interim Agreement. The Interim Committee meets regularly and its decisions, when adopted, are published in the Croatian Official Gazette.⁶⁰ Following the entry into force of the SAA, the first meeting of the Stabilisation and Association Council was held in Brussels on 14 July 2005.

Another institution created under the SAAs is the Stabilisation and Association Parliamentary Committee, which comprises members of the European Parliament and parliamentarians from the relevant SAP country and serves as a forum for the exchange of views.⁶¹

Despite some differences in the institutional setting that have been noted by other authors, such as different arbitration procedures and different modes of participation of the Community in the rotating presidency of the SAC,⁶² the institutional provisions do not differ significantly from those employed in earlier Association Agreements. However, it should not be forgotten that activities taking place outside the framework of the SAA are by no means less important than those taking place under the SAA. This issue will be addressed in section 4.

2.4 Substantive provisions: free movement and competition

Similarly to the earlier generations of Association Agreements, the SAA Croatia mirrors the free movement and competition law provisions of the EC Treaty,

⁵⁸ Art. 112 SAA Croatia.

⁵⁹ Art. 38 of the Interim Agreement on trade and trade-related matters between the European Community, of the one part, and the Republic of Croatia, of the other part, *OJ* 2001 L 330/3.

⁶⁰ The only one that was published in *Narodne novine* is Decision No. 1/2002 of the Interim Committee between the European Community, of the one part, and the Republic of Croatia, of the other part, of 19 April 2002 concerning the adoption of its Rules of Procedure, *Narodne novine - Međunarodni ugovori* No. 8/2003.

⁶¹ Art. 116 SAA Croatia.

⁶² Phinnemore, loc. cit. n. 45, at p. 95.

albeit in an asymmetric way. While a full elaboration of these provisions would merit a separate study, a few remarks on the free movement of goods and competition deserve attention here.

As far as the free movement of goods is concerned, a free trade area is to be established within six years of the entry into force of the agreement, starting from the date of application of the Interim Agreement, that is, 1 March 2002. Subject to Article 18 SAA Croatia, all customs duties on imports from the European Union to Croatia shall be progressively abolished by 1 January 2007. In addition, pursuant to the standstill clause in Article 33, all customs duties and charges having equivalent effect must not be increased or introduced after the SAA Croatia has entered into force.

Competition is addressed in Article 70 SAA Croatia, which specifies that any practices contrary to this article ‘... shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 of the Treaty establishing the European Community and interpretative instruments adopted by the Community institutions.’ This in fact creates an obligation to apply the Community competition *acquis* from the date that the Interim Agreement enters into force.

No less importantly, Article 69 provides for Croatia’s commitment to ‘... ensure that its existing laws and future legislation will be gradually made compatible with the Community *acquis*.’ This provision, read in conjunction with the Article 120,⁶³ which mirrors the duty to cooperate specified by Article 10 TEC, arguably introduces not only an obligation to harmonise but also an obligation for Croatian courts to interpret existing Croatian law in accordance with Community law.

The provisions on the free movement of goods and competition are capable of having direct effect in the Community legal order. Their possible effects in Croatia will be explained in detail below.

2.5 Interpretation of the SAA Croatia

The SAA between the European Communities and its Member States, of the one part, and Croatia, of the other, is the key legal instrument regulating Croatia’s path of integration and the harmonisation of its legal system with the *acquis communautaire*. Certainly, the application of the agreement will largely depend on its interpretation. Although it may sound premature to speculate about possible interpretative approaches, the European Court of Justice has on many occasions

⁶³ Art. 120 SAA Croatia: ‘The Parties shall take any general or specific measures required to fulfil their obligations under this Agreement. They shall see to it that the objectives set out in this Agreement are attained.’

interpreted Association Agreements of earlier generations.⁶⁴ Positions taken by the ECJ are also of great relevance for the definition and application of SAAs. However, it should be stressed that this chapter focuses on EU policies and that the position and understanding of the SAA Croatia in the European Union may differ from its position and understanding in Croatia. For example, the Union will be concerned exclusively with the *bona fide* performance of the agreement and not with the instruments for its implementation in national law.⁶⁵

The consequences of the ECJ's case law concerning the direct application of Europe Agreements⁶⁶ for the interpretation of SAAs appear to be as follows:

- they can be expected to have direct effect in the Community legal order under the *Pabst* doctrine, building on the *Van Gend en Loos* case, according to which a provision of an international agreement in order to be directly effective in the Community legal order has to contain '... a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure';⁶⁷
- the same should hold for secondary association law under the *Sevince* doctrine, according to which the direct effect of secondary association law (i.e., decisions of an association council) cannot be excluded;⁶⁸ and
- interpretation will largely depend on the 'purpose and nature' of the agreement (*Kondova, Gloszczuk*), and the so-called provisions of Association Agreements mirroring the founding treaties need not be interpreted in the same way as the founding treaties themselves.⁶⁹

⁶⁴ An Association Agreement may be subject to interpretation either by the ECJ or by the courts of a contracting party (an associated state). The ECJ can interpret it either in the process of its making, under Art. 300(6) TEC, or *ex post*, following its entry into force, if a case concerning its application is brought before the Court in the preliminary ruling procedure.

⁶⁵ Cf., M. Cremona, 'External Relations and External Competence', in Paul P. Craig and G. de Búrca, *The Evolution of EU Law* (Oxford, Oxford University Press 1999) p. 143.

⁶⁶ See chapter 2 in this volume.

⁶⁷ ECJ, Case 17/81 *Pabst & Richarz* [1982] ECR 1331.

⁶⁸ ECJ, Case C-192/89 *Sevince* [1990] ECR I-3461. At the first sight, the wording of the relevant SAA articles does not seem to be intended to produce direct effects: 'The decisions taken shall be binding on the Parties, which shall take the measures necessary to implement the decisions taken.' However, as witnessed in the *Sevince* case, this did not prevent the ECJ from recognising the direct effect of secondary association law. In addition, since the legal form of SAC decisions is similar to directives under Article 249 TEC, their possible direct effect in the case of non-implementation cannot be excluded. There is, of course, no explicit obligation to draw any parallels from the ECJ's case law related to vertical direct effect of directives.

⁶⁹ See ECJ, Case C-235/99 *Secretary of State for the Home Department, ex parte: Eleanora Ivanova Kondova* [2001] ECR I-06427; ECJ, Case C-63/99 *Secretary of State for the Home Department, ex parte: Wieslaw Gloszczuk et Elzbieta Gloszczuk* [2001] ECR I-06369. For a confirmation of the direct effect of the provisions of association treaties, see also ECJ, Case C-268/99 *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie* [2001] ECR I-08615. See also ECJ, Case

The last consequence seems to be of crucial importance for the interpretation of SAAs. Specifically, the question is whether SAAs can be interpreted in the same way as the earlier generation of Europe Agreements or whether they have to be judged on their own purpose and nature. There is no ECJ case law on the point. However, the aims of an Association Agreement are, as a matter of practice, explicitly specified in the text. They reflect a number of political considerations that are expressed in various official documents, such as Council conclusions and other similar documents. As pointed out earlier, the Presidency Conclusions adopted at Feira⁷⁰ were echoed in the preamble of the SAA Croatia and further confirmed by the Presidency Conclusions of the Nice European Council⁷¹ and, more recently, the Thessaloniki Council.⁷² In all those documents, the purpose of the association relationship and, accordingly, the perspective of EU membership is phrased in a different way than in the earlier generation of agreements, and this can be of consequence for their interpretation.

Regardless of the developments described above, the understanding of the SAA and secondary association law in Croatia differs from its understanding in the European Union, especially in the case of the ECJ. The question whether regulatory powers have to be transferred to the SAC already arose during the ratification process of the SAA. Due to the political balance in the Croatian Parliament, the agreement was ratified by a majority of all representatives but fell short of the two-thirds majority that is required for the transfer of powers.⁷³ In response to the claim by the right-wing parties that the SAA would strip Croatia of its national sovereignty, the Croatian Prime Minister and Minister for European Integration classified the SAA as an ordinary international treaty and did not push for the two-thirds majority ratification that would have been required by the Constitution in the case of the transfer of regulatory powers to supranational bodies.⁷⁴

C-257/99 *Secretary of State for the Home Department, ex parte: Julius Barkoci et Marcel Malik* [2001] ECR I-06557, para. 39.

⁷⁰ See n. 23 *supra*.

⁷¹ Presidency Conclusions, 7-9 December 2000, *Bull. EU* 12-2000, point I.36.60: '... the EU will continue to support the Western Balkans' efforts in their progress towards democracy, the rule of law, reconciliation and cooperation based on respect for existing borders and other international obligations which will contribute to the rapprochement of each of these countries with the Union and form a whole.' The Presidency further concluded that all countries of the Western Balkans have '... a clear prospect of accession, indissolubly linked to progress in regional cooperation, in accordance with the conclusions of Cologne and Feira.'

⁷² Presidency Conclusions, 19-20 June 2003, *Bull. EU* 6-2003, point I.17.40: 'The European Council, recalling its conclusions in Copenhagen (December 2002) and Brussels (March 2003), reiterates its determination to fully and effectively support the European perspective of the Western Balkan countries, which will become an integral part of the EU, once they meet the established criteria.'

⁷³ Izvješća Hrvatskog Sabora [Reports of the Croatian Parliament], No. 315, 20 December 2001.

⁷⁴ See, e.g., the speech by Minister Neven Mimica in the Croatian Parliament on 24 October 2001, in which he stated that no constitutional regulatory authority would be transferred to the Stabilisation and Association Council. Source <<http://www.mei.hr>>.

This method of ratification gave rise to questions as to whether decisions of the SAC could be directly applicable in the absence of implementing legislation. In order to address this issue, the Croatian Parliament adopted the Law Implementing the SAA, apparently in pursuance of the position that the SAC may not, without further implementing measures, exercise constitutional regulatory powers.⁷⁵ Article 6 of this Law applies a radical dualist approach according to which decisions of the Association Council are subject to parliamentary ratification. This is a clear departure from the constitutional mandate of monism stipulated under Article 140 of the Constitution, which renders ratified international treaties part of national law. For this reason, the compatibility of the Law and the Constitution is questionable. So far, no practice of application of the SAA has been reported by the Croatian courts. Due to their extremely formalist attitude, however, Croatian judges are inclined to look into the most precise regulation available.⁷⁶ Instances of regulatory infringement of the SAA have already occurred, but have not been brought before Croatian courts.⁷⁷

3. CONDITIONALITY

In broad and plain terms, the conditionality approach can be described as a ‘carrot and stick’ mechanism that can be used by the European Union to influence the policies of associated states and control the speed of rapprochement.⁷⁸ Not surprisingly, conditionality requirements are often understood not as incentives for faster integration but as limitations upon national sovereignty in candidate countries. In Croatia, for instance, the signature of the SAA was criticised by the right-wing opposition as a limitation of state sovereignty.⁷⁹ In the context of the SAP, the European Union has thus far adopted at least two distinctive conditionality requirements: human rights conditionality, which is nowadays considered an

⁷⁵ Zakon o provedbi sporazuma o stabilizaciji i pridruživanju [Law on Implementation of the Stabilisation and Association Agreement], *Narodne novine - Međunarodni ugovori* No. 15/2001.

⁷⁶ See T. Čapeta, D. Mihelin and S. Rodin, ‘National Report on Croatia’, in A.E. Kellermann, J. Czuczai, S. Blockmans, A. Albi and W.Th. Douma, eds., *Impact of EU Accession on the Legal Orders of New Member States and (Pre-)Candidate Countries: Hopes and Fears* (The Hague, T.M.C. Asser Press 2006) p. 69.

⁷⁷ See Naredba o visini naknade za upis broda, jahte i brodice u upisnik brodova, odnosno jahti i očevidnik brodice [Order on Registration Fees for Yachts and Boats with the Register of Boats or Yachts and with the Register of Boats], *Narodne novine* No. 2/2005. This ministerial order imposes a discriminatory charge on the registration of Croatian-made and imported boats.

⁷⁸ On the difficulties of defining the concept of conditionality, see chapter 3 in this volume.

⁷⁹ In Estonia, the constitutional definition of sovereignty seemed to be inappropriate for the purpose of EU membership. See, e.g., A. Albi, ‘Europe Agreements in the Light of Sovereignty and Legitimacy: The Case of Estonia’, in A.E. Kellermann et al., eds., *EU Enlargement: The Constitutional Impact at EU and National Level* (The Hague, T.M.C. Asser Press 2001) p. 195 et seq.

essential element of all Association Agreements,⁸⁰ and the conditionality of regional cooperation. The European Union's conditionality policy towards the Western Balkans has been supplemented by other benchmarks that reach beyond the 1993 Copenhagen criteria⁸¹ and the 1995 Madrid criteria.⁸² Those include benchmarks for the commencement and conclusion of SAAs that were elaborated in 1997 by the Luxembourg European Council.⁸³ In the SAA Croatia, conditionality is extended to yet other areas, such as cooperation with the ICTY and the development of good neighbourly relations. The latter two will not be discussed further in this chapter.⁸⁴

The 1997 Luxembourg criteria for the *commencement* of negotiations on SAAs are: respect for the rule of law and the principle of democracy; compliance with human and minority rights, including freedom of the media; free and fair elections; full implementation results; absence of discriminatory treatment; implementing first steps of economic reform, including privatisation and abolition of price controls; proven readiness for good neighbourly relations; compliance with obligations undertaken under the Dayton Agreement; cooperation with the ICTY; and the return of refugees. At the same time, the conditions for *concluding* negotiations are: substantial progress in the achievement of objectives and conditions for opening negotiations; substantial results in field of political and economic reforms (stable economic environment, price liberalisation, regulatory framework, competitive banking sector, etc.); proven regional cooperation; and good neighbourly relations. Compliance with those criteria is technically monitored by the Commission. In fact, what we have witnessed up to this day is not an enhancement of membership criteria, which continue to be set by the EU Treaty, but a gradual introduction of a complex benchmarking method as a means of measuring the progress of the countries concerned.

⁸⁰ See, generally, M. Nowak, 'Human Rights "Conditionality" in Relation to Entry to, and Full Participation in, the EU', in P. Alston, ed., *The European Union and Human Rights* (Oxford, OUP 1999) p. 687 et seq.; and M. Bulterman, *Human Rights in the Treaty Relations of the European Community* (Antwerp, Intersentia 2001).

⁸¹ *Bull. EU* 6-1993, point 13.

⁸² As decided by the Madrid European Council in December 1995, '...the candidate country must have created the conditions for its integration through the adjustment of its administrative structures'. See Madrid European Council, 15 and 16 December 1995, Presidency Conclusions, pt. III.A.

⁸³ European Council Conclusions – Luxembourg, 29 April 1997, Guidelines on the Principle of Conditionality Governing the Development of the European Union's Relations with Certain Countries of South-East Europe, *Bull. EU* 4-1997, point 2.2.1.

⁸⁴ See chapter 10 in this volume and C. Pippan, 'The Rocky Road to Europe: The EU's Stabilisation and Association Process for the Western Balkans and the Principle of Conditionality', 9 *EFA Rev.* (2004) pp. 219-245.

3.1 Human rights conditionality

Human rights conditionality is anchored in Article 6 TEU, according to which the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States. Respect for these principles is an absolute requirement for membership according to Article 49 TEU. The position that the legal basis for human rights conditionality is not necessarily Article 310 TEC has been confirmed by the ECJ:

The mere fact that Article 1(1) of the Agreement provides that respect for human rights and democratic principles ‘constitutes an essential element’ of the Agreement does not justify the conclusion that that provision goes beyond the objective stated in Article 130u(2) of the Treaty. The very wording of the latter provision demonstrates the importance to be attached to respect for human rights and democratic principles, so that, amongst other things, development cooperation policy must be adapted to the requirement of respect for those rights and principles.⁸⁵

Early Europe Agreements, such as the one with Hungary, did not provide for human rights conditionality *expressis verbis*. Later on, conditionality provisions were gradually included in all Association Agreements, regardless of their generation. For example, Article 6 EA Romania introduced human rights conditionality in the form of an ‘essential element clause’.⁸⁶ The same practice was applied in the case of the SAA Croatia, where respect for human rights was made one of the essential elements of the agreement⁸⁷ and a legal basis for suspension of its application.⁸⁸

⁸⁵ ECJ, Case C-268/94 *Portugal v. Council* [1996] ECR I-6177, para. 24. See also E. Shaver Duquette, ‘Human Rights in the European Union: Internal Versus External Objectives’, 34 *Cornell Int’l L.J.* 363 (2001).

⁸⁶ *OJ* 1994 L 357/2: ‘Respect for the democratic principles and human rights established by the Helsinki Final Act and the Charter of Paris for a New Europe, as well as the principles of market economy, inspire the domestic and external policies of the Parties and constitute essential elements of the present association.’ See also Art. 2 EA Latvia, *OJ* 1998 L 26/3. For a broader discussion of the so-called human rights clauses, see F. Hoffmeister, *Menschenrechts- und Demokratieklauseln in den vertraglichen Außenbeziehungen der Europäischen Gemeinschaft* (Berlin, Springer 1998) pp. 117-175; and E. Riedel and M. Will, ‘Human Rights Clauses in External Agreements of the European Communities’, in Alston, op. cit. n. 80, pp. 723-754.

⁸⁷ See Art. 2 SAA Croatia: ‘Respect for the democratic principles and human rights as proclaimed in the Universal Declaration of Human Rights and as defined in the Helsinki Final Act and the Charter of Paris for a New Europe, respect for international law principles and the rule of law as well as the principles of market economy as reflected in the Document of the CSCE Bonn Conference on Economic Cooperation, shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement.’

⁸⁸ See Art. 2 SAA Croatia. The clause was originally applied in the Association Agreement with Bulgaria and is more generally known as the ‘Bulgarian’ clause.

In addition to the above-mentioned formal conditionality policies and criteria, as witnessed in the context of the ratification process of the SAA Croatia, some Member States have taken recourse to other forms of political pressure in order to stimulate compliance. For example, the United Kingdom persisted in requiring full cooperation with the ICTY as a condition for ratification of the SAA, and it was only on 19 April 2004 that it gave the green light to further progress, including the ratification of the SAA.⁸⁹

More recent developments in relations between the European Union and Croatia follow the conditional open door policy. First, the Thessaloniki summit explicitly opened the door of the Union to all the countries of South-Eastern Europe. As stated in the Declaration of the 2003 EU-Western Balkans Summit, '... the EU reiterates its unequivocal support to the European perspective of the Western Balkan countries. The future of the Balkans is within the European Union.'⁹⁰ A similar wording is maintained in the Presidency Conclusions.⁹¹ As far as conditionality is concerned, its most recent expression can be found in the so-called *safeguard clauses* that make progress towards EU membership contingent on the fulfilment of political criteria. These newly introduced safety valves apply not only to Croatia, which still has to negotiate its way into the European Union, but also to Bulgaria and Romania – countries that have completed the negotiations and signed their Accession Treaties.⁹² In the case of Croatia, Article 2 of the SAA provides that

the Commission will recommend the suspension of negotiations in the case of a serious and persistent breach of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law on which the Union is founded. The Council should be able to decide on such recommendation by a qualified majority of Member States.

3.2 Regional cooperation conditionality

Regional cooperation conditionality is one of the core policies of the Union towards Croatia and the other states of South-Eastern Europe and was originally formulated by the European Commission in 1996.⁹³ It not only antedates the SAAs but serves as an underlying policy for their interpretation. It can therefore be said that the SAAs with Macedonia and Croatia integrate regional cooperation

⁸⁹ As reported by *The Guardian* on 20 April 2004. 'The British government hopes to see Croatia as a member of the EU before the decade is out,' said Denis MacShane, the Minister for Europe.

⁹⁰ Thessaloniki, 21 June 2003 10229/03 (Presse 163).

⁹¹ See n. 81 *supra*.

⁹² See chapters 7 and 8 in this volume.

⁹³ See n. 11 *supra*.

conditionality in a contractual form.⁹⁴ The main principles of this policy are cooperation, conditionality, an individual approach and flexibility.

The principle of *cooperation* aims at promoting the development of cooperation and good neighbourly relations between the countries concerned. The principle of *conditionality* makes the development of relations with the European Union dependent on their willingness and readiness to cooperate and develop good neighbourly relations with the other states, and the same holds for compliance with human rights requirements. In both cases, a lack of compliance is threatened by the possible inclusion of suspension clauses into legal and political instruments. The principle of *individual approach* specifies that one state must not be made to suffer as a result of another state's lack of commitment or refusal to cooperate, and the principle of *flexibility* allows for a differential approach in the negotiation process and framing of the SAAs.

In pursuance of this policy, the SAA Croatia introduced two regional cooperation commitments. The first and possibly easiest commitment is to inform and consult the Community and its Member States about potential reinforcement of their cooperation with one of the SAP countries, countries concerned with the SAP or EU candidate countries. This should take place at the appropriate level, at regular intervals, and when circumstances require. The above-mentioned commitment represents a limitation on state sovereignty in external relations and forms a good example of how the gravitational field of the European Union affects relations between third countries. It also provides clear evidence of the specific nature of SAAs as opposed to 'ordinary' international agreements concluded with third states. Such a limitation of sovereignty can already have constitutional implications at this early stage of rapprochement since it may require a constitutional redefinition of the concept of national sovereignty.

The second commitment concerns negotiations and the eventual conclusion of a convention on regional cooperation. According to Article 12 SAA Croatia, which provides for cooperation with other countries that have signed an SAA, such a convention, which could take the form of a bilateral treaty, is to be concluded within two years after the entry into force of an SAA. It follows from the nature of such a convention that at least two SAAs have to be signed and in force

⁹⁴ See Council conclusions on the principle of conditionality governing the development of the European Union's relations with certain countries of south-east Europe of 29 April 1997, *Bull. EU* 4-1997, point 2.2.1. For a discussion of this topic, see B. Brandtner and A. Rosas, 'Trade Preferences and Human Rights', in Alston, op. cit. n. 80, at pp. 699 et seq. See also S. Rodin and M. Šarolić, *New Generation of Association Treaties for South-East Europe: Case for Croatia*, Proceedings of the III International Conference on the Economic System of the European Union and the Accession of the Republic of Croatia, University of Rijeka, University of Trieste and University of Antwerp, 2001. For a more recent contribution, see K.E. Smith, 'The Evolution and Application of EU Membership Conditionality', in M. Cremona, ed., *The Enlargement of the European Union* (Oxford, Oxford University Press 2003) p. 105 et seq. See also chapter 3 in this volume.

prior to the start of the negotiations. So far, Croatia has signed such bilateral agreements with Macedonia and Bulgaria.⁹⁵ Both agreements reiterate the ambition of the parties to become members of the European Union. They provide for a political dialogue, the establishment of free trade areas, mutual cooperation in the harmonisation of laws with the EU *acquis*, as well as for cooperation in the field of justice and home affairs. The free movement of workers, services and capital and the freedom of establishment are subject to separate agreements. Croatia has also entered into bilateral commitments with other SAP countries, regardless of whether or not they have actually signed an SAA.⁹⁶ This shows that, while the absence of readiness of any SAP country to conclude such a convention or bilateral treaty would prevent further development of the relations between European Union and the country concerned, regional cooperation is viable regardless of the existence of effective SAAs in all countries. In fact, regional cooperation policy does not exclude but stands side-by-side with cooperation with other countries, notably those concerned with the SAP and EU candidate countries.

4. BETWEEN REALISM AND FUNCTIONALISM

Both human rights and regional cooperation conditionality are based on certain realist and functionalist assumptions that originate from European integration theory.⁹⁷ The realist position assumes that states, being autonomous and rational subjects, by necessity have and represent certain interests. Since they are the main actors in the international arena, the structure of international politics is determined by their actions.⁹⁸ So the Union's conditionality approach is based on the

⁹⁵ The Croatian Government decided on 13 March 2005 to forward this agreement to the Parliament for ratification. The treaty has been ratified and published. See *Zakon o potvrđivanju Sporazuma o suradnji između Republike Hrvatske i Republike Makedonije u okviru približavanja i pristupanja Europskoj uniji* [Law on the Ratification of the Agreement on Cooperation between the Republic of Croatia and the Republic of Macedonia within the Framework of Approach and Accession to the European Union], *Narodne novine - Međunarodni ugovori* No. 2/2005 of 18 February 2005. See *ibid.* for the agreement with Bulgaria.

⁹⁶ See, e.g., the free trade agreement between Croatia and Bosnia Hercegovina [*Zakon o potvrđivanju ugovora o slobodnoj trgovini između Republike Hrvatske i Bosne i Hercegovine*], *Narodne novine - Međunarodni ugovori* No. 9/2001. Art. 2 of the agreement refers to European integration. For Serbia and Montenegro, see *Zakon o potvrđivanju ugovora između Republike Hrvatske i Srbije i Crne gore o izmjenama i dopunama ugovora o slobodnoj trgovini između Republike Hrvatske i Savezne Republike Jugoslavije* [Law on Ratification of the Agreement between the Republic of Croatia and Serbia and Montenegro on Amendments and Supplements to the Free Trade Agreement between the Republic of Croatia and the Federal Republic of Yugoslavia], *Narodne novine - Međunarodni ugovori* No. 4/2004.

⁹⁷ For a recent overview of European integration theory, see, e.g., A. Wiener and T. Diez, *European Integration Theory* (Oxford, Oxford University Press 2004).

⁹⁸ See, e.g., F. Laursen, 'Explaining the Intergovernmental Conference on Political Union', in F. Laursen and S. Vanhoonacker, eds., *The Intergovernmental Conference on Political Union: Institutional*

realist assumption and tailored towards motivating the SAP states to engage – or not engage – in certain courses of action. Another important consideration is exerting political and economic pressure on national elites and strengthening pro-European political options at national level.

At the same time, the SAAs, and in particular their *mirror requirements*, that is to say, provisions the wording of which is identical or substantially similar to provisions of the EC Treaty,⁹⁹ attempt to integrate national policies and regulations into the functional matrix of the European Union and serve as a harmonisation track in the pre-accession period. The functional approach employed by the Union reaches beyond the mirror requirements of the SAAs. In addition, there are external policy actions that can be characterised as both realist and functional. A good example of such mixity can be found in the gradual inclusion of Croatia in the European political dialogue, including the Common Foreign and Security Policy of the Union (CFSP).

4.1 Political dialogue between realism and functionalism

Political dialogue, as envisaged by the SAAs, can be understood as both a realist and a functional component of the Union's regional policy. Its realist aspect lies in the fact that the dialogue is contingent on compliance with political criteria and that its forms may vary. It *may* take place within a multilateral framework such as a regional dialogue.¹⁰⁰ When compared to earlier Association Agreements, the Union's commitment is weaker, which is understandable taking into account the uncertain development of the situation in the region, which at the time was threatening to reduce the possibilities for political dialogue. For example, the commitment to provide regular information on CFSP activities that was envisaged by Europe Agreements is softened in the SAAs to 'promoting the common views'. The participation of Croatia in the CFSP is described in Article 7 SAA Croatia, which specifies that the political dialogue is intended to promote, in particular, '... common views on security and stability in Europe, including

Reforms, New Policies and International Identity of the European Community (Maastricht, European Institute of Public Administration 1992) pp. 230-231. See also K.N. Waltz, *Theory of International Politics* (Reading, Mass., Addison-Wesley 1979).

⁹⁹ Examples of this include the free movement and competition provisions. The expression is used by the Commission in its communication to identify requirements that are phrased in substantially similar language to those applicable pursuant to the EC Treaty. However, the ECJ noted earlier that '... similarity of terms is not a sufficient reason for transposing to the provisions of the agreement (with Portugal) the above-mentioned case-law, which determines in the context of the Community the relationship between the protection of industrial and commercial property rights and the rules on the free movement of goods.' See ECJ, Case 270/80 *Polydor Limited and RSO Records Inc. v. Harlequin Records Shops Limited and Simons Records Limited* [1982] ECR 329.

¹⁰⁰ Art. 8 SAA Croatia.

cooperation in the areas covered by the Common Foreign and Security Policy of the European Union.’ This provision took effect on the entry into force of the SAA on 1 February 2005, within the framework of the activities of the SAC. In the meantime, political dialogue was taking place in a traditional international relations format, on the basis of a joint declaration adopted by the European Union and Croatia on the occasion of the signing of the SAA.

Following the publication of the Thessaloniki Presidency Conclusions in June 2003, a new mechanism for cooperation in the field of foreign policy between the European Union and the states of South-Eastern Europe was instituted. Since then, the European Union has committed to invite, ‘... as appropriate, the SAP countries to align themselves with EU demarches, declarations and common positions on CFSP issues’, without the possibility to take part in their adoption.¹⁰¹ Since then, endorsing common positions has become regular practice in Croatia.¹⁰² Although endorsing common positions has great political significance, they need to be implemented in national law in order to take legal effect, in spite of their mandatory language.¹⁰³ As compliance with and implementation of common positions has become a benchmark for measuring compliance with the political criteria for accession, their implementation in Croatia has been subject to the provisions of the International Restrictive Measures Act since December 2004.¹⁰⁴

As one can see, provisions on political dialogue cannot be understood exclusively as an instrument of the Union’s conditionality policy. Their functional component lies in the gradual inclusion of the SAP countries in CFSP actions, which arguably has two functional dimensions. While the rational dimension contributes to the achievement of the Union’s foreign policy objectives, the experiential dimension contributes to the gradual inclusion of the political elites in SAP countries in the institutional framework of the Union and to burden sharing in the implementation of foreign policy goals.

¹⁰¹ Council Conclusions of 16 June 2003 on the Western Balkans, Annex: ‘The Thessaloniki Agenda for the Western Balkans: moving towards European integration’. In addition, a forum comprising the Foreign Ministers of the EU Member States and the states of South-Eastern Europe created additional space for the participation of these countries in European foreign policy. The forum held its first meeting in Brussels on 9 December 2003.

¹⁰² See, e.g., Common Position 2004/694/CFSP of 11 October 2004 on further measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), *OJ* 2004 L 315/52. As reported by the Council, Croatia and other countries declared that they share the objectives of the above-mentioned common position.

¹⁰³ The language of common positions sometimes includes clearly defined obligations for the Member States, for example: ‘All funds and economic resources belonging to the natural persons listed in the Annex, who have been indicted by the ICTY, shall be frozen.’ However, due to their legal nature, which is based in the CFSP, these obligations need to be implemented in national law.

¹⁰⁴ *Zakon o međunarodnim restriktivnim mjerama* [International Restrictive Measures Act], *Narodne novine* No. 178/2004.

4.2 Functional spill-over

An entirely new development in the European Union's contractual relationship with South-Eastern Europe started to unfold in late 2002, when the Athens Memorandum of Understanding launched an initiative for the creation of a regional energy market with a clear attempt to repeat the success of the functional spill-over that characterised the three original European Communities.¹⁰⁵ This led to the initiation of negotiations for the establishment of the Energy Community Treaty for South-Eastern Europe. The treaty was initialled on 22 March 2005 by the states concerned and by the European Commission. On 17 October 2005, the Council adopted a decision on its signature.¹⁰⁶ This paved the way for the official signature ceremony that took place in Athens on 25 October 2005.¹⁰⁷ Long kept away from the eyes of the public, the initialled version of the treaty was published by the European Federation of Public Services Unions¹⁰⁸ and was severely criticised for its lack of transparency, the undemocratic nature of the institutions and the disregard for the social dimension.¹⁰⁹ The disclosed version also revealed the change of the original name to the Treaty Establishing an Energy Community.¹¹⁰

The main aims of the Treaty, which brings together European Community, Albania, Bulgaria, Bosnia-Herzegovina, the Former Yugoslav Republic of Macedonia, Croatia, Serbia, Montenegro, Romania and UNMIK-Kosovo, are to create a regionally integrated energy market for electricity and natural gas networks and to integrate that market into the wider EU market. To this end, the parties have decided to establish common rules for the generation, transmission and distribution of electricity; to establish common rules for the transmission, distribution, supply and storage of natural gas; to establish state-level national energy authorities, regulators and transmission system operators; to establish compatible state and regional electricity and natural gas market action plans and embryonic regional level dispute resolution mechanism; to open the markets in line with the EU *acquis* in accordance with the transitional periods. It is interesting to note that several pieces of the EC *acquis* listed in the annexes to the agreement will be

¹⁰⁵ Memorandum of Understanding on the Regional Electricity Market in South East Europe and its Integration into the European Union Internal Electricity Market ('The Athens Memorandum – 2002'), available at: <<http://www.seerecon.org/infrastructure/documents/mou-rem-see.pdf>>.

¹⁰⁶ Council Decision 2005/905/EC of 17 October 2005 on the signing by the European Community of the Energy Community Treaty, *OJ* 2005 L 329/30.

¹⁰⁷ The European Union and South-Eastern Europe sign a historic treaty to boost energy integration, Brussels, 25 October 2005, IP/05/1346.

¹⁰⁸ See <<http://www.epsu.org/a/871>>.

¹⁰⁹ 'Unions condemn lack of social dimension of South East European Energy Treaty Energy Conference', Sarajevo, Bosnia-Herzegovina, 10-11 December 2004, Press Release, 10 December 2004.

¹¹⁰ Draft Energy Community Treaty, Version IV.5, Brussels, 3 December 2004, TREN/C2/EC/BD/kb-D(2004).

applicable between the parties. This includes, *inter alia*, the framework legislation on the internal market in electricity and gas,¹¹¹ as well as the legislation on environmental protection.¹¹²

The Treaty is undoubtedly building on the positive experiences of European integration, and neo-functional hopes of a functional spill-over and its importance have been explicitly compared to the ECSC Treaty.¹¹³ Moreover, the motive behind the idea to create functional spill-over effects in South-Eastern Europe seems to be an attempt to integrate those states in the region that do not meet the Luxembourg criteria and do not qualify for the conclusion of an SAA¹¹⁴ into a legal framework that would have a significant functional and meta-functional impact.¹¹⁵ It could be inferred that the Union's choice between realism and functionalism is informed and motivated by the wish to speed up and facilitate structural reforms in and reconciliation among states in South-Eastern Europe.

On the other hand, it may be argued that the mechanism that the European Union is employing in an attempt to encourage Croatia to embark on higher levels of integration is a gradual replacement of the international law method with a tailor-made Community method. As can be seen from the example of political dialogue,

¹¹¹ Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity, *OJ* 2003 L 176/37; Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas, *OJ* 2003 L 176/57.

¹¹² For example, Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, *OJ* 1985 L 175/40 (as amended).

¹¹³ In a speech delivered in Vienna on 15 July 2004, Mr Erhard Busek compared the proposed treaty to the ECSC Treaty: 'However the originality of the ECSEE is that it substitutes to the vertical country by country approach, which could still take many years, a horizontal sectoral approach, which provides to most of you a unique opportunity to become much sooner part of the EU single market as far as the crucial energy sector is concerned. As I have said before, the proposed treaty is a unique political chance for the region. In the same way the European Coal and Steel Community, launched by Robert Schumann and Jean Monnet in 1950, cemented the reconciliation between France and Germany and was a prelude to the Treaty of Rome of 1957 establishing the European Economic Community, the proposed treaty establishing the ECSEE could consolidate reconciliation in the region and provide a powerful driver towards a more comprehensive economic and political integration of the whole of SEE into the European Union.' Available at: <<http://www.stabilitypact.org/pages/speeches/detail.asp?y=2004&p=12>>.

¹¹⁴ See n. 94 *supra*.

¹¹⁵ The dual nature of the Treaty has been emphasised by the European Commissioner for Energy, Mr Andris Piebalgs: 'The political objective is clear: an enhanced cooperation among the countries in this region will foster the conditions for peace, stability and growth. Experience in Western Europe has shown that, by working together, people can become more familiar with one another and make conflicts impossible, if not unthinkable. The economic objective is the establishment of an integrated market in natural gas and electricity, based on common solidarity. As it was already pointed out, this region suffers from a number of deficiencies: lack of energy sources, inadequate infrastructure for transporting energy, disruption of electricity supply, absence of competition, and serious environmental problems, to name only a few.' 'Energy Community is a key to the stabilisation and development of South East Europe', High Level EBRD Southeast Europe Regional Energy Seminar, Tirana, 10 February 2005, Reference: SPEECH/05/83.

the external relations voice of Croatia is maximised when exercised within the European framework and minimised when it is exercised individually. This is arguably a strong argument against proponents of unilateralism and an additional motive to proceed on the European track. Whether this effect was intended by the European Union or whether it is merely incidental can only be speculated.

5. IMPACT OF ENLARGEMENT AND THE TREATY ESTABLISHING A CONSTITUTION FOR EUROPE

Since the emergence of the regional approach policy in 1996, it is possible to identify several trends in the European Union's external relations with Croatia. Those trends can be described as:

- shifting from legal commitments to political assessment;
- the expansion of the conditionality approach;
- a combination of realism (conditionality) and functionalism; and
- a combination of regional and individual approach.

Two events that forever marked the history of Europe in 2004, namely the 'big bang' enlargement and the signing of the Treaty establishing a Constitution for Europe (TCE)¹¹⁶ carry significant consequences for the relationship of the Union with Croatia.

5.1 Impact of enlargement

The entry of the ten new Member States that took place on 1 May 2004 postponed the entry into force of the SAA Croatia until 1 February 2005. As explained before, in order to become effective, the new Member States needed to accede to the agreement. The new Member States had a choice between ratification by individual states and the procedure laid down in Article 6 of the Act of Accession, which provides for a simplified procedure for the accession of new Member States to agreements and conventions concluded or provisionally applied by the Community.¹¹⁷ The 'big bang' enlargement created a situation in which being outside the Union was becoming increasingly difficult, both economically and politically, amounting to exclusion from the European mainstream.¹¹⁸ Admittedly,

¹¹⁶ *OJ* 2004 C 310.

¹¹⁷ See nn. 33 and 34 *supra* and accompanying text.

¹¹⁸ An example of the disparate impact of the EU enlargement of 2004 is the application of existing Community legislation in new Member States that has proven to be more restrictive. See Commission Regulation (EEC) No. 2454/93 of 2 July 1993 laying down provisions for the implementation of

the change is in degree rather than in the kind of relationship. Nevertheless, it raises the motivation for joining the European Union and contributes to the arguments of the pro-European political actors in Croatia.

On the Union's side, the 'big bang' enlargement released a huge administrative burden from the Union and facilitated a shift of the political, administrative and economic focus to South-Eastern Europe and Croatia in particular. An understanding of the problems of transition in post-Communist Member States allows better tailoring to Croatia's needs. In terms of financial assistance, there is a clear trend towards the transition from humanitarian aid, which amounted to almost €205 million in 1994, to support for democracy and human rights, as well as other specific projects, in the amount of €62 million in 2003. As a candidate country, Croatia has become eligible for pre-accession financial instruments: Phare for institution building and economic and social cohesion, ISPA for environment and transport and SAPARD for rural development.¹¹⁹ The Commission recommended the allocation to Croatia of €105 million (€80 million for Phare and €25 million for ISPA) in 2005 and €140 million (€80 million for Phare, €35 million for ISPA and €25 million for SAPARD) in 2006. These amounts will be financed out of the pre-accession funds. The Commission also proposed that the Council establish a new financial pre-accession instrument (IPA) applicable from 2007.¹²⁰ Following the 'big bang' enlargement, its recognition as a candidate country, and the decision by the Council to open accession negotiations, Croatia's European future is becoming more certain.

5.2 Impact of the Constitutional Treaty

Following the French and Dutch 'no' to the Constitutional Treaty it is becoming increasingly difficult to predict whether Croatia will accede to the Union under the terms of the Constitutional Treaty or under the present 'constitutional' framework. In any case, accession negotiations will be based on the current status of the EU law.¹²¹ On the Union's side, the accession of Croatia under the terms of

Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code, *OJ* 1993 L 253/1. In practice, the transit of Croatian trucks was restricted in Slovenia by the mere application of the above-mentioned regulation.

¹¹⁹ See Council Regulation (EC) No. 2257/2004 amending Regulations (EEC) No. 3906/89, (EC) No. 1267/1999, (EC) No. 1268/1999 and (EC) No. 2666/2000, to take account of Croatia's candidate status, *OJ* 2004 L 389/1. See also Framework Agreement between the European Community and the Republic of Croatia on the general principles for the participation of the Republic of Croatia in Community programmes, *OJ* 2005 L 192/16.

¹²⁰ See chapter 19 in this volume.

¹²¹ However, the Commission has said that it would be taking the Constitutional Treaty into account. It has emphasised that: 'In line with the Treaty on European Union and the Constitution for Europe, the Commission will recommend the suspension of negotiations in the case of a serious and persistent breach of the principles of liberty, democracy, respect for human rights and fundamental

the Treaty of Nice would require the amendment of carefully negotiated majorities and institutional structures. On the other hand, accession under the terms of the Constitutional Treaty would not require substantial adjustment, as the treaty envisages a flexible solution that can easily accommodate new Member States. A good example of such flexibility is Article I-25 TCE, which provides for a qualified majority of 55 per cent of the members of the Council comprising 65 per cent of the population of the Member States. Therefore, accession under the terms of the Constitutional Treaty would entail less bargaining and more consideration of what the new membership would mean in terms of the voice of the incumbent Member States.

The impact of the Constitutional Treaty on the Croatian side does not seem to be significant. The process of harmonisation has just entered the screening phase, and public opinion is not yet sensitive to potential differences. In either case, accession to the European Union will require a referendum, although it is not clear whether the Constitutional Treaty would be subject to a referendum in the case of accession under the terms of the Treaty of Nice. For the time being, public debate in Croatia is focused on the impact of accession on national sovereignty and the voluntary withdrawal clause envisaged by Article I-60 TCE seems to have been well received. In any case, both Croatian public opinion and the political elite support membership of the European Union, at least in general, as witnessed by the recent political alliance of the two largest political parties.¹²²

6. CONCLUDING REMARKS

Croatia's relationship with the European Union has developed from almost complete isolation to the opening of membership negotiations. During this process, the European Union has developed several benchmarking instruments that control the dynamics of integration and link it to progress in meeting European criteria. There is a clear trend towards the expansion of conditionality policy from a political to a contractual form, and from human rights conditionality to other areas, such as regional cooperation. In addition, the national enforcement of conditionality, such as making the ratification of the SAA contingent on compliance with political criteria is accepted by the Union insofar as it furthers the common interests of the Union.¹²³ Although this approach has often proven to be

freedoms and the rule of law on which the Union is founded.' See Commission Communication, loc. cit. n. 39, at p. 6.

¹²² See *Jutarnji List*, 29 January 2005, p. 3. The Social Democrats and the HDZ entered into an 'Alliance for Europe'.

¹²³ This is concluded from the reaction of the Commission in two cases concerning the national enforcement of conditionality. While the United Kingdom successfully insisted on cooperation with

effective, the effectiveness of the conditionality approach depends largely on acceptance by the associated states of the overarching political goal of joining the European Union. The persistence of the associated states in the pursuit of this goal affects the direction of legislative reform, the intensity of the impetus for legal harmonisation¹²⁴ and compliance with other requirements, such as cooperation with the ICTY. The mechanisms of conditionality, as can be seen from the Croatian example, can take the form of joint action, as in the case of CFSP actions,¹²⁵ or individual action by Member States that is made possible due to the fact that unanimity is required at each step towards the European Union. However, it should also be noted that conditionality policy has its limits. Croatian public opinion increasingly views it as an expression of the negative sentiment of the European Union towards the country, which creates a danger of political saturation concerning and increasing indifference or even hostility towards the integration process.¹²⁶

In the broader context, the European Union's relationship with Croatia has two distinct – though closely related – dimensions: regional and individual (or country-specific). These dimensions may take the form of policy or legal instruments. After an initial period of incoherent reactions to developments in the region, the Union developed the SAP as a central policy framework that can be differentiated into a number of conditionality policies on, e.g., human rights or regional cooperation.

When they are transformed into legal instruments, these policies become more country-specific, while retaining their inherent regional dimension. The application of conditionality to contractual relations must be seen as an evolutionary process, where a lower level of compliance with EU benchmarks is required in the early stages, gradually increasing in the more advanced ones.¹²⁷ Compliance and progress are to be closely monitored and conditioned by the possible suspension of the relationship in case of 'serious non-compliance'.¹²⁸

the ICTY, Slovenia was dismissed by the Commission and the Council when it threatened to withdraw support for Croatia's membership due to a minor border dispute.

¹²⁴ See A. Evans, 'Voluntary Harmonisation in Integration between the European Community and Eastern Europe', 22 *ELR* (1997) pp. 207-208; see also Albi, loc. cit. n. 79, at pp. 198-199.

¹²⁵ See, e.g., Common Position 2004/694/CFSP of 11 October 2004 on further measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), *OJ* 2004 L 315/52 (as amended).

¹²⁶ As reported by a prominent daily newspaper, *Večernji List*, on 28 February 2005, support for EU membership in Croatia dropped to 47 per cent due to the insistence that the requirement of full cooperation with the ICTY will be satisfied only if a single remaining fugitive is handed over to the ICTY. The Croatian Government insists he is not within the reach of the Croatian authorities, and this is considered to be the only outstanding issue of cooperation.

¹²⁷ See chapter 3 in this volume.

¹²⁸ Cf., Council conclusions on the principle of conditionality governing the development of the European Union's relations with certain countries of south-east Europe, *Bull. EU* 4-1997, point 2.2.1.

Table 1: Participation of Croatia in the European Union's external relations and the CFSP

Legal Basis	Format	Model	Form of participation	National sovereignty	Voice
Actual					
Joint Declaration	Diplomacy	International relations	Exchange of information	Formally intact	None
SAA	S&A Council	Transitional model	Possibility to block decisions adopted by unanimity	Formally intact	Low
Thessaloniki Agenda	Diplomacy	International relations	Joining common positions of the EU in the CFSP	Formally intact	Low
Potential					
TEU and TEC (Nice)	Council of Ministers and Commission	Art. 3 TEU; Art. 23 TEC Unanimity/QMV	Place at the table	Shared	Moderate to high
Constitutional Treaty	Council of Ministers, Minister of Foreign Affairs and Commission	Art. III-201 Unanimity/QMV	Place at the table	Shared	Moderate to high

It may also be observed that EU policy towards Croatia and the other states of South-Eastern Europe envisages their gradual inclusion in EU policies as a reward for compliance. As can be seen from the example of external relations and the CFSP, the voice of the SAP countries is minimised at the lower stages of integration and gradually increases in parallel with the progress of integration. This is the opposite of what advocates of national sovereignty in Croatia claim when they argue that EU membership will adversely affect Croatia's national sovereignty.

In conclusion, the SAAs represent the contractual component of the SAP. They build on various aspects and components of EU policy and integrate conditionality in relation to both human rights and regional cooperation. This approach has facilitated a necessary degree of flexibility while subjecting the target states to the same standards of scrutiny. It should be noted that the transition from the policy stage to a contractual relationship is governed by the political assessment of the Commission and the Council and, no less importantly, the Member States, due to unanimity principle. The same holds for progress towards membership of the European Union. As Cremona has noted, the criteria for differentiating between the countries in South-Eastern Europe were based 'entirely on the Community's own assessments', but with reference to individual economic and political progress and compliance with explicit conditions.¹²⁹ It appears that Croatia's progress towards possible membership depends on the country's own achievements, but judged by the strict didactic mechanisms of conditionality.

¹²⁹ See M. Cremona, 'External Policy and the European Economic Constitution', in G. de Búrca and J. Scott, eds., *Constitutional Change in the EU, From Uniformity to Flexibility* (Oxford and Portland, Hart Publishing 2000) pp. 64-65.