

STUDY

For the AFCO committee



The meaning of 'association' under EU law

A study on the law and practice of EU association agreements



Policy Department for Citizens' Rights and Constitutional Affairs
Directorate General for Internal Policies of the Union
PE 608.861 - February 2019



EN

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Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, analyses the law and practice of EU association agreements. It maps out different types of association agreements concluded on the legal basis of Article 217 TFEU and identifies the key features characterising the nature of association under EU law.

ABOUT THE PUBLICATION

This research paper was requested by the European Parliament's Committee on Constitutional Affairs and was commissioned, overseen and published by the Policy Department for Citizens' Rights and Constitutional Affairs.

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LINGUISTIC VERSION

Original: EN

Manuscript completed in February 2019
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LIST OF ABBREVIATIONS

AA	Association Agreement
AASM	Associated African States and Madagascar
ACP	African, Carribean and Pacific
AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
CJEU	Court of Justice of the European Union
CFSP	Common Foreign and Security Policy
CEECs	Central and Eastern European Countries
CEPA	Comprehensive and Enhanced Partnership Agreement
CETA	Comprehensive Economic Trade Agreement
DCFTA	Deep and Comprehensive Free Trade Area
EaP	Eastern Partnership
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EPCA	Enhanced Partnership and Cooperation Agreement
EMAA	Euro-Mediterranean Association Agreement
EMP	Euro-Mediterranean Partnership
ENP	European Neighbourhood Policy
EU	European Union
PCA	Partnership and Cooperation Agreement
SAA	Stabilisation and Association Agreement
SAP	Stabilisation and Association Process

TDCA	Trade, Development and Cooperation Agreement
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
WTO	World Trade Organization

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Map of third countries 'associated' with the EU	

EXECUTIVE SUMMARY

Third countries may be associated to the EU through the conclusion of association agreements foreseen in Article 217 TFEU. However, the meaning of such an 'association' is rather elusive.

This study shows how association agreements are broad and comprehensive agreements which have evolved over time, in line with the evolution of (internal) EU integration itself. From a material point of view, association agreements typically contain three main components: political dialogue, trade liberalisation and sectoral cooperation. Whereas such areas may also be covered in other types of agreements, association agreements generally include more far-reaching commitments in terms of trade integration and legislative approximation. They are considered to be the most ambitious and most far-reaching types of agreements concluded with third countries in a particular geographical area and, therefore, introduce a certain level of differentiation in the EU's relations with third countries.

Association agreements establish a long-term legal and institutional framework for cooperation. The establishment of joint institutions with decision-making capacities allows for the dynamic development of the association. 'Association' is therefore to be conceived of as a process rather than as an end in itself.

Different types of association agreements, and thus 'association', may be identified. Broadly speaking, there is association as a pre-accession status, association as an alternative to membership and association as a privileged status of non-European countries. Notwithstanding the general flexibility regarding the precise scope and objectives of the established relationship, there are also certain limits to what is feasible under the association formula. In particular, the procedural and institutional rights of the associated countries are limited to decision-shaping and cannot involve any rights of representation or decision-making within the EU Institutions.

The association formula may also be used for defining the post-Brexit relations with the United Kingdom. In fact, the political declaration setting out the framework for the future EU-UK relationship explicitly provides that the overarching institutional framework could take the form of an association agreement. From a pragmatic point of view, this would help avoiding potentially complex discussions regarding the choice of the correct legal basis for the new legal arrangement.

In addition, the experience of the EU's bilateral relations with Switzerland illustrates the importance of a well-designed institutional structure in order to guarantee legal certainty for citizens and businesses. Moreover, the establishment of joint bodies with decision-making powers allows for the dynamic development of the future relationship.

The inherent flexibility of 'association' as a legal concept also means that the actual format of the new relations is not pre-defined. This may either be a comprehensive framework agreement, such as the association agreements with Ukraine, Moldova and Georgia, or a more focused agreement on market integration, such as the EEA agreement.

Finally, it is noteworthy that the European Parliament's role in the process leading to the conclusion of association agreements is not to be underestimated. From a formal perspective, the Parliament only has to give its consent at the end of the procedure but a dynamic application of its right to be immediately informed at all stages of the procedure, guaranteed under Article 218 (10) TFEU, provides significant opportunities to influence the content of international agreements. The Interinstitutional Agreement (IIA) between the European Parliament, the Council and the Commission on Better Law-making may be used to clarify the role of the Parliament with respect to issues such as access to the negotiation guidelines, decisions on provisional application and monitoring of the implementation and potential suspension of agreements.

INTRODUCTION

Association agreements (AAs) between the European Union (EU) and third countries are one of the most important and traditional tools of the EU's external policy. Already in the Treaty of Rome of 1957, it was foreseen that the European Economic Community (EEC) "may conclude with a third state, a union of states or an international organisation agreements establishing an association involving reciprocal rights and obligations, common action and special procedures".¹ Apart from certain procedural amendments, involving *inter alia* a greater role for the European Parliament, this provision has never been substantially amended and is now to be found in Article 217 of the Treaty on the Functioning of the European Union (TFEU). The Treaty of Lisbon further introduced a specific provision (Article 8 TEU) for the development of a 'special relationship' with neighbouring countries, raising questions about its significance for the practice of association.

In the history of the European integration process, association agreements have been concluded with a wide variety of third countries, in Europe and beyond.² It is noteworthy that the evolution of the EU's association practice is not linear. Association agreements come and go in waves and are frequently used as policy instruments *vis-à-vis* particular regions and (groups of) countries. Although all association agreements differ in terms of their exact content and objectives, the common denominator is the ambition to establish a legal and institutional framework for the development of privileged relations involving close political and economic cooperation.

Defining the precise meaning of association is a challenging task. The relevant treaty provision (Article 217 TFEU) is rather vague and the proliferation of different types of association agreements in practice means that it is almost impossible to arrive at a precise definition. However, based upon an analysis of the law and practice of association, the aim of this study is to identify a number of key features characterising the nature of association under EU law.

¹ Article 238 of the EEC Treaty.

² For an overview, see Chapter 4 of this study.

1. THE TREATY FRAMEWORK

KEY FINDINGS

- **Article 217 TFEU is the main legal basis allowing third countries to be associated with the EU.**
- **Article 8 TEU, introduced with the Treaty of Lisbon, may be seen as an essentially political provision which does not affect the legal nature of association under Article 217 TFEU.**
- **Article 217 TFEU is a very flexible legal basis allowing for a variety of privileged relations with third partners.**
- **Association under Article 217 TFEU differs from EU membership in the sense that the associated country cannot be granted decision-making powers within the EU institutions.**

Under general international law it is not entirely uncommon for international organisations to allow for different forms of membership. Indeed, some international organisations allow for 'associate membership', which may be defined as "*membership with limited rights, possibly leading to full membership at a later date.*"³ Although the original EEC Treaty dealt with enlargement and association in two subsequent Articles (237 and 238 EEC), the association of third states (and international organisations) foreseen in the current Article 217 TFEU is not to be confused with associate membership as a form of observer status known under international law. In fact, under EU law, third countries and international organisations cannot acquire an institutionalised status as observer.⁴ Put differently, association (pursuant to Article 217 TFEU) remains 'external', internal association (i.e. observer or associate membership status) is not foreseen in EU law.⁵ The precise meaning of the EU notion of association will then first be explored by looking at the Treaty framework.

1.1. Article 217 TFEU

The legal basis for the conclusion of association agreements can be found in Article 217 TFEU. In terms of procedure, Article 217 TFEU does not contain any indication on how to conclude an association agreement. Instead, association agreements are a special case under Article 218 TFEU, which provides that such agreements are to be concluded following a unanimous vote in the Council (Article 218(8) TFEU) and with the consent of the European Parliament (Article 218(6)(a)(i) TFEU).

³ J. Klabbers, *An Introduction to International Organizations Law*, Cambridge, CUP, 2015, p. 96.

⁴ See T. Garcia, *Les observateurs auprès des organisations intergouvernementales*, Bruxelles, Bruylant, 2012, p. 126.

⁵ D. Hanf and P. Dengler, 'Les accords d'association', in: J.-V. Louis and M. Dony (eds), *Commentaire Megret: Relations Extérieures*, Bruxelles, Editions de l'Université de Bruxelles, 2005, p. 296.

Article 217 TFEU

The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.

According to the Court of Justice in the *Demirel* case (relating to the association agreement with Turkey), an agreement concluded on the basis of Article 217 TFEU creates “special, privileged links with a non-member country,” allowing the third country concerned to “take part in the [Union] system.”⁶ Association is, in other words, a privileged relation under public international law and should be distinguished from the association of overseas countries and territories foreseen in Part 4 of the TFEU.⁷

While international agreements generally create reciprocal rights and obligations,⁸ the defining aspect of an association agreement is the reference to ‘common action and special procedure’ which in practice means that the agreement will establish joint institutions with a competence to adopt binding decisions. These decisions form an integral part of the EU legal system.⁹ This allows for a deepening of the association beyond the original content of the agreement itself (but evidently within this framework).¹⁰ Although the EU’s more recent treaty practice shows that ‘mere’ cooperation or trade agreements may also establish common institutions, these are generally not empowered to take decisions binding on the parties.¹¹

While Article 217 TFEU is not explicit on the possible scope and depth of the privileged relation established by an association agreement, the Court (again in *Demirel*) noted that Article 217 TFEU empowers the Union “to guarantee commitments towards non-member countries in all the fields covered by the Treat[ies].”¹² As a result, the Court draws a parallel between the EU’s internal scope of action and the relation it may set up with an associated country or international organisation. This implies that the instrument of association can develop in line with the evolution of EU integration itself and with the international context in which the EU operates.¹³

The privileged relationship established on the basis of an association agreement may take several forms, ranging from little more than a free trade agreement to a level of integration that comes close to membership.¹⁴ Article 217 TFEU is, in other words, a very flexible instrument allowing for a variety of ties with states interested in a formal relationship with the EU. The actual scope of the association depends on the outcome of the negotiations.

⁶ See Case 12/86, *Demirel*, ECLI:EU:C:1987:400, para. 9.

⁷ See K. Schmalenbach, ‘Art. 217 (ex-Art. 310 EGV) [Assoziierungsabkommen]’, in: Callies and Ruffert, *EUV/AEUV*, München, Beck, 2016, § 1; S. Vöneky and B. Beylage-Haarmann, ‘AEUV Art. 217 Assoziierungsabkommen’, in: Grabitz, Hilf and Nettesheim, *Das Recht der Europäischen Union*, 56. EL 2015, § 3.

⁸ The reference to ‘reciprocal rights and obligations’ does not require that there should be ‘equality’ in the obligations between the parties. An association can involve an imbalance of obligations, for instance in respect to development countries. See M. Maresceau, ‘Bilateral Agreements Concluded by the European Community’, *Hague Academy of International Law, Recueil des cours* 309 (2004), p. 316.

⁹ See Case 30/88, *Greece v. Commission*, ECLI:EU:C:1989:422, para. 13.

¹⁰ See K. Schmalenbach, op.cit. note 7, § 4.

¹¹ S. Vöneky and B. Beylage-Haarmann, op. cit. note 7, § 10. However, there are also exceptions to this rule. For instance, the joint institutions established under the CEPA between the EU and Armenia do have decision-making powers.

¹² See Case 12/86, *Demirel*, ECLI:EU:C:1987:400, para. 9. See also Case C-81/13, *UK v. Council*, ECLI:EU:C:2014:2449, para. 61.

¹³ D. Hanf and P. Dengler, op. cit. note 5, p. 294.

¹⁴ Walter Hallstein, former Commission president, declared that ‘association can be anything between full membership minus 1% and a trade and co-operation agreement plus 1%’. Cited in: D. Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*, Sheffield, Sheffield Academic Press, 1999, p. 23.

Of course, this flexibility also has its limits. On the one hand, a mere cooperation or trade agreement cannot be based on Article 217 TFEU.¹⁵ On the other hand, the equation of third countries to EU Member States through an association is limited to equal treatment in terms of substantive law but does not grant a third country the right to participate in EU decision-making. The privileged relation, while allowing the third country to take part in the Union system, differs from EU membership in the sense that the associated country cannot be granted decision-making powers within the EU institutions.¹⁶

1.2. Article 8 TEU

The Lisbon Treaty introduced a new legal basis for developing the EU's relations with its neighbouring countries. The first proposals regarding a specific 'neighbourhood clause' were launched within the European Convention during the preparation of the Draft Treaty establishing a Constitution for Europe and coincided with the emerging European Neighbourhood Policy (ENP). Despite this connotation with the ENP, neighbouring countries outside of the ENP have not been excluded from its geographical scope of application.¹⁷

Article 8 TEU

1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.
2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.

Article 8 TEU does not formally belong to the treaty provisions on EU external action but is part of the so-called 'common provisions' of the TEU including the Union's foundational values, basic objectives and fundamental principles. This position within the structure of the treaties reveals the importance attributed to the EU's neighbourhood relations but, at the same time, the actual implications of this vaguely formulated provision are far from clear.¹⁸ In particular, the striking similarities between the wording of Article 8 (2) TEU and Article 217 TFEU raise questions about the relationship between both clauses.

One possible approach is to regard the introduction of Article 8 (2) TEU as a reaction to the increase in classical association agreements in the past decades. From this perspective, the purpose of Article 8 (2)

¹⁵ See S. Vöneky, B. Beylage-Haarmann, op. cit note 7, § 13-14.

¹⁶ See K Schmalenbach, op. cit note 7, § 7. Exceptionally, third countries may exercise voting rights on the governing bodies of EU agencies but this is not necessarily based on Article 217 TFEU. See e.g. Arrangement between the European Community and the Republic of Iceland and the Kingdom of Norway on the modalities of the participation by those States in the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ, 2007 L 188/17.

¹⁷ P. Van Elsuwege, and R. Petrov, 'Towards a New Generation of Agreements with the Neighbouring Countries of the European Union? Scope, Objectives and Potential Application of Article 8 TEU', *European Law Review* 36(5), 2011, pp. 688-703.

¹⁸ C. Hillion, 'Anatomy of EU norm export towards the neighbourhood: the impact of Article 8 TEU' in: P. Van Elsuwege and R. Petrov (eds.), *Legislative approximation and application of EU law in the Eastern neighbourhood of the European Union: Towards a common regulatory space?*, Oxon, Routledge, 2014, pp. 13-20.

TEU is to create a *lex specialis* to Article 217 TFEU allowing for a specific form of association, reserved for the Union's neighbours and underlining the specific importance of the EU's neighbourhood relations.¹⁹

Article 8 (2) TEU may also be regarded as a potential alternative to formal association. The latter has important political connotations. For instance, association agreements with European countries are often perceived as a (potential) stepping-stone to EU membership based upon their partial integration in the EU legal framework.²⁰ The references to 'good neighbourliness' and 'peaceful relations based on cooperation' in Article 8 TEU reveal that the objectives of agreements concluded under this legal basis are unrelated to the prospect of accession. This understanding follows from the genesis of Article 8 TEU against the background of the unfolding ENP and the suggestion made in the initial ENP policy documents to offer a new type of 'Neighbourhood Agreements' within this framework.²¹ However, this notion quickly disappeared from the official discourse, particularly because the ENP countries were not interested in such a formula. Ukraine, in particular, strongly opposed any reference to the term 'neighbourhood' or 'neighbouring country' during the negotiations of a new framework agreement with the EU. After an initial period of uncertainty, with references to the conclusion of an 'enhanced agreement', it soon became clear that a traditional association agreement on the basis of Article 217 TFEU was the preferred option. It is noteworthy, in this respect, that Article 8 (2) TEU did not play a role in the conclusion of the association agreements with Ukraine, Moldova and Georgia, nor in relation to the less-far reaching Comprehensive and Enhanced Partnership Agreement (CEPA) with Armenia.²²

A third alternative interpretation is that Article 8 (2) TEU cannot be used as an autonomous substantive legal basis. Its general wording and unusual location under Title I on 'common provisions' of the TEU as well as the absence of specific procedural guidelines under Article 218 TFEU point in this direction.²³ As a result, Article 8 TEU may be seen as an essentially political provision that does not affect the legal practice of the EU's external action.²⁴ Of course, a reference to Article 8 (2) TEU may be added to the substantive legal basis of an association agreement in order to clarify its specific nature and objectives of 'good neighbourliness'. However, from a legal perspective, the added value of such a reference is not very clear because this type of privileged relations can be perfectly established under Article 217 TFEU alone.

Finally, it is noteworthy that a Declaration on Article 8 TEU, adopted as an annex to the Intergovernmental Conference which adopted the Treaty of Lisbon, provides that "the Union will take into account the particular situation of small-sized countries which maintain specific relations of proximity with it."²⁵ This declaration formed the basis for a revision of the EU's relations with Andorra, Monaco and San Marino leading to negotiations on one or several association agreement(s) with these countries in 2015. Significantly, the Council decision authorising the opening of the negotiations only refers to Article 217 TFEU as the substantive legal basis whereas a reference to Article 8 TEU is included in the preamble to the

¹⁹ D. Hanf, 'The ENP in the light of the new neighbourhood clause', in: E. Lannon (ed.), *Challenges of the European Neighbourhood Policy*, Brussels-Berlin: Peter Lang Publishers, 2011, p. 211.

²⁰ D. Phinnemore, *op. cit.* note 14.

²¹ P. Van Elsuwege and R. Petrov, *op. cit.* note 17, p. 693.

²² Cadilhac and Rapoport deplore the fact that Article 8 TEU was not used to conclude the CEPA with Armenia, see M.-C. Cadilhac and C. Rapoport, 'Chronique Action extérieure de l'Union européenne - L'accord de partenariat global et renforcé UE-Arménie: une quasi-association qui tait son nom', *Revue Trimestrielle de droit Européen*, 2018, 1, pp. 211-213.

²³ See on this discussion: Van Elsuwege and Petrov *op. cit.* note 17, p. 697.

²⁴ S. Blockmans, 'Friend or Foe? Reviewing EU Relations with its Neighbours Post-Lisbon', in Koutrakos, P. (ed.) *The European Union's External Relations a Year after Lisbon*, CLEER Working Papers 2011/13, p. 116.

²⁵ Declaration No 3 on Article 8 of the Treaty on European Union, OJ (2012) C 326/339.

decision.²⁶ This confirms the practice that Article 8 TEU is not used as a separate legal basis in itself but rather as an essentially political provision defining the general framework of the EU's neighbourhood relations.

²⁶ Council of the EU, Decision authorising the opening of negotiations on one or several association agreement(s) between the European Union and the Principality of Andorra, the Principality of Monaco the Republic of San Marino, doc. 10345/14, 4 December 2014.

2. ASSOCIATION AGREEMENTS IN PRACTICE: INSTITUTIONAL AND PROCEDURAL ASPECTS

KEY FINDINGS

- Article 217 TFEU is in itself sufficient to cover a wide variety of substantive areas without requiring the addition of other substantive legal bases.
- Despite the broad scope of Article 217 TFEU, almost all association agreements are concluded in the form of 'mixed agreements', which implies that in addition to the EU the EU Member States are involved as parties in their own right.
- The choice for mixity is essentially political in nature but raises questions in light of the EU's institutional balance and the principle of conferral.
- Association agreements establish a legal and institutional framework for cooperation. The implementation of the commitments and the elaboration of the association are left for the joint institutions set up under the agreement, which can adopt binding decisions that may have direct effect.
- The legal consequences attributed to the provisions in association agreements that are similar or identical to provisions to be found in the EU Treaties depend on the aim and context of the agreement in comparison to the aim and context of the EU Treaty.

2.1. The choice of legal basis

Whereas it is perfectly possible to indicate the intention of concluding an association agreement at the very start of the procedure, the formal decision concerning the use of Article 217 TFEU as the substantive legal basis for the conclusion of an international agreement is a purely internal EU matter which is, in principle, not subject to negotiations with the third party.²⁷ The legal basis is decided after the end of the negotiations and is solely reflected in the Council's decision to conclude an agreement. This explains why certain agreements are legally based on Article 217 TFEU without having a reference to association in the title or text of the agreement.²⁸ The opposite is also possible.²⁹

In line with the well-established case law of the Court of Justice, the choice of the legal basis for an EU measure must be based on "objective factors amenable to judicial review, which include the aim and content of that measure".³⁰ In a situation where a measure pursues several objectives or includes multiple

²⁷ M. Maresceau, 'Bilateral Agreements Concluded by the European Community', *Hague Academy of International Law, Recueil des cours* 309 (2004), p. 155.

²⁸ Examples are the Bilaterals I package of seven bilateral agreements with Switzerland and the Trade, Development and Cooperation Agreement with South Africa, see further in Chapter 4 of this study.

²⁹ Reference can be made to the Interim Association Agreement concluded with the Palestinian Liberalisation Organisation (PLO), which is legally based on the treaty provisions related to common commercial policy and development co-operation or the agreements relating to the association of Norway, Iceland, Switzerland and Liechtenstein with the implementation, application and development of the Schengen acquis, which all have a more specific substantive legal basis, i.e. the protocol integrating the Schengen acquis into the framework of the EU for Norway and Iceland (due to the pre-existing Nordic Passport Union) and a combination of legal bases (ex Arts 62, 63, 66, 95 EC Treaty and ex 24, 38 EU Treaty) as far as Switzerland is concerned and Arts. 16, 79(2)(c), 82(1)(b) and (d), 87(3), 89, 114 TFEU with respect to Liechtenstein.

³⁰ See e.g. Case C-244/17, *Commission v. Council*, ECLI:EU:C:2018:662, para. 36.

components, the predominant purpose or component defines the single legal basis. Exceptionally, when the various objectives or components are inextricably linked without one being incidental to the other, the measure must be founded on the corresponding legal bases.³¹

Due to its broad scope and general nature, Article 217 TFEU is in itself sufficient to cover a wide variety of substantive areas without requiring additional substantive legal bases.³² Two remarks nonetheless need to be made in light of recent institutional practice. First, a number of post-Lisbon association agreements have been based on both Article 217 TFEU and Article 37 TEU³³ to reflect the Common Foreign and Security Policy (CFSP) component of those agreements.³⁴ From a procedural point of view, the presence of a CFSP legal basis does not make a major difference because association agreements already require unanimity in the Council.³⁵ Moreover, the CFSP dimension of association agreements is in general too limited to overrule Article 218(6)a(i) TFEU, which requires the consent of the European Parliament for the conclusion of association agreements.³⁶ Nevertheless, the combination of CFSP/TFEU legal bases may be regarded as a consequence of the continuing bipolarity of the EU's external action as reflected in Article 40 TEU.³⁷ However, in its recent case law, the Court of Justice raised some doubt about this practice when it suggested that where the CFSP component of a horizontal agreement is merely ancillary to the agreement's main component, the agreement cannot be based on a TEU legal basis.³⁸ This would mean that future association agreements (which typically contain a CFSP component) must be signed and concluded pursuant to the single substantive legal basis of Article 217 TFEU.

Second, in relation to the EU-Ukraine association agreement, the Council has taken a remarkable approach by concluding the agreement on the basis of separate decisions.³⁹ Despite the Commission's proposal for a single decision on the basis of Article 217 TFEU, the Council opted to 'split off' the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the parties (Article 17 of the EU-Ukraine AA). The latter formed the subject of a separate Council Decision adopted on the basis of Article 79(2)(b) TFEU.⁴⁰ The main reason for this complexity is the specific status

³¹ In accordance with established jurisprudence of the Court, a single legal basis should be relied upon where possible. For an articulation of this rule, see e.g. Case C-94/03, *Commission v. Council*, ECLI:EU:C:2006:2, paras 35-36.

³² Maresceau, op. cit. note 27, p. 168.

³³ Article 37 TEU of Chapter 2 "Specific provisions on the Common Foreign and Security Policy" provides that "The Union may conclude agreements with one or more States or international organisations in areas covered by this Chapter."

³⁴ See the agreements with Kosovo, Ukraine, Moldova, Georgia, etc. See also Frederik Naert, *The Use of the CFSP Legal Basis for EU International Agreements in Combination with Other Legal Bases*, in: Jenő Czuczai and Frederik Naert (eds) *The EU as a Global Actor - Bridging Legal Theory and Practice*, Martinus Nijhoff, Leiden, 2017, pp. 394-423.

³⁵ Article 218 (8) TFEU.

³⁶ According to Article 218(6) TFEU an association agreement can only be concluded without the consent of the European Parliament if it relates "exclusively" to CFSP. In Case C-658/11, *Commission v. Council*, the Court of Justice clarified that the substantive legal basis of a Council decision adopted for the conclusion of an international agreement determines the procedures to be followed. Hence, the Parliament does not play a role in this process only when the substantive legal basis exclusively relates to the area of CFSP.

³⁷ See A. Dashwood, 'The continuing bipolarity of EU external action', in: I. Govaere, E. Lannon, P. Van Elsuwege, S. Adam (eds.), *The European Union in the World. Essays in Honour of Marc Maresceau*, Boston-Leiden, Brill-Martinus Nijhoff, 2014) pp. 3-16 and, in the same volume, S. Adam, 'The Legal Basis of International Agreements of the European Union in the Post-Lisbon Era', pp. 65-86.

³⁸ See Case C-244/17, *Commission v. Council*, ECLI:EU:C:2018:662. In this case, the Court was not asked to rule on the validity of the Council decision concluding the Enhanced Partnership and Cooperation Agreement (EPCA) with Kazakhstan but only on the Council decision determining the position to be adopted in the body set up by this agreement. However, there do not seem to be any reasons why the Court's reasoning could not be transposed to the Council decisions on concluding and signing agreements.

³⁹ It is noteworthy that the same issue did not arise in relation to the association agreements with Moldova and Georgia because the latter agreements do not include clause similar to Article 17 of the EU-Ukraine AA.

⁴⁰ Council Decision 2017/1248 on the conclusion, on behalf of the European Union, of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other

of the United Kingdom (UK) and Ireland in respect of the EU competences in the Area of Freedom Security and Justice (AFSJ). Pursuant to Protocol 21 to the Treaty of Lisbon, both countries have the discretionary power to decide whether or not they want to take part in the adoption of legislative acts under this title.⁴¹ Taking into account that Article 17 of the EU-Ukraine AA falls within the scope of the AFSJ, in particular Article 79(2)(b) TFEU on the rights of third-country nationals residing legally in the EU Member States, a separate Council Decision was deemed necessary. Nevertheless, this option is not undisputable. The provision on the equal treatment of workers is an integral part of the established association and it seems far-fetched to argue that the aim and content of this provision is distinct from and independent of the aim and content of the other provisions of the association agreement. Arguably, the approach developed by the Council ignores the essence of the association agreement as a comprehensive framework for the establishment of privileged relations.⁴²

2.2. The role of the European Parliament

Pursuant to Article 218 (6) (a) (i) TFEU, the conclusion of association agreements requires the consent of the European Parliament. Although withholding consent is not a mere theoretic possibility,⁴³ it is far from evident for the European Parliament to do so without risking negative fallout for the credibility of the EU as an international actor. However, the European Parliament's influence in the procedure for the conclusion of international agreements is not limited to the possibility of withholding consent after the end of the negotiations. Of particular significance is the duty, laid down in Article 218 (10) TFEU, to keep the European Parliament "immediately and fully informed at all stages of the procedure". This is an essential procedural requirement which is of general application to all types of international agreements, including agreements relating exclusively to the CFSP.⁴⁴ As observed by the Court of Justice, "the information requirement arising under Article 218(10) TFEU is prescribed in order to ensure that the Parliament is in a position to exercise democratic scrutiny of the European Union's external action and, more particularly, to verify that its powers are respected specifically as a result of the choice of legal basis for a decision on the conclusion of an agreement."⁴⁵

Significantly, Article 218 (10) TFEU does not imply that the Parliament should remain passive until it is informed by the Commission and the Council. In this respect, it is noteworthy that the Rules of Procedure of the European Parliament provide ample opportunities to influence the process leading to the conclusion of international agreements. Under Rule 52, the Parliament's Committees can draw up own-initiative reports and submit them to the plenary for adoption.⁴⁶ Rule 123(2) provides for the possibility

part, as regards the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other party, OJ 2017 L 181/4.

⁴¹ Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, OJ 2010 C 83/295.

⁴² M.-C. Cadilhac and C. Rapoport, 'Chronique Action extérieure de l'Union européenne - Conclusion de l'accord d'association UE-Ukraine : le Conseil voit double !', *Revue Trimestrielle de Droit Européen*, 2018, pp. 213-214.

⁴³ In the past, the European Parliament decided to withhold its consent of the Swift agreement with the United States, the Anti-Counterfeiting Trade Agreement (ACTA) and the Second Protocol to the Fisheries Agreement with Morocco. See: R. Passos, 'The External Powers of the European Parliament', in: P. Eeckhout and M. Lopez-Escudero, *The European Union's External Action in Times of Crisis*, Oxford, Hart Publishing, 2016, pp. 88-100.

⁴⁴ Case C-658/11, *European Parliament v. Council*, EU:C:2014:2025, paras 80-85. See for comments: P. Van Elsuwege, 'Securing the Institutional Balance in the Procedure for Concluding International Agreements: European Parliament v. Council (Pirate Transfer Agreement with Mauritius)', *Common Market Law Review* (2015) 1379-1398.

⁴⁵ Case C-658/11, *European Parliament v. Council*, EU:C:2014:2025, para 79 and Case C-263/14, *European Parliament v. Council*, EU:C:2016:435, para. 80.

⁴⁶ Relevant examples of such resolutions include the European Parliament resolution of 5 February 2009 on the development impact of Economic Partnership Agreements; European Parliament resolution of 13 March 2018 on gender equality in EU trade

to wind up a debate, on the basis of a resolution, following a statement made by the (European) Council or Commission.⁴⁷ This may be tabled by a committee, a political group or MEPs reaching at least the low threshold of one twentieth of Parliament's component members. In addition, under Rule 133 even individual MEPs may table motions for resolutions. Of course, there has to be an internal decision on the message the Parliament wants to convey to the other institutions. As the least 'monolithic' of the institutions finding such an internal agreement is not self-evident. The currently pending Opinion procedure 1/17 before the Court of Justice is a case in point. Formally, the Parliament is on an equal footing with the Commission, Council and the Member States when it comes to the submission of observations to the Court. However, before such observations can be lodged, Parliament will have to internally agree on a position.⁴⁸ Despite (or because of?) the significant political relevance of Opinion 1/17 such an internal agreement could not be mustered, with the result that the Parliament was conspicuously absent in the proceedings before the Court.

In addition to the opportunities provided under the Parliament's Rules of Procedure, the Framework Agreement on relations between the European Parliament and the European Commission⁴⁹ grants important rights to the Parliament, such as immediate access to the Commission's draft negotiating directives, inclusion of MEPs in Union delegations, etc.⁵⁰ In addition, the Interinstitutional Agreement (IIA) between the European Parliament, the Council and the Commission on Better Law-making of April 2016, concluded on the basis of Article 295 TFEU, provides that each institution can exercise its rights and fulfil its obligations regarding the negotiation and conclusion of international agreements, as interpreted by the Court of Justice. Moreover, there is a commitment to negotiate improved practical arrangements for cooperation and information-sharing. This would allow to clarify certain issues regarding the involvement of the European Parliament in the procedure for concluding international agreements, including *inter alia* possibilities to express its views before the opening of negotiations, the decision on the provisional application of mixed agreements (see *infra*) or the implementation and potential suspension of agreements.⁵¹ Hence, the role of the Parliament is in practice more sophisticated than what a cursory reading of Article 218 TFEU suggests.

2.3. The practice of mixity and its implications

Almost all association agreements are concluded in the form of 'mixed agreements', which implies that in addition to the EU the EU Member States are involved as parties in their own right.⁵² This so-called

agreements; European Parliament resolution of 16 January 2019 on the implementation of the Trade Pillar of the Association Agreement with Central America; etc.

⁴⁷ Relevant examples of such resolutions include European Parliament resolution of 12 March 2015 on relations between the EU and the League of Arab States and cooperation in countering terrorism; European Parliament resolution of 13 June 2013 on the negotiations on an EU-Afghanistan cooperation agreement on partnership and development; European Parliament resolution of 17 January 2013 on the EU-Iraq Partnership and Cooperation Agreement; European Parliament resolution of 13 June 2012 on the negotiations on the UN Arms Trade Treaty; etc.

⁴⁸ See Rule 141 of the Parliament's Rules of Procedure.

⁴⁹ See OJ 2010 L 304/47. Article 295 TFEU now provides that inter-institutional agreements may be binding. Pre-Lisbon, the Court already enforced the provisions of an interinstitutional agreement in Case C-25/94, *Commission v. Council*, ECLI:EU:C:1996:114.

⁵⁰ For a discussion, see Andrea Ott, *The European Parliament's Role in EU Treaty-Making*, (2016) 23 *Maastricht Journal of European and Comparative Law* 6, pp. 1017-1019.

⁵¹ Passos, *op cit.* supra note 43, pp. 127-128.

⁵² In the past, only the association agreements with Malta and Cyprus were not mixed, due to their almost exclusive focus on the establishment of a customs union. Today, the only exception is the Stabilisation and Association Agreement with Kosovo, which has been concluded as an EU-only agreement due to the non-recognition of the independence of Kosovo by five EU Member States. See: P. Van Elsuwege, 'Legal Creativity in EU External Relations: The Stabilisation and Association Agreement between the EU and Kosovo', *European Foreign Affairs Review*, 2017, pp. 393-410.

practice of mixity is somewhat paradoxical taking into account that Article 217 TFEU allows agreements to be concluded by the EU alone with a scope as broad as that of the EU Treaties themselves.⁵³ Moreover, Member States already have veto power since unanimity in the Council is needed for the conclusion of association agreements. Nevertheless, association agreements tend to be mixed for a number of reasons. First, they are typically comprehensive in nature, providing a general framework for cooperation involving areas belonging to EU and Member State competences. Second, mixity is often a pragmatic solution to avoid internal competence battles among EU institutions and Member States. Third, the political importance of association agreements explains why Member States prefer to be a contracting party in their own right, in addition to the EU. It not only endows them with additional bargaining power during the negotiations and in the ratification process but also upholds their visibility *vis-à-vis* third countries.⁵⁴ Hence, the choice for mixity is not necessarily a result of legal orthodoxy but frequently the consequence of crude political interests on behalf of the Member States.

Before mixed agreements enter into force they need to be ratified by all the parties, thus including all the EU Member States. Accordingly, mixed agreements create a kind of 'additional reinforced unanimity'.⁵⁵ Non-ratification by one Member State is sufficient to block the entry into force of the entire agreement and this seriously affects the Union, as a whole, as well as the Member States that have already ratified.⁵⁶ Moreover, the entire ratification process of mixed agreements can take several years. In anticipation of the finalisation of this procedure, the Council therefore adopts a decision regarding the provisional application of certain parts of the agreement. The scope of the provisional application can be as broad as the EU's own competences. This decision on provisional application is usually adopted simultaneously with the Council decision upon signature of the agreement.

In terms of decision-making this is significant since the Council can decide autonomously on the provisional application of an association agreement without the consent of the European Parliament, whereas the Parliament's consent is required for the formal conclusion of the agreement (see *supra*). In political terms, however, the formal option of withholding consent at conclusion stage would be practically nullified because the agreement would already have *de facto* entered into force for years. In light of this reality, and to safeguard the prerogatives of the European Parliament, a certain practice has developed whereby the Commission only initiates the procedure for provisional application of an agreement after having heard the European Parliament.⁵⁷ However, this practice is not enforceable before the Court and has not been consistently adhered to.⁵⁸

Since the choice for mixity seems to be essentially political (at least in so far as no exclusive national competences are involved), the means to limit mixity would also seem to be political. Thus, the Commission and the Parliament may pressure the Council to exhaust the EU's competences to the fullest.

⁵³ See also A. Rosas, 'Exclusive, shared and national competence in the context of EU external relations; do such distinctions matters?', in I. Govaere, et al. (eds.) *The European Union in the World. Essays in Honour of Marc Maresceau*, Leiden, Martinus Nijhoff Publishers, 2014, p. 24; A. Rosas, 'The Future of Mixity', in C. Hillion and P. Koutrakos (eds.), *Mixed agreements revisited: the EU and its Member States in the world*, Oxford, Hart Publishing, 2010, p. 368.

⁵⁴ A. Rosas, 'The Future of Mixity', in: C. Hillion and P. Koutrakos (eds.) *Mixed Agreements Revisited. The EU and its Member States in the World*, Oxford, Hart Publishing, 2010, pp. 367-374.

⁵⁵ See: M. Maresceau, 'A Typology of Mixed Bilateral Agreements', in: C. Hillion and P. Koutrakos (eds.) *Mixed Agreements Revisited. The EU and its Member States in the World*, Oxford, Hart Publishing, 2010, p. 19.

⁵⁶ See: G. Van der Loo and R. Wessel, 'The Non-ratification of Mixed Agreements: Legal Consequences and Solutions', *Common Market Law Review*, 2017, pp. 735-770.

⁵⁷ See G. Van der Loo, *The EU-Ukraine association agreement and deep and comprehensive free trade area: a new legal instrument for EU integration without membership?*, Leiden, Brill, 2016, pp. 128-129. This practice goes beyond what the Commission and Parliament agreed in para. 7 of Annex III to the 2010 Framework Agreement, see OJ 2010 L 304/47.

⁵⁸ See R. Passos, *op.cit. supra* note 43, pp. 120-123.

However, a *legal* case could also be made against mixity on the basis of two grounds.⁵⁹ First, the choice for a mixed (rather than an EU-only) agreement may upset the EU's institutional balance.⁶⁰ Second, it may be argued that the option for mixity is not possible when the provisions of an agreement, which fall under national competence, are purely ancillary.⁶¹ It must be noted however that these two legal limits have not yet been tested before the Court of Justice.

2.4. The implementation (and direct effect) of association agreements

Association agreements are typically broad instruments, providing a framework for further and deeper cooperation. The implementation of the commitments and the elaboration of the association are then left to the joint institutions set up under the agreement.⁶² A clear example are the decisions of the EU-Turkey Association Council regarding the establishment of the customs union and the legal position of Turkish workers and their family members in the EU (see *infra*). Significantly, decisions of the Association Council are legally binding and qualify for direct effect in the legal order of EU Member States if they contain clear and precise commitments which do not require further implementing measures.⁶³ The same conditions for direct effect are applicable to the provisions of association agreements themselves and their protocols.⁶⁴

It is noteworthy that the Council Decisions on the conclusion of the latest generation of association agreements with Ukraine, Moldova and Georgia all provide that “[t]he Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts or tribunals.”⁶⁵ The question thus arises to what extent such a unilateral declaration, which is not part of the agreement itself, precludes the direct effect of the agreement's clear and unconditional provisions.⁶⁶ This practice, which has not yet been tested before the Court of Justice, may have some paradoxical implications in the sense that certain provisions in older and less ambitious agreements do qualify for direct effect.⁶⁷

⁵⁹ On both the options discussed below, see M. Chamon, 'Constitutional Limits to the Political Choice for Mixity', in E. Neframi and M. Gatti (eds.), *Constitutional Issues of EU External Relations Law*, Baden-Baden, Nomos, 2018, pp. 137-166.

⁶⁰ For earlier suggestions in this vein, see Opinion 1/76 re Draft Agreement establishing a European laying-up fund for inland waterway vessels, ECLI:EU:C:1977:63, para. 7; P. Gilsdorf, 'Die Außenkompetenzen der EG im Wandel – Eine kritische Auseinandersetzung mit Praxis und Rechtsprechung', (*Europarecht*, 1996, 31(2)), p. 161.

⁶¹ On this, see also Opinion of AG Wahl of 8 September 2016, Opinion 3/15, EU:C:2016:657, para. 122; A. Rosas, 'The European Union and Mixed Agreements', in: A. Dashwood, C. Hillion (eds), *The General Law of EC External Relations*, London, Sweet & Maxwell, 2000, pp. 203-204. Contra applying the ancillary test in these situations, see Council doc. 8305/14 ADD 1, p. 3; Opinion of AG Kokott of 31 May 2018, Joined Cases C-626/15 and C-659/16, *Commission v. Council*, ECLI:EU:C:2018:362, para. 82.

⁶² See further at section 5.2 of this study for a detailed analysis of the institutional framework established on the basis of association agreements.

⁶³ Case C-192/89, *Sevinçe*, EU:C:1990:322.

⁶⁴ See e.g. Case 17/81, *Pabst & Richarz*, EU:C:1982:129; Case C-438/00, *Deutscher Handballbund v. Maros Kolpak*, EU:C:2003:255; Case C-228/06, *Soysal et. al.*, EU:C:2009:101.

⁶⁵ See Article 5 of Council Decision 2014/295/EU (OJ 2014 L161/1) and Article 7 of Council Decision 2014/668 (OJ 2014 L278/1). Significantly, a specific Council Decision 2014/669 was adopted with respect to the provisions relating to the third country nationals legally employed as workers in the territory of the other party. Also in this Council Decision the formula excluding the direct applicability of the AA provision is included (both in the preamble and in Article 3) See: OJ 2014 L 278/6.

⁶⁶ According to AG Saggio “a unilateral interpretation of the agreement made in the context of an internal adoption procedure cannot – outside the system of reservations – limit the effects of the agreement itself”, See: Opinion of the AG in Case C-149/96, *Portugal v. Council*, [1999], ECR I-8395, para. 20. For comments, see also G. Van Der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area* (Brill 2016) p. 197.

⁶⁷ For instance, in the *Simutenkov* case, the Court recognised the direct effect of a provision guaranteeing the non-discrimination of legally employed Russian workers in EU Member States (Case C-265/03, *Simutenkov v. Real Federación Española de Fútbol* EU:C:2005:213, para. 29). A similarly worded provision is included in Article 17 of the association agreement with Ukraine. It is perhaps even more paradoxical that such a clause is not even foreseen in the association agreements with Moldova and Georgia.

Significantly, recognition of direct effect does not necessarily mean that identically worded provisions in an association agreement and in the EU Treaties are given the same substantive interpretation. According to the well-established case law of the Court of Justice, a textual parallel between certain provisions of an international agreement and those of the EU Treaties is insufficient to ensure an identical interpretation. The legal consequences attributed to the respective provisions depend upon the aim and context of the agreement in comparison to the aim and context of the EU Treaty.⁶⁸ Hence, the conclusion of an association agreement does not automatically imply the application of EU law principles and concepts in relations with the associated country. This depends upon the specific nature of the commitments and the objectives of the established association.⁶⁹

The objectives of the association also affect the legal basis for the adoption of EU positions within the bodies set up under association agreements. In three largely comparable cases initiated by the UK against the Council,⁷⁰ the Court concluded that Article 48 TFEU (regulating the free movement of workers in the EU legal order) could be used as the sole legal basis for the adoption of the EU position regarding the rules on social security coordination with the EEA countries and Switzerland. In this respect, the Court stressed the existence of legal instruments guaranteeing the homogenous interpretation and application of the shared legal rules in this particular area.⁷¹ With respect to Turkey, however, such mechanisms are not provided under the association agreement and, as a result, the EU's position had to be adopted on the combined legal basis of Article 48 TFEU and 217 TFEU. However, since the purpose of the decision was not to conclude an association agreement or to supplement or amend the established institutional framework, the position could still be adopted by qualified majority rather than unanimously.⁷²

⁶⁸ Case 270/80, *Polydor v. Harlequin*, EU:C:1982:43, para. 15-16. See also Case C-312/91, *Metalsa*, EU:C:1993:279, para. 11.

⁶⁹ See, further in Chapter 4 of this study for a comparison between different types of association and its legal implications. See also: C. Tobler, 'Context-related Interpretation of Association Agreements. The Polydor Principle in a Comparative Perspective: EEA Law, Ankara Association Law and Market Access Agreements between Switzerland and the EU', in: D. Thym and M. Zoetewij-Turhan (eds.), *Rights of Third-Country Nationals under EU Association Agreements. Degrees of Free Movement and Citizenship*, Boston-Leiden, Brill, 2015, pp. 101-126.

⁷⁰ Case C-431/11, *UK v. Council (EER)*, EU:C:2013:589; Case C-656/11, *UK v. Council (Switzerland)*, EU:C:2014:97; Case C-81/13, *UK v. Council (Turkey)*, EU:C:2014:2449.

⁷¹ N. Rennuy and P. Van Elsuwege, 'Integration without membership and the dynamic development of EU law: *United Kingdom v. Council (EEA)*' *CMLRev.*, 2014, p. 946.

⁷² Case C-81/13, *UK v. Council*, ECLI:EU:C:2014:2449.

3. A TYPOLOGY OF ASSOCIATION AGREEMENTS

KEY FINDINGS

- The EU's association practice is not the result of a pre-determined strategy but rather the consequence of a pragmatic approach.
- The material scope of association agreements coincides with the evolution of the EU's competences.
- From a legal perspective, the conclusion of an association agreement is disconnected from the procedure for accession to the EU.

The concept of 'association' has been used in various contexts and for different purposes. Originally, there were only two types of association agreements: those preparing a third country for accession to the EU and those supporting the development of former colonies of the Member States in the African, Pacific and Caribbean (ACP) region.⁷³ In the 1990s this picture changed when Article 217 TFEU was used to establish privileged relations with a diverse group of neighbouring countries, which either did not aspire for EU membership, such as the EFTA states, or did not qualify for membership at all, such as the countries of the Southern Mediterranean.

Moreover, the purpose of association may evolve over time. For instance, the Europe Agreements with the CEECs were initiated as an alternative to membership but later became an important vehicle for accession following their political reorientation by the 1993 Copenhagen European Council.⁷⁴ In the more recent past, the EU also concluded association agreements with non-European countries in Central and Latin America.

⁷³ M.-A., Gaudissart, 'Réflexions sur la nature et la portée du concept d'association à la lumière de sa mise en œuvre', in: M.F. Christophe Tchakaloff (ed.), *Le concept d'association dans les accords passés par la Communauté: Essai de clarification*, Bruxelles, Bruylant, 1999, p. 7 et. seq. The development type thereby had to be understood in light of the fact that until the Maastricht Treaty, the EU did not have an explicit development cooperation competence. See M. Cremona, 'The Principle of Conferral and Express and Implied External Competences', in: E. Neframi and M. Gatti (eds), *Constitutional Issues of EU External Relations Law*, Baden-Baden, Nomos, 1998, p. 48.

⁷⁴ K. Inglis, 'The Europe Agreements compared in light of their pre-accession orientation', *CMLRev.* 2000, pp. 1173-1210.

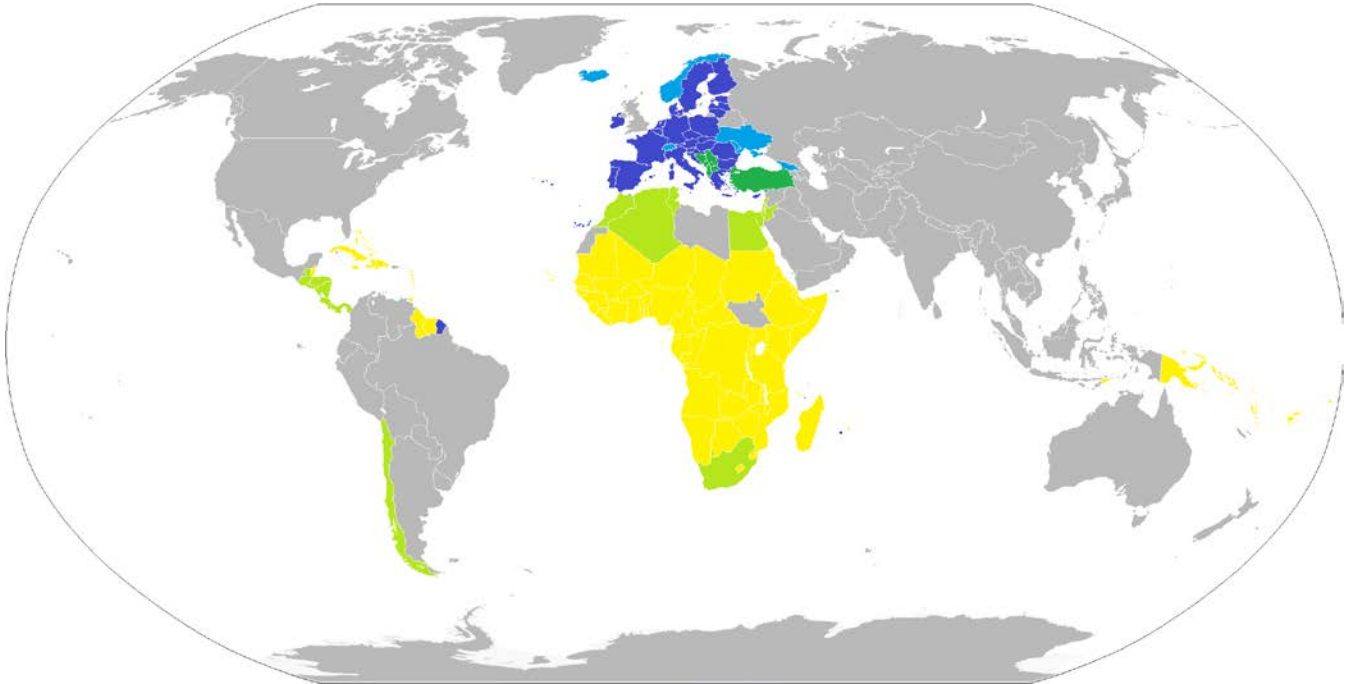


Figure 1: Map of third countries 'associated' with the EU

- EU
- EU membership alternative
- Third countries (non-ACP)
- Pre-accession
- ACP countries

Source: Authors

In light of this diversity, any attempt to define a particular typology of association agreements faces significant limits. The EU’s association practice is not the result of a pre-determined strategy but rather the consequence of a pragmatic approach towards the establishment of privileged relations with a wide range of third countries. A distinction may be based upon geographical criteria (European vs. non-European), the type of agreement (bilateral vs. multilateral) or the *finalité* of the established relationship. Association agreements with European countries may either be conceived of as a stepping-stone towards accession or as an alternative for membership. With non-European countries, the concept of association has proven to be an attractive instrument for creating a flexible legal framework with strategically important partners.

Pre-accession instruments	EU membership alternatives	Privileged relationships with non-European countries
Association agreements with Turkey and Greece*	European Economic Area (EEA)	African, Caribbean and Pacific (ACP) countries
Europe Agreements*	Bilaterals I (Switzerland)	Euro-Mediterranean Association Agreements (EMAAAs)
Stabilisation and Association Agreements (AAAs)	Eastern Partnership (EaP) countries (Ukraine, Moldova, Georgia)	Chile, Central America**, Mercosur***

Table 1: A typology of association agreements

* This (type of) agreement is no longer in force. ** This agreement has been signed and provisionally applied but is not yet fully into force; *** This agreement is still under negotiation.

3.1. Association agreements as pre-accession instruments

The existence of an association agreement is neither a necessary nor a sufficient condition for membership. From a legal perspective, it is perfectly possible to join the EU without a prior association agreement. This was the case with the accession of the United Kingdom, Ireland, Denmark, Spain and Portugal. Of course, the establishment of privileged relations in the form of an association agreement may be a useful tool in the preparations for membership but new and additional commitments must always be negotiated in light of the specific rules and procedures for accession as laid down in Article 49 TEU.⁷⁵ This implies that EU accession can only become a reality after a process of accession negotiations leading to the conclusion of an accession treaty between the existing Member States and the applicant country. In any event, the link between association and (potential) accession is only relevant with respect to European states that are committed to respecting and promoting the EU's foundational values as defined under Article 2 TEU.⁷⁶ Whether or not such a link materialises in practice essentially depends upon the evolving political context.

There is no specific model of pre-accession association agreements but, in general, three generations of relevant agreements may be distinguished.⁷⁷ In the first place, the agreements with Greece and Turkey concluded in 1961 and 1963 respectively had an explicit pre-accession dimension. Second, the Europe Agreements (EAs) concluded with the CEECs in the 1990s became important pre-accession instruments following the 1993 Copenhagen European Council. Third, the Stabilisation and Association Agreements (SAAs) with the Western Balkans all refer to the potential candidate status of the countries concerned and are an important instrument of the EU's enlargement policy.

3.1.1. The 'first generation' of pre-accession association agreements

The very first bilateral association agreements, concluded with Greece and Turkey in 1961 and 1963 respectively, had an explicit pre-accession dimension. For instance, the preamble of both association agreements included the identical provision that the support given by the EEC would facilitate the accession of the associated country at a later date. Both agreements also explicitly provided that the contracting parties "shall examine the possibility of the accession of [Greece/Turkey] to the Community" as soon as the operation of the agreement had advanced far enough.⁷⁸ Several other provisions closely followed the structure of the EEC Treaty and aimed at gradually establishing a customs union and the introduction of free movement of workers and services. Hence, the Athens and Ankara Agreements could be qualified as 'pre-accession association agreements'.⁷⁹

It is difficult to assess the precise impact of the 1961 association agreement on the EEC accession of Greece in 1981, but the explicit membership objective certainly facilitated this process.⁸⁰ With respect to Turkey, the picture is more sophisticated. The 1963 Ankara Agreement only provided the general framework for the development of privileged relations. An additional protocol, signed in 1970 and entered into force in 1973, introduced more specific commitments regarding the gradual establishment of the customs union and the envisaged introduction of free movement of persons and services. For this purpose, the association council had to adopt the necessary implementing decisions. Even though the latter failed to take the measures required for the introduction of a free movement regime between

⁷⁵ Maresceau, *op. cit.*, note 27, p. 320.

⁷⁶ Art 49 (1) TEU.

⁷⁷ The association agreements with Cyprus and Malta are not explicitly mentioned in this typology since they did not include any reference to future membership perspectives but only aimed at the gradual establishment of a customs union. This exclusive focus on trade integration did not prevent the successful membership application of both countries leading to their accession in May 2004.

⁷⁸ Article 28 of the Ankara Agreement and Article 73 of the Athens Agreement.

⁷⁹ Maresceau, *op. cit.* note 27, pp. 321-339.

⁸⁰ *Ibid.*, p. 325.

the EU and Turkey, this institutional body played a crucial role in the deepening of the bilateral relations. It significantly strengthened the legal position of Turkish workers inside the Union⁸¹ and provided for the establishment of the customs union with the adoption of Decision No 1/95 in December 1995.

The EU-Turkey association *acquis*, including the association agreement, the additional protocol and the association council decisions, has been the subject of multiple proceedings before the Court of Justice of the European Union (CJEU). Whereas a detailed analysis of this abundant case law would go beyond the scope of the present study,⁸² the Court's interpretation of the objectives of the established association deserve particular attention. In several judgments, the Court unequivocally observed that the purpose of Turkey's association is "to promote the development of trade and economic relations between the contracting parties [...] so as to improve the living conditions of Turkish people and facilitate the accession of the Republic of Turkey to the Community at a later date".⁸³ Consequently, the Court has always adopted a so-called 'integration-oriented approach' implying that the provisions of the bilateral EU-Turkey legal instruments should be interpreted 'so far as possible' in correspondence with similar provisions under EU law.⁸⁴

In *El Yassini*, the Court stressed the more ambitious objectives of the established association with Turkey in comparison to a less far-reaching cooperation agreement with Morocco.⁸⁵ As a result, rights granted to Turkish workers could not simply be transposed to Moroccan workers notwithstanding the, at first sight, comparable formation of certain provisions in the bilateral agreements with both countries. In its more recent case law, the Court emphasized the limits of Turkey's association. In particular, it upheld that "in deciding whether a provision of European Union law lends itself to application by analogy under the EEC-Turkey Association, a comparison must be made between the objective pursued by the Association Agreement and the context of which it forms a part, on the one hand, and those of the European Union law instrument in question, on the other".⁸⁶ In applying this test, the Court largely ignored the pre-accession nature of the Ankara Agreement when it underlined the essentially economic character of the established relationship.⁸⁷ As a result, the EU-Turkey association *acquis* does not imply the analogous interpretation of rights derived from the EU's citizenship directive 2004/38⁸⁸ or from the EU treaty provisions relating to the freedom of services.⁸⁹

Despite its pre-accession orientation, the substantive scope of the Ankara Agreement is less far-reaching on certain aspects than other association agreements. This is partly due to temporal factors, in the sense that the European integration process was less developed when the agreement was negotiated, and partly due to the absence of explicit provisions relating to the homogenous interpretation of similarly worded provisions. The political context of EU-Turkey relations cannot be ignored either. Notwithstanding the recognition of Turkey as a candidate country and a key partner for the EU, the association council failed to adopt further implementation measures aimed at a substantive deepening

⁸¹ In this respect, Council decisions 2/76, 1/80 and 3/83 turned out to be particularly important. For comments, see: M. Maresceau, 'Turkey: A Candidate State Destined to Join the Union', in: N. Niamh Shuibhne and L. W. Gormley (eds.), *From Single Market to Economic Union. Essays in Honour of John A Usher*, Oxford, Oxford University Press, 2012, pp. 321-322.

⁸² For an analysis of this case law, see e.g. K. Groenendijk, 'The Court of Justice and the Development of EEC-Turkey Association Law', in: D. Thym and M. Zoetewij-Turhan (eds.), *Rights of Third-Country Nationals under EU Association Agreements. Degrees of Free Movement and Citizenship*, Leiden-Boston, Brill-Nijhoff, 2015, pp. 39-64.

⁸³ Case C-37/98, *Savas*, EU:C:2000:224, para. 52 (emphasis added).

⁸⁴ Maresceau, 'Turkey: A Candidate State Destined to Join the Union', *op. cit.* note 81, pp. 323-330.

⁸⁵ Case C-416/96, *El Yassini v. Staatssecretaris van Justitie*, EU:C:1999:107.

⁸⁶ Case C-371/08, *Ziebell*, EU:C:2011:809, para. 62 and Case C-221/11, *Demirkan*, EU:C:2013:583, para. 48.

⁸⁷ *Demirkan*, EU:C:2013:583, paras 50 and 26. In *Ziebell*, the Court even upheld that the EEC-Turkey Association Agreement pursues 'a solely economic purpose' (para. 64). See also V. Hatzopoulos, 'Turkish Service Recipients under the EU-Turkey Association Agreement: *Demirkan*', *Common Market Law Review*, 2014, pp. 647-664.

⁸⁸ Case C-371/08, *Ziebell*, EU:C:2011:809.

⁸⁹ Case C-221/11, *Demirkan*, EU:C:2013:583.

of the bilateral relationship beyond the customs union and the decisions of the 1980s governing the position of Turkish workers and their family members.

3.1.2. The 'Europe Agreements' with the Central and Eastern European countries

After the fall of the Berlin wall, the European Community offered the prospect of association to the Central and Eastern European countries (CEECs) engaged in economic and political reform.⁹⁰ A new generation of association agreements, called 'Europe Agreements' (EAs) to mark their political significance, upgraded and replaced the initially concluded trade and economic cooperation agreements. The EAs introduced a political dialogue, provided for the gradual establishment of bilateral free trade areas and formed the basis for economic, cultural and financial cooperation. In addition, they contained provisions on movement of persons, establishment, supply of services, payments, capital, competition and approximation of laws. Even though all EAs have been replaced by accession treaties, a brief analysis of this type of agreement is relevant for understanding the mechanism of association.

Significantly, the EAs were initially conceived as alternatives to membership. This explains why the agreements concluded before the 1993 Copenhagen European Council with Poland, Hungary and Czechoslovakia did not have an explicit pre-accession orientation. It was only after the EU's political decision that the associated countries from Central and Eastern Europe could become member states upon fulfilment of political, economic and legal conditions that the EAs became *de facto* instruments for pre-accession. However, this political reorientation of the EAs did not result in a formal amendment of the preamble to the agreements or to the signing of an additional protocol. Only the EAs with the Baltic States and Slovenia, which were negotiated and signed after the 1993 Copenhagen European Council, included a reference to the 'accession preparation strategy'.⁹¹ The latter agreements also included a new title on the prevention of illegal activities. The increased attention to new security threats such as irregular migration, trafficking in drugs, smuggling of nuclear materials and all forms of organized crime explains this evolution. In other words, the material scope of association agreements also depends upon the evolving societal context.

Last but not least, it is worth mentioning the differences between the EAs with the CEECs and the less far-reaching Partnership and Cooperation Agreements (PCAs) concluded with the former Soviet republics in the same period. The latter differ from association agreements with respect to their legal basis and the degree of rapprochement with the EU.⁹² For instance, the PCAs do not aim at the integration of third countries in the EU legal system but refer to more modest ambitions of political and economic cooperation. In comparison to the EAs, they do not provide for the gradual establishment of free trade. Both types of agreements also significantly differ with regard to the institutional framework they set out. The association councils can take legally binding decisions whereas the cooperation councils established under the PCAs can only adopt recommendations. As a result, the association agreements create a more dynamic legal framework.

Hence, in the typology of EU external agreements, association agreements may be regarded as more advanced than PCAs whereas the latter were conceived as more far-reaching than the initial Trade and Cooperation Agreements with the former communist countries. The actual meaning of association thus also depends upon the geopolitical context and the EU's external policy towards a particular region. It is

⁹⁰ Communication from the Commission to the Council and the Parliament, 'Association agreements with the countries of Central and Eastern Europe: a general outline', COM (90) 398 final, Brussels, 27 August 1990, p. 2.

⁹¹ For a comparison between the various EAs, see also: K. Inglis, *op. cit.* note 74.

⁹² C. Hillion, *The Evolving System of EU External Relations as Evidenced in the EU Partnerships with Russia and Ukraine*, Leiden University, PhD thesis, 2005, p. 38 et. seq. 9, available at: <https://www.peacepalacelibrary.nl/ebooks/files/hillion.pdf>.

an instrument that indicates the establishment of the most far-reaching form of legal relations in a particular geographical area. After the EU accession of the CEECs, the instrument of association allowed for the upgrading of bilateral relations with certain post-Soviet countries – Ukraine, Moldova and Georgia – whereas the legal differentiation with other, less far-reaching agreements such as the (enhanced) PCAs remained (see *infra*).

3.1.3. The Stabilisation and Association Agreements with the Western Balkan countries

The Stabilisation and Association Agreements (SAAs) concluded with the countries of the Western Balkans constitute a cornerstone of the Stabilisation and Association Process (SAP), i.e. the EU's regional policy for South-Eastern Europe. The central objective of the SAP is to foster a process of regional reconciliation and cooperation on the basis of common political and economic goals. Of particular significance is the offer of a so-called 'European perspective' implying that the participating countries are recognised as potential candidates for EU membership. This is confirmed in the preamble of the bilateral SAAs, creating an explicit link between the successful implementation of the agreement and progress towards the objective of membership.

The SAAs are to a large extent modelled upon the earlier EAs. Despite the considerable similarities between both types of agreements, a distinct type of association was nevertheless deemed necessary in order to tackle the particular challenges in the Western Balkans.⁹³ The most significant difference is the focus on stabilisation on the basis of regional cooperation and good neighbourliness. All SAAs have a dedicated title devoted to regional cooperation requiring the start of negotiations with other countries which signed a SAA in view of the establishment of a political dialogue, free trade, mutual concessions concerning the movement of workers, establishment, supply of services, current payments and movement of capital and cooperation with respect to justice, freedom and security.⁹⁴ The implementation of this commitment is a condition for the further development of close bilateral relations with the EU. This is a remarkable evolution in comparison to the EAs, where the approach of conditionality was more implicit and focused on economic and political reform.⁹⁵

Notwithstanding the largely comparable structure of all SAAs, some noticeable differences can be identified. For instance, the SAAs with Serbia and Bosnia and Herzegovina include an explicit clause regarding full cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY)⁹⁶ whereas such a clause is absent in earlier SAAs with Croatia and the Former Yugoslav Republic of Macedonia (FYROM). The latest SAA with Kosovo is a special case in the sense that it is concluded as an EU-only agreement and with the explicit proviso that this does not constitute recognition of Kosovo as an independent state.⁹⁷ This reality has some implications regarding the formulation of certain provisions and the scope of the agreement.⁹⁸ For instance, the preamble to the SAA with Kosovo carefully avoids the words 'potential candidate Member State', which can be found in all other SAAs. Alternatively, it uses the more diplomatic formula that the implementation of the SAA "will lead to progress in Kosovo's European perspective and rapprochement with the EU, should objective circumstances so permit and Kosovo fulfil the criteria defined by the European Council in Copenhagen on 21-22 June 1993 and the aforementioned conditionalities".⁹⁹ The abundant use of the caveat 'should objective circumstances so permit' in the preamble but also in several provisions of the SAA reveals the uncertainties regarding the

⁹³ D. Phinnemore, 'Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?', *European Foreign Affairs Review*, 2003, p. 81.

⁹⁴ See e.g. Article 15 of the SAA with Serbia.

⁹⁵ Phinnemore, *op. cit.* note 93, p. 88.

⁹⁶ Article 4 of the SAA with Serbia.

⁹⁷ Article 2 of the SAA with Kosovo.

⁹⁸ For a detailed analysis of these differences, see: P. Van Elsuwege, 'Legal Creativity in EU External Relations: The Stabilisation and Association Agreement between the EU and Kosovo', *European Foreign Affairs Review*, 2017, pp. 405-408.

⁹⁹ Preamble to the EU-Kosovo SAA.

development of EU-Kosovo relations. At the same time, it underlines once again the flexible and long-term legal framework of the established relationship.

3.2. Association Agreements as alternatives for membership

3.2.1. The Agreement on the European Economic Area

One of the most far-reaching association agreements is the Agreement on the European Economic Area (EEA) between the EU and its Member States, on the one hand, and three participating EFTA States (Norway, Iceland and Liechtenstein), on the other hand.¹⁰⁰ The EEA-agreement aims at 'the fullest possible realization of the free movement of goods, persons, services and capital', equal conditions for competition as well as strengthened cooperation with respect to so-called 'flanking policies' such as research and development, the environment, education and social policy.¹⁰¹ For this purpose, the EEA involves a sophisticated institutional structure ensuring the homogenous interpretation and application of the shared legal rules.¹⁰²

Contrary to traditional forms of voluntary approximation, the objective of homogeneity leads to a form of 'integration without membership', implying that the participating EEA countries are under a direct legal obligation to apply selected pieces of EU legislation which are to be interpreted and applied as if they are a part of the EU.¹⁰³ In other words, the participating EFTA countries (Norway, Iceland, Liechtenstein) have become 'virtual' EU Member States which apply the entire internal market legislation by analogy.¹⁰⁴

The functioning of the EEA is based upon a two-pillar institutional structure with the EU and its institutions, on the one hand, and the EEA EFTA States and their institutions, on the other hand. Between the two pillars, a number of joint bodies have been established by the EEA Agreement including the EEA Council (representatives at ministerial level), the EEA Joint Committee (representatives at civil servant level), the EEA Joint Parliamentary Committee (representatives at parliamentary level) and the EEA consultative committee (representatives of the social partners). All EU legislation with EEA relevance, i.e. concerning an area covered by the EEA agreement, is incorporated in the annexes or protocols to the agreement. Taking into account the dynamic development of EU law, the common rules of the EEA Agreement are subject to constant revision. Following the adoption of new EU legislation, it is the task of the EEA Joint Committee to amend the annexes as soon as possible in order to secure the homogeneity of the common rules.

The EEA Agreement does not grant the EEA EFTA States any decision-making powers within the EU Institutions. However, they play a role at the level of 'decision-shaping' in the sense that representatives of the EEA EFTA States are involved in the preparation of EEA relevant legislation. They have a right to participate in expert groups and committees of the European Commission and should be consulted in the same manner as EU experts.¹⁰⁵ Moreover, they have the right to submit comments on legislative initiatives, which are officially noted by the EEA Joint Committee after they have been sent to the relevant

¹⁰⁰ Agreement on the European Economic Area, OJ (1994) L 1/3.

¹⁰¹ See preamble and Article 1 of the EEA-agreement.

¹⁰² C. Baudenbacher, 'The goal of homogeneous interpretation of the law in the European Economic Area', *The European Legal Forum*, 2008, pp. 22-31.

¹⁰³ See: M. Maresceau, 'Les accords d'intégration dans les relations de proximité de l'Union Européenne', in C. Blumann (ed.), *Les frontières de l'Union Européenne*, Bruxelles : Bruylant, 2013, pp. 152-191 ; G. Van der Loo, *op. cit* note 57, pp. 23-27.

¹⁰⁴ N. Renuy and P. Van Elsuwege, *op. cit.* note 71, p. 946.

¹⁰⁵ Article 99 EEA Agreement. Twice a year, the EEA Joint Committee publishes progress reports providing information about the involvement of the EFTA States in the shaping of EU legislation. These reports can be consulted at the website of the EEA Council at: <https://www.efta.int/EEA/EEA-Council-1315>.

services of the European Commission, the European Parliament and the Council.¹⁰⁶ However, they have no voting rights within the EU institutions. Such decision-making powers at the EU level cannot be granted on the basis of association and are part of the prerogatives of EU membership. This basic rule stems from the autonomy of the EU legal order and has i.a. been reiterated in the framework of the Brexit discussions. For instance, the European Council guidelines on the framework for the future EU-UK relationship explicitly provide that “the Union will preserve its autonomy as regards its decision-making, which excludes participation of the UK as a third country in the EU Institutions and participation in the decision-making of EU bodies, offices and agencies.”¹⁰⁷

3.2.2. The ‘sectoral’ association of Switzerland

Despite the absence of a comprehensive association agreement in the relations between the EU and Switzerland, the concept of association is also relevant in this context. It is well known that Switzerland rejected the ratification of the EEA agreement in a popular referendum and opted instead for a dense network of bilateral agreements without an overarching institutional structure. In principle, Article 217 TFEU only covers agreements of a general nature and is, therefore, not very appropriate for the conclusion of sectoral agreements which are related to a more specific material legal basis in the EU Treaties. However, in 1999, a series of seven agreements, connected through a guillotine clause,¹⁰⁸ were concluded together under the legal basis of Article 217 TFEU. The set of agreements, called Bilaterals I, covered various areas such as transport over land, civil aviation, free movement of persons, public procurement markets, elimination of technical barriers to trade, research and agriculture. Significantly, the Commission originally proposed the relevant sectoral legal bases for the seven agreements but, for reasons of legal pragmatism, the Council concluded the Bilaterals I (which anyway formed a ‘horizontal’ package) pursuant to the association’s legal basis.¹⁰⁹ A subsequent set of nine sectoral agreements, called Bilaterals II, was signed in 2004. However, in contrast to the Bilaterals I, every agreement of the Bilaterals II stands on its own and has been concluded by a separate Council decision. The absence of this ‘package approach’ at the conclusion stage explains why Article 217 TFEU has not been used for the Bilaterals II.¹¹⁰

The peculiar form of ‘sectoral association’, which from a strict legal point of view only applies to the Bilaterals I, has significant limitations in comparison to more traditional forms of association. In particular, there is no common institutional framework for managing the development of the bilateral relationship. On several occasions, the EU recalled that this lacunae creates legal uncertainty for citizens and businesses.¹¹¹ For instance, there is no harmonised legal framework for free movement of financial services, leading to *ad hoc* solutions such as the temporary granting of a recognition of equivalence for Swiss share trading values.¹¹² Moreover, by rejecting the EEA Agreement, the Swiss Confederation did not subscribe to the objective of establishing an internal market.¹¹³ As a result, the interpretation given to provisions of EU law concerning the internal market do not automatically apply under the bilateral agreement regarding free movement of persons, unless there are express provisions to that effect in the agreement itself.¹¹⁴ This is a remarkable difference in comparison to the EEA Agreement, which is based

¹⁰⁶ See: <http://www.efta.int/eea/eea-efta-comments>.

¹⁰⁷ European Council (Art. 50) guidelines, Brussels, 23 March 2018, EUCO XT 20001/18, para. 7. 5

¹⁰⁸ Pursuant to the guillotine clause, all seven agreements are to enter into force simultaneously and the termination of one of them results in the termination of all seven.

¹⁰⁹ See Maresceau, *op. cit.* note 27, p. 415; Hanf and Dengler, *op. cit.* note 5, p. 308.

¹¹⁰ Maresceau, *ibid.*, p. 421.

¹¹¹ Council of the EU, Conclusions on EU relations with the Swiss Confederation, doc. 6767/17, Brussels, 28 February 2017.

¹¹² European Commission, ‘Commission Proposes to extend equivalence for Swiss share trading venues for six months’, Press Release IP/18/6801, Brussels, 17 December 2018.

¹¹³ Case C-351/08, *Christian Grimme*, EU:C:2009:697, para. 27; Case, C-541/08, *Focus Invest*, EU:C:2010:74, para. 28; Case C-70/09, *Hengartner and Hassner t. Landesregierung Vorarlberg*, EU:C:2010:430, para. 42; Case C-547/10P, *Confédération Suisse v. European Commission*, EU:C:2013:139, para. 80.

¹¹⁴ Case C-547/10P, *Confédération Suisse v. European Commission*, EU:C:2013:139, para. 81.

upon the homogenous interpretation of the common rules (cf. *supra*). Hence, the Swiss approach of sectoral association provides a less far-reaching model of integration without membership in comparison to the EEA.

In order to tackle the identified problems in their bilateral relations, the EU and Switzerland negotiated a draft institutional framework agreement. This agreement, which was made public in December 2018 by the Swiss government as part of a broad internal consultation process, does not explicitly refer to the concept of association.¹¹⁵ However, just as with the Bilaterals I package in 1999, Article 217 TFEU may be used as a legal basis for its conclusion and would even seem the most appropriate legal basis given the agreement's 'framework' nature.

3.2.3. Association Agreements with the EU's Eastern neighbours (Ukraine, Moldova and Georgia)

The latest generation of association agreements has been concluded with the EU's eastern neighbours Ukraine, Moldova and Georgia within the context of the European Neighbourhood Policy (ENP), more specifically the Eastern Partnership (EaP). The association agreements replace the old PCAs and provide for a significant upgrade of the bilateral relations with the countries concerned. Notwithstanding the existence of certain differences among the three agreements, they all share a number of common characteristics in comparison to other types of association.

The association agreements with the eastern neighbours are among the most ambitious and voluminous agreements ever concluded between the EU and third countries.¹¹⁶ They are comprehensive framework agreements embracing the whole spectrum of EU activities, from trade to foreign and security policy and cooperation in justice and home affairs.¹¹⁷ Of particular significance is the ambition to set up Deep and Comprehensive Free Trade Areas (DCFTAs), leading to the gradual and partial integration of the associated countries into the EU internal market. This implies a far-reaching liberalisation of trade in goods and services and the abolition of non-tariff barriers through regulatory convergence with regard to issues such as the protection of intellectual property rights, competition law, rules of origin, labour standards and environmental protection.

In order to ensure the effective implementation of those commitments, the agreements are based upon a strict conditionality approach. Broadly speaking, two different forms of conditionality can be distinguished. On the one hand, several provisions relate to the associated countries' commitment to the common values of democracy, rule of law and respect for human rights and fundamental freedoms set out in Article 2 TEU. On the other hand, the part on the DCFTA is based on an explicit 'market access conditionality' implying that additional access to a section of the EU internal market will only be granted if the association council decides, after a strict monitoring procedure, that the legislative approximation commitments are adequately implemented. This form of conditionality is a rather unique feature of this type of association agreements and corresponds to the general approach of the ENP and the EaP.¹¹⁸

This policy context also explains why the association agreements carefully avoid any direct reference to future membership perspectives but somewhat diplomatically acknowledge the 'European aspirations' and the 'European choice' of the associated countries. This formulation does not entail any legal or political commitment towards further enlargement on behalf of the Union. The association agreements with the eastern neighbours can, therefore, not be regarded as pre-accession instruments. This view is

¹¹⁵ See: https://www.eda.admin.ch/dam/dea/fr/documents/abkommen/Acccord-inst-Projet-de-texte_fr.pdf.

¹¹⁶ For example, the EU-Ukraine AA comprises 7 titles, 28 chapters, 486 articles, 43 annexes of about 1000 pages.

¹¹⁷ See Title II and III of the AAs.

¹¹⁸ G. Van der Loo, P. Van Elsuwege and R. Petrov, 'The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Framework', *EUI Working Papers Law*, 2014/09, p. 12, available at: <http://cadmus.eui.eu/handle/1814/32031>.

confirmed in the decision adopted by the Heads of State or Government of the EU Member States in response to the concerns expressed in the framework of the Dutch referendum on the bill approving the EU-Ukraine association agreement.¹¹⁹

Nevertheless, the agreements do not exclude a further evolution of the established relationship in the future. This is expressed in so many words in the preamble to the agreements. In addition, the parties explicitly recognize that the associates are (Eastern) European countries sharing a common history and common values with the EU Member States of the EU and are committed to the promotion of those values.¹²⁰ The parallels with the first sentence of Article 49 TEU are obvious. Moreover, it is noteworthy that several provisions reflect the formulation of the Copenhagen pre-accession criteria.¹²¹ Hence, depending upon the evolving political context, a potential re-orientation of the association agreements cannot be excluded. For the time being, however, it is clear that the agreements solely aim at the establishment of close and privileged links without any membership objective.

3.2.4. Association as a means to define the EU-UK relationship post-Brexit?

On 23 June 2016 UK citizens voted to leave the EU, leading to the start of the withdrawal procedure foreseen under Article 50 TEU on 29 March 2017 after Prime Minister Theresa May formally notified the European Council of the UK's intention to leave the EU. At the time of writing, the fate of the draft withdrawal agreement and the shape of the future relationship between the EU and the UK were still unclear. As observed in previous studies, the post-Brexit relations may be inspired by the experience of other agreements. For instance, Franklin Dehousse compared the association agreement with Ukraine and the Comprehensive Economic Trade Agreement (CETA) with Canada as potential models¹²² whereas Piet Eeckhout pointed at the fundamental difference between the paradigms of market integration or trade integration.¹²³ Without entering into the details of this discussion, both authors agree about the importance of a common institutional framework for the governance of post-Brexit relations between the EU and the UK.

The significance of a coherent and solid governance system for the management of future EU-UK relations is also highlighted in a European Parliament resolution of 14 March 2018.¹²⁴ This resolution explicitly suggests that "an association agreement negotiated and agreed between the EU and the UK following the latter's withdrawal pursuant to Article 8 TEU and Article 217 TFEU could provide an appropriate framework". Moreover, it proposes that this future relationship should be based on four pillars, including trade and economic relations; foreign policy, security cooperation and development cooperation; internal security and thematic cooperation.

¹¹⁹ European Council Conclusions on Ukraine, Brussels, 15 December 2016, available at:

<https://www.consilium.europa.eu/media/24151/15-euco-conclusions-ukraine.pdf>.

¹²⁰ It is noteworthy that the preamble to the association agreement with Georgia recognizes Georgia as an 'Eastern European country' whereas the agreements with Ukraine and Moldova use the expression 'European country'. From a legal point of view, this differentiation does not make a significant difference.

¹²¹ See: Van der Loo, Van Elsuwege and Petrov, *op. cit.* note 118, p. 10.

¹²² F. Dehousse, "The Institutional Consequences of a 'Bespoke' Agreement with the UK based on a 'Distant' Cooperation Model", European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, 2018, available at:

[http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2018\)604972](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)604972).

¹²³ P. Eeckhout, "on "Future trade relations between the EU and the UK: options after Brexit", European Parliament, Policy Department, Directorate-General for External Policies, 2018, available at:

[http://www.europarl.europa.eu/RegData/etudes/STUD/2018/603866/EXPO_STU\(2018\)603866_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/603866/EXPO_STU(2018)603866_EN.pdf).

¹²⁴ European Parliament resolution of 14 March 2018 on the framework of the future EU-UK relationship, P8 TA(2018)0069.

It is noteworthy that point 122 of the political declaration of 22 November 2018 setting out the framework for the future relationship between the European Union and the United Kingdom¹²⁵ also provides that the overarching institutional framework could take the form of an association agreement:

"PART IV: INSTITUTIONAL AND OTHER HORIZONTAL ARRANGEMENTS
I. STRUCTURE

120. The future relationship should be based on an overarching institutional framework covering chapters and linked agreements relating to specific areas of cooperation, while recognising that the precise legal form of this future relationship will be determined as part of the formal negotiations. Where appropriate, the Parties may establish specific governance arrangements in individual areas.

121. The Parties may also decide that an agreement should sit outside of the overarching institutional framework, and in those cases should provide for appropriate governance arrangements.

122. The Parties note that the overarching institutional framework could take the form of an Association Agreement.

123. The Parties should provide for the possibility to review the future relationship.

Source: Political declaration of 22 November 2018 setting out the framework for the future relationship between the European Union and the United Kingdom.

The association formula would indeed have several advantages. From a pragmatic point of view, it avoids potentially complex discussions regarding the choice of the correct legal basis for the new legal arrangement. In addition, the experience of the EU's bilateral relations with Switzerland illustrates the importance of a well-designed institutional structure in order to guarantee legal certainty for citizens and businesses. Moreover, the establishment of joint bodies with decision-making powers allows for the dynamic development of the future relationship. Finally, the existence of a comprehensive association agreement does not prevent the parallel conclusion of other, separate agreements covering specific areas of cooperation but would at least ensure a coherent institutional structure for the management of the bilateral EU-UK relationship after Brexit.

3.3. Association Agreements as a framework for privileged relations with non-European countries

A third group with which association agreements have been concluded consists of non-European countries. This means that the EU (and the third countries concerned) have set up an association, even if the third countries concerned have no possibility or prospect of joining the EU. Within this group, a further division can be made between the historically grown association with the ACP countries, the conclusion of association agreements in the framework of the Euro-Mediterranean Partnership and the more recent proliferation of association agreements in relation to countries in Central and Latin America.

3.3.1. Association of the ACP countries

At the initial stages of the European integration process, the instrument of 'association' was used to develop privileged relations with the former colonies of the EEC Member States. This was particularly the

¹²⁵https://ec.europa.eu/commission/publications/political-declaration-setting-out-framework-future-relationship-between-european-union-and-united-kingdom_en.

case for the so-called African-Caribbean-Pacific (ACP) countries, which had close connections with either France or the United Kingdom. In 1963, the EEC and 18 Associated African States and Madagascar (AASM) signed the first convention in Yaoundé, the capital of Cameroon. This convention was later extended and replaced by the Lomé convention in 1975, which provided the framework for development cooperation with the ACP countries. The Lomé convention went through four rounds of revision and, despite its primary focus on trade and development, it was based on the treaty provision for association. Apart from the close historical ties with several Member States, the absence of a specific legal basis related to development cooperation in the EEC Treaty explains this choice.

Even though a specific competence on development cooperation has been introduced with the Treaty of Maastricht, the Cotonou agreement, which replaced the Lomé convention in 2002, is also concluded on the legal basis of association. This is due to the broad objectives of this multilateral framework, which involves the EU's relations with 78 ACP countries. It includes a political dialogue and covers a wide range of areas including not only traditional forms of development cooperation but also issues such as peace and security, arms trade and migration. The Cotonou agreement also provides the basis for economic partnership agreements with certain ACP countries. Due to their more specific focus, the latter are not concluded on the basis of Article 217 TFEU but refer to the treaty provisions on development cooperation (Article 207 (3) and (4) TFEU) and common commercial policy (Article 209 (2) TFEU).¹²⁶ In the meantime, negotiations for a new EU-ACP framework agreement started in September 2018. Even though the legal basis of this new agreement is still to be determined, the broad negotiating mandate as well as the legacy of association in relation to the ACP countries imply that Article 217 TFEU may be used again.

Finally, a special reference should be made to the EU's relations with South Africa. This country is a member of the ACP group and a party to the Cotonou agreement. In addition, a bilateral Trade, Development and Cooperation Agreement (TDCA) entered into force in 2004.¹²⁷ Despite the absence of any reference to the concept of 'association' in the title of this agreement, it is legally based on article 217 TFEU. It is noteworthy that other agreements, which are largely comparable in terms of substance,¹²⁸ are not based on this provision. The significance of South Africa as a strategic partner for the EU as well as the link with the Cotonou agreement may be possible explanations. Moreover, pragmatic concerns may have played a role as well since the comprehensive scope of article 217 TFEU avoids the more complex exercise of combining substantive legal bases.¹²⁹

3.3.2. The Euro-Mediterranean Association Agreements

The conclusion of bilateral association agreements with seven countries of the Southern Mediterranean (Tunisia, Morocco, Israel, Jordan, Egypt, Algeria and Lebanon)¹³⁰ between 1998 and 2006 must be situated within the context of the Euro-Mediterranean Partnership (EMP). The latter, also known as the Barcelona process, started in 1995 and aimed at the establishment of a regular dialogue on political and security

¹²⁶ See e.g. Council Decision (EU) 2016/1623 of 1 June 2016 on the signing, on behalf of the European Union and provisional application of the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, OJ (2016) L 205/1.

¹²⁷ Whereas the TDCA remains in force, it is noteworthy that its provisions relating to trade and trade-related issues have been replaced by the Economic Partnership Agreement between the EU and the South African Development Community (SADC). See protocol No 4 to this agreement, OJ (2016) L 205/2109.

¹²⁸ Reference can, for instance, be made to the Economic Partnership, Political Co-ordination and Co-operation Agreement with Mexico.

¹²⁹ In this respect, it is noteworthy that the institutional framework of the TDCA with South Africa is less developed in comparison to traditional association agreements. See also Maresceau, *op. cit.* note 27, p. 421.

¹³⁰ The EU concluded a 'Euro-Mediterranean Interim Association Agreement on trade and co-operation' with the Palestine Liberalisation Organisation (PLO) in 1997 but this was not a proper association agreement in the sense that it was more limited in scope and not based on Article 217 TFEU. A Euro-Mediterranean Association Agreement with Syria was initialled in 2004 and, after a revision, in 2008 but it was never signed. Libya is the other country from the Southern Mediterranean which has no association agreement with the EU.

matters; economic, trade and financial cooperation including the creation of a free trade area and as well as cooperation on social, cultural and human affairs.¹³¹ The bilateral 'Euro-Mediterranean Association Agreements' (EMAs) replaced the earlier cooperation agreements of the 1970s and provided the legal framework for the implementation of the EMP.

The launch of the European Neighbourhood Policy (ENP) in 2004 resulted in a further broadening and deepening of the EU's relations with its southern neighbours. For instance, bilateral agreements on agricultural, processed agricultural and fisheries products have been concluded in the form of an exchange of letters and then added as protocols to the EMAs with Mediterranean countries such as Israel, Egypt, Morocco and Jordan. In addition, new dispute settlement protocols have been concluded with Tunisia, Jordan, Egypt, Lebanon and Morocco. Negotiations on the further liberalisation of trade with a view to the establishment of a DCFTA have been launched with Tunisia and Morocco but did not yet result in a further amendment of the EMAs.¹³²

3.3.3. The proliferation of Association Agreements with Central and Latin America

The instrument of 'association' has been used to upgrade the EU's relations with the countries of Central and Latin America, be it with varied success. The conclusion of an interregional association agreement between the EU and Mercosur, i.e. the Southern Common Market formed by Argentina, Brazil, Paraguay and Uruguay, was already mentioned as an explicit objective in the 1995 Interregional Framework Cooperation Agreement.¹³³ Negotiations to this end started in 1999 but were suspended and relaunched several times. At the end of 2018, already more than 35 rounds of negotiations of the trade part of the association agreement had taken place. Notwithstanding progress on several issues there is still work to be done, notably on cars and car parts, geographical indications, maritime transport and dairy products.¹³⁴

In parallel to the gradual development of its relations with Mercosur, the EU engaged in a deepening of its bilateral relations with Chile. The latter country is not a member of Mercosur but concluded in 1996 a comprehensive framework cooperation agreement, which was in many ways similar to the 1995 agreement with Mercosur. This implied, amongst others, the objective of association in the future. In contrast to the long and difficult negotiations with Mercosur, the bilateral negotiations with Chile ran smoothly and the association agreement was already signed in 2002 and entered into force in 2005.¹³⁵ The agreement covers a political dialogue, includes provisions on economic, financial, scientific, technological, social and cultural cooperation and several others areas such as the fight against drugs and organised crime, alongside a significant part on trade and trade-related matters which resulted in a progressive trade liberalisation in industrial and agricultural goods and fisheries. Taking into account considerable evolutions since the signature of the agreement, the EU and Chile started negotiations towards a modernised association agreement in January 2018. The ambition is "to broaden the current scope of the association agreement and adjust it to the new political and economic challenges."¹³⁶ This includes, amongst others, the progressive and reciprocal further liberalisation of goods and services,

¹³¹ See: E. Philippart and G. Edwards, 'The Euro-Mediterranean Partnership: Fragmentation and Reconstruction' *European Foreign Affairs Review*, 1997, pp. 465-489.

¹³² G. Van der Loo, 'Mapping out the Scope and Contents of the DCFTAs with Tunisia and Morocco', *EuroMesco Paper* (2016)28, available at: <https://www.ceps.eu/publications/mapping-out-scope-and-contents-dcftas-tunisia-and-morocco>.

¹³³ Interregional Framework Cooperation Agreement between the European Community and its Member States, on the one part, and the Southern Common Market and its Party States, on the other part, OJ (1996) L 69/4.

¹³⁴ Information about the state of play of the negotiations can be found at: <http://ec.europa.eu/trade/policy/countries-and-regions/regions/mercosur/>.

¹³⁵ Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, OJ (2002) L 352/3.

¹³⁶ Council of the EU, Directives for the negotiation of a Modernised Association Agreement with Chile, doc. 13553/17, Brussels, 22 January 2018.

investment, access to public procurement opportunities, the protection of intellectual property rights and the elimination, reduction and prevention of non-tariff barriers. It is noteworthy that the Council negotiation directives refer to “the widest possible scope for cooperation from which no field of activity should in principle be excluded.”¹³⁷ This confirms the typically comprehensive nature of association agreements as legal instruments for the development of close political and economic relations in several areas.

Apart from the envisaged conclusion of an association agreement with Mercosur and the modernisation of the agreement with Chile, the EU already signed an association agreement with Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama) in 2012.¹³⁸ The agreement covers rather traditional provisions on political dialogue, cooperation and trade. The latter part is provisionally applicable in anticipation of the finalization of the ratification procedure. Finally, it is noteworthy that a rather similar association agreement was anticipated with the Andean Community (Bolivia Colombia, Ecuador and Peru). However, following a breakdown of negotiations in the second half of 2008 – due to a lack of consensus among the Andean countries concerning the scope and objectives of the trade part of the envisaged agreement – a new negotiating format was put in place from January 2009 onwards. This implied continued regional negotiations with the Andean Community as a whole on political dialogue and cooperation, on the one hand, and 'multi-party' trade negotiations with Peru, Colombia and Ecuador, on the other hand. This resulted in the conclusion of a trade agreement with Colombia and Peru in 2012.¹³⁹ A protocol regarding the accession of Ecuador to this agreement was signed in 2016.¹⁴⁰ With respect to the non-trade related aspects, the ratification of a political dialogue and cooperation agreement with the Andean Community and its Member States is still pending. The proposed Council decision for the conclusion of this agreement does not refer to Article 217 TFEU but to Article 37 TEU (CFSP) and 207 TFEU (common commercial policy) and 209 TFEU (development cooperation) as the substantive legal bases.¹⁴¹ In terms of substance, however, the combination of the separate trade agreement and this agreement on political dialogue and cooperation comes close to the type of association with Central America. A key difference, however, is the less developed institutional framework, in particular the absence of an association council with decision-making powers and other joint institutions such as an association committee, sub-committees, and an association parliamentary committee.

¹³⁷ Ibid. p. 10. This includes a non-exhaustive list of 45 areas of cooperation.

¹³⁸ Agreement establishing an association between the European Union and its Member States, of the one part, and Central America of the other part, OJ (2012) L 346/3.

¹³⁹ Trade Agreement between the European Union and its Member States, on the one part, and Colombia and Peru, on the other part, OJ (2012) L 354/3.

¹⁴⁰ Protocol of Accession to the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, to take account of the accession of Ecuador, OJ (2016) L 356/3.

¹⁴¹ European Commission and High Representative of the Union for Foreign Affairs and Security Policy, Joint Proposal for a Council Decision on the conclusion of a Political Dialogue and Cooperation Agreement between the European Community and its Member States, of the one part, and the Andean Community and its Member countries of the other part, JOIN (2016) 4 final, Brussels, 3 February 2016.

4. COMMON FEATURES OF ASSOCIATION AGREEMENTS

KEY FINDINGS

- Since EU integration itself has evolved over the years, so has the content of association agreements. Today they typically consist of three substantive components: political dialogue, trade liberalisation and sectoral cooperation (in an ever increasing number of areas).
- Association agreements typically set up a multilevel institutional structure through which the agreement is implemented and through which disputes between the parties may be settled.
- Association agreements typically include an association council (ministerial level), an association committee with technical sub-committees (senior official level) and a parliamentary committee. The latest association agreements also include a civil society platform.

4.1. Scope and content

The flexibility provided by Article 217 TFEU first of all translates in the substantive scope and content of association agreements. The oldest association agreements have an almost exclusive focus on economic integration of the third country with the addition of a future membership perspective. This may be explained in light of the parallelism already noted above: since the EU in the 1960s was almost exclusively an economic community, its association agreements were a reflection of this. However, as the EU developed and diversified its internal policies this was also reflected in the association agreements that it concluded. In terms of scope, association agreements today typically cover three main dimensions: political cooperation, economic integration and a basis (which may already be developed by the agreement to a varying degree) for sector specific cooperation. Of course these three dimensions do not categorically distinguish the association agreements from other comprehensive framework agreements such as (enhanced) partnership and cooperation agreements¹⁴² The real difference therefore lies in the depth of the commitments (rather than the scope) entered into by both the EU and the third country. For instance, the CEPA with Armenia essentially differs from the association agreements with Ukraine, Moldova and Georgia because it does not aim at the gradual integration of the country in the EU internal market by setting up a DCFTA. Instead, it aims to establish enhanced trade cooperation and regulatory cooperation “in compliance with the rights and obligations arising from WTO membership.”¹⁴³ Whereas association allows the EU to enter into such far-reaching commitments that the third country involved is almost equated with an EU Member State in relation to the application of certain parts of the *acquis*, this is not possible through a ‘mere’ cooperation agreement.

To make the sometimes rather abstract notions on political, economic and sectoral cooperation more concrete, the present study will draw the reader’s attention to some notable differences between the provisions which may be found in association agreements and similar provisions in agreements concluded pursuant to legal bases other than Article 217 TFEU.

¹⁴² For instance, the EPCA with Kazakhstan or the CEPA with Armenia.

¹⁴³ Compare Article 1 (2) d of the EU-Ukraine AA with Article 1 (d) of the EU-Armenia CEPA.

4.1.1. Political dimension

Today, association agreements typically have a well-developed political dimension, which includes provisions on political dialogue, human rights, cooperation on foreign policy, disarmament, etc.

The EAs with the CEECs in the 1990s were the first association agreements with a provision on political dialogue (see *infra*).¹⁴⁴ While a political dialogue allowing the EU and the third country to discuss any area of mutual interest, including also domestic reforms, can also be found in agreements other than association agreements, political dialogue in an association setting may be more far-reaching. This can be illustrated when the AA with Georgia is compared to the CEPA with Armenia. While both agreements are not per se representative of their kind, they have been concluded with two very similar countries of the same region (Southern Caucasus) in the same time span.

Article 3(1) CEPA Armenia	Article 3(1) AA Georgia
[Political] dialogue will increase the effectiveness of political cooperation on foreign policy and security matters	[Political dialogue] will increase the effectiveness of political cooperation and promote <i>convergence</i> on foreign and security matters

Table 2: Political dialogue provisions

Thus, the *finalité* of the political dialogue in both agreements (although worded virtually identically) is fundamentally different.

The inclusion of clauses on political dialogue in association agreements must be understood in light of the historical development of the EU's external relations. With the fall of the iron curtain, the EU was confronted with young or even (re-)nascent democracies. Given this context, the EAs contained an important political dimension to consolidate political reforms in the associated countries. A sufficiently stable political basis to build on is necessary to contemplate the conclusion of an association agreement. This was not the case with respect to the former Soviet republics, which explains the preference for less far-reaching partnership and cooperation agreements in relation to these countries.¹⁴⁵ Amongst other reasons, such as the countries' ambitions in relation to the EU, this also explains why recent agreements with countries such as Iraq, Afghanistan and Kazakhstan have not been concluded as association agreements.

Since the second round of EAs, the EU consistently insisted on including human rights clauses, which also constitute essential elements of the agreement.¹⁴⁶ The EU subsequently included similar provisions in other association agreements.¹⁴⁷ While such provisions are now also typically included in 'mere' cooperation agreements,¹⁴⁸ Wessel and Van Vooren argue that a human rights clause qualified as an essential element of the agreement has become a defining feature of the association agreement.¹⁴⁹ A comparison of the human rights clauses in four different association agreements shows how the clause has been developed over time and is adapted in light of the finality of the association relationship.

¹⁴⁴ Gaudissart, *op. cit.* note 73, p. 19.

¹⁴⁵ Maresceau, *op. cit.* note 27, p. 347.

¹⁴⁶ Qualifying a provision of an agreement as an essential element allows the parties to terminate or suspend the application of the agreement more easily pursuant to Article 60(3)(b) VCLT.

¹⁴⁷ See L. Bartels, 'A Legal Analysis of Human Rights Clauses in the European Union's Euro-Mediterranean Association Agreements', *Mediterranean Politics*, 2004, 9(3), p. 368.

¹⁴⁸ See, for instance, Article 1 of the EPCA with Kazakhstan, OJ 2016 L 29/3.

¹⁴⁹ R. Wessel and B. Van Vooren, *EU External Relations Law – Text, Cases and Materials*, Cambridge, Cambridge University Press, 2014, p. 63.

Article 6 AA Bulgaria	Article 2(1) AA Estonia	Article 2 AA Egypt	Article 2 SAA Serbia
Respect for the democratic principles and human rights established by the Helsinki Final Act and the Charter of Paris for a New Europe inspires the domestic and external policies of the Parties and constitutes an essential element of the present association	Respect for democratic principles and human rights, established by the Helsinki Final Act and in the Charter of Paris for a New Europe, <i>as well as the principles of market economy</i> , inspire the domestic and external policies of the Parties and constitute essential elements of this Agreement.	Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect of democratic principles and fundamental human rights as set out in the <i>Universal Declaration on Human Rights</i> , which guides their internal and international policy and constitutes an essential element of this Agreement.	Respect for democratic principles and human rights as proclaimed in the Universal Declaration of Human Rights and as defined in the Convention for the Protection of Human Rights and Fundamental Freedoms, in the Helsinki Final Act and the Charter of Paris for a New Europe, respect for principles of international law, <i>including full cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY)</i> , and the rule of law as well as the principles of market economy as reflected in the <i>Document of the CSCE Bonn Conference on Economic Cooperation</i> , shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement.

Table 3: Evolution of essential elements provisions

The EA with Bulgaria¹⁵⁰ signed in 1993 contains the so-called Bulgarian clause,¹⁵¹ which was slightly modified in the EA with Estonia signed in 1995.¹⁵² In contrast, the agreement with Egypt signed in 2001 evidently does not have a pre-accession objective.¹⁵³ As a result, it does not foresee the economic integration of Egypt in the EU and left out a reference to the market economy. Given Egypt's non-European status the agreement also only refers to the Universal Declaration on Human Rights. Going back to an agreement with a pre-accession component, the SAA with Serbia contains a significantly elaborated human rights clause, adding a reference to the rule of law and taking into account Serbia's and the Western Balkans' peculiar (territorial and historical) situation.

Again, juxtaposing a number of more recent agreements with similar countries also shows differences in the commitments entered into under an association agreement when compared to a cooperation agreement.¹⁵⁴

¹⁵⁰ See OJ 1994 L 358/3.

¹⁵¹ On the Bulgarian clause, see also E. Fierro, *European Union's Approach to Human Rights Conditionality in Practice*, Leiden, Martinus Nijhoff, 2003, pp. 223 et. seq.

¹⁵² See OJ 1998 L 68/3.

¹⁵³ See OJ 2004 L 304/39.

¹⁵⁴ For the EPCA with Kazakhstan, see OJ 2016 L 29/3; for the AA with Ukraine, see OJ 2014 L 161/3.

Article 1 EPCA Kazakhstan	Article 2(1) CEPA Armenia	Article 2(1) AA Georgia	Article 2(1) AA Ukraine
<p>Respect for democratic principles and human rights as laid down in the Universal Declaration of Human Rights, the OSCE Helsinki Final Act and the Charter of Paris for a New Europe, and other relevant international human rights instruments, and for the principle of the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement.</p>	<p>Respect for the democratic principles, the rule of law, human rights and fundamental freedoms, as enshrined in particular in the <i>UN Charter</i>, the OSCE Helsinki Final Act and the Charter of Paris for a New Europe of 1990, as well as other relevant human rights instruments such as the UN Universal Declaration on Human Rights and the <i>European Convention on Human Rights</i>, shall form the basis of the domestic and external policies of the Parties and constitute an essential element of this Agreement.</p>	<p>Respect for the democratic principles, human rights and fundamental freedoms, as proclaimed in the United Nations Universal Declaration of Human Rights of 1948 and as defined in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe and the Charter of Paris for a New Europe of 1990 shall form the basis of the domestic and external policies of the Parties and constitutes an essential element of this Agreement. <i>Countering the proliferation of weapons of mass destruction, related materials and their means of delivery</i> also constitute essential elements of this Agreement.</p>	<p>Respect for democratic principles, human rights and fundamental freedoms, as defined in particular in the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe and the Charter of Paris for a New Europe of 1990, and other relevant human rights instruments, among them the UN Universal Declaration of Human Rights and the European Convention on Human Rights and Fundamental Freedoms, and respect for the principle of the <i>rule of law</i> shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement. Promotion of respect for the <i>principles of sovereignty and territorial integrity, inviolability of borders and independence</i>, as well as countering the proliferation of weapons of mass destruction, related materials and their means of delivery also constitute essential elements of this Agreement.</p>

Table 4: Recent essential elements provision in (non-) association agreements

While all four agreements were signed between 2014 and 2017 and contain a human rights clause, which is qualified as an essential element of the agreement, the clauses in the association agreements are more

elaborate,¹⁵⁵ including references to territorial integrity, sovereignty and independence, etc. This again may be seen as indicative of the association relationship constituting a more privileged and deeper relationship with more far-reaching commitments than an ordinary cooperation relationship.

4.1.2. Trade liberalisation

Other than the specific institutional machinery (cf. *infra*), an element that has been historically present in every association agreement relates to trade liberalisation. Some association agreements (notably those with Malta and Cyprus) even had an exclusive focus on trade.¹⁵⁶ The scope and extent of the trade commitments are of course determined by the type of association agreement and the status of the partner country. For instance, the objective of establishing a customs union in relation to Turkey cannot be disconnected from the explicit pre-accession dimension of this association agreement. Moreover, the level and scope of trade integration may develop over time. This is clearly illustrated with the EMAAs, which initially only provided for the liberalisation of trade in industrial goods. The addition of protocols, concluded in the form of an exchange of letters, allowed for an extension of the free trade regime to agricultural and processed agricultural products with certain countries (cf. *supra*). The latest generation of association agreements with the EU's eastern neighbours provide for the establishment of DCFTAs. In comparison to traditional FTAs, the DCFTAs do not only foresee the mutual opening of markets for goods but also cover services, competition, intellectual property rights, energy, public procurement, technical barriers to trade, etc. The 'deep' character of the DCFTAs refers to the process of legislative approximation. The DCFTAs include numerous legislative approximation clauses obliging the associated countries to apply a selection of EU legislation in their domestic legal order. The objective is to tackle non-tariff barriers and to create a common legal space, leading to the gradual and partial integration of the associated countries in the EU internal market.¹⁵⁷

While a detailed analysis of the precise commitments which the EU and its partners enter into pursuant to association agreements cannot be performed here, it is useful to highlight the ultimate finality of the trade provisions in different types of agreements, similar to the juxtaposition of the finality of political cooperation presented above. In this regard, the plurilateral EEA association agreement and the bilateral association agreement with Georgia may be compared with the CEPA with Armenia and the comprehensive and economic trade agreement with Canada (CETA).¹⁵⁸ While the trade objectives of these four agreements are all different to one and other, there is still a remarkable contrast between the economic finality of the association agreements and that of the 'other' agreements. The two association agreements essentially put forward the almost complete¹⁵⁹ (if gradual) integration of the partner countries in the EU internal market (which establishes the four freedoms). Again, this is not to say that an association agreement necessarily foresees a third country's integration in the internal market (something which would in any event seem difficult for non-neighbouring countries) but it would appear that such a far-reaching commitment can only be entered into (on the part of the EU) by virtue of an association agreement.

¹⁵⁵ Note, however, that the essential element clause in the AA with Georgia does not refer to 'the rule of law' (even though the preamble and several provisions underline the significance of respect for the rule of law as an important feature and objective of the association. See also: N. Ghazaryan, 'A New Generation of Human Rights Clauses? The Case of Association Agreements in the Eastern Neighbourhood', *European Law Review*, 2015, pp. 391-410.

¹⁵⁶ Maresceau, *op. cit.* note 27 p. 318.

¹⁵⁷ Van der Loo, *op. cit.* note 57, p. 57.

¹⁵⁸ See OJ 2017 L 11/23.

¹⁵⁹ Apart from the EEA agreement, association agreements will typically not go as far as also allowing free movement of workers in a way similar to the intra-EU free movement of workers.

Preamble CETA	Preamble EEA	Article 1 CEPA Armenia	Article 1(2) AA Georgia
The Parties resolve to create an expanded and secure market for their goods and services through the reduction or elimination of barriers to trade and investment.	[The Parties are] determined to provide for the fullest possible realization of the free movement of goods, persons, services and capital within the whole European Economic Area, as well as for strengthened and broadened cooperation in flanking and horizontal policies	The aims of this Agreement are: (g) to support the efforts of the Republic of Armenia to develop its economic potential via international cooperation, including through the approximation of its legislation to the EU acquis	The aims of this association are: (g) to support the efforts of Georgia to develop its economic potential through international cooperation, including through the approximation of its legislation to that of the EU; (h) to achieve Georgia's gradual economic integration into the EU Internal Market

Table 5: Economic aims of (non-)association agreements

4.1.3. Sectoral cooperation

The third major part (in substantive terms), which is by now a typical feature of association agreements, are the provisions dealing with sectoral cooperation in policy areas other than political cooperation or free trade. These provisions may be rather general and programmatic in nature but they provide a basis for further deeper engagement through the institutional bodies set up by the agreement (see *infra*). This again illustrates how an association agreement may set in motion a process of further integration and should not be considered as an a goal in itself.

Various areas of cooperation (other than political cooperation and trade) may be identified. Some agreements make a distinction between 'economic cooperation' (other than trade) and 'cooperation in other areas'.¹⁶⁰ Or they spell out the general objectives (and principles) underpinning the cooperation in the areas specified.¹⁶¹ In light of what has already been mentioned, it will not come as a surprise that the scope and depth of the foreseen cooperation (i.e. the different areas in which cooperation is foreseen and the degree to which the basis for cooperation is worked out in the agreement) varies significantly from one agreement to the other. As a general rule, the scope and depth of the envisaged cooperation are largely determined by the evolution of the EU's own level of integration and the general international context at the time of negotiations. This explains why there appears to be an ever increasing list of areas for cooperation in the framework of an association agreement. For instance, the negotiations for a modernised agreement with Chile include a non-exhaustive list of 45 areas of cooperation whereas the existing association agreement contains around 30 areas. Moreover, in light of their function as comprehensive framework agreements, association agreements may also cross-refer to other sectoral agreements or dialogues.¹⁶²

¹⁶⁰ See e.g. the DTCA with South Africa.

¹⁶¹ See e.g. Articles 24 and 25 of the agreement with Central America; article 87 of the SAA with Serbia.

¹⁶² For instance, the AAs with the Eastern neighbours include cross-references to the Energy Community Treaty and the visa liberalisation dialogue.

Competition policy is an area for which some basic principles are typically laid down. As the table below shows, the degree to which these clauses are developed varies, the principles in the cooperation agreement with Kazakhstan being developed only embryonically.

Article 35 DTCA South Africa	Article 278 AA Central America	Article 73 SAA Serbia	Article 156 EPCA Kazakhstan
<p>The following are incompatible with the proper functioning of this Agreement, in so far as they may affect trade between the Community and South Africa:</p> <p>(a) agreements and concerted practices between firms in horizontal relationships, decisions by associations of firms, and agreements between firms in vertical relationships, which have the effect of substantially preventing or lessening competition in the territory of the Community or of South Africa, unless the firms can demonstrate that the anti-competitive effects are outweighed by pro-competitive ones;</p> <p>(b) abuse by one or more firms of market power in the territory of the Community or of South Africa as a whole or in a substantial part thereof.</p>	<p>1. The Parties recognise the importance of free and undistorted competition in their trade relations. The Parties acknowledge that anti-competitive practices have the potential to affect the proper functioning of markets and the benefits of trade liberalisation.</p> <p>2. The Parties therefore agree that the following are incompatible with this Agreement, in so far as they may affect trade between the Parties:</p> <p>(a) agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings, which have as their object or effect the prevention, restriction or distortion of competition as specified in their respective competition laws;</p> <p>b) any abuse by one or more undertakings of a dominant position or a substantial market power or notable market participation, as specified in their respective competition laws; and</p> <p>(c) concentrations between undertakings, which significantly impede effective competition, as specified in their respective competition laws.</p>	<p>1. The following are incompatible with the proper functioning of this Agreement, insofar as they may affect trade between the Community and Serbia:</p> <p>(i) all Agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;</p> <p>(ii) abuse by one or more undertakings of a dominant position in the territories of the Community or Serbia as a whole or in a substantial part thereof;</p> <p>(iii) any State aid which distorts or threatens to distort competition by favouring certain undertakings or certain products.</p>	<p>The Parties recognise the importance of free and undistorted competition in their trade relations. The Parties acknowledge that anti-competitive business practices and state interventions, including subsidies, have the potential to distort the proper functioning of markets and undermine the benefits of trade liberalisation.</p>

Table 6: Competition law provisions in (non-)association agreements

Other areas that figure in horizontal association agreements are environment, statistical cooperation, taxation, youth, public health, education and training, tourism, fisheries, industrial cooperation, small and medium sized enterprises, cultural cooperation, social and labour policy, etc. As noted, the degree to which the cooperation in these areas is worked out by the agreement itself may vary.¹⁶³ One key area which has not been mentioned yet but which *de facto* is reserved to associated countries concerns the participation of third countries in EU agencies or programmes such as the flagship programme Horizon2020.¹⁶⁴

While it would not be useful to further compare the clauses on sectoral cooperation to be found in association (and non-association) agreements, it is important to stress again the fundamental rule: the EU (and its partners) can in principle foresee cooperation on any area which comes under the EU's internal scope of action. Within a single agreement (or even a series of agreements with the same partner) the cooperation may be worked out differently from one sector to the next. As long as there is a political agreement on this, cooperation could theoretically result in virtual EU membership for the sector concerned. Here again, therefore, the flexibility in the association instrument is apparent.

4.2. Multilevel institutional structure

A common feature of all association agreements is that they contain a number of institutional provisions setting up joint bodies, which are responsible for monitoring the execution of the agreement. They are also granted decision-making powers to implement the agreement and to further develop the association, in line with the framework defined by the agreement.¹⁶⁵ As a result, association is to be conceived of as a process, rather than as a specific outcome.¹⁶⁶

Even though the institutional framework of association agreements developed over time, they all have a multilevel structure involving at least an association council, an association committee (with can be assisted by specific sub-committees and other bodies) and a parliamentary committee. The most recent generation of association agreements also have a civil society platform.¹⁶⁷ The AA with Ukraine stands out because it also provides for the annual organisation of summit meetings at the highest political level.¹⁶⁸

The *association council* (or depending on the agreement, the EEA Council, the Stability and Association Council, etc.) is typically the main body set up by an association agreement, bringing together representatives of the parties at ministerial level with the power to adopt binding decisions by unanimity or common accord. For the EU side, the association council includes both members of the Council and the European Commission. The Court of Justice has confirmed, since its *Sevince* ruling, that binding decisions of an association council may be directly invoked by private parties before national courts, even if the decisions are not published.¹⁶⁹

AA Turkey	SAA Serbia	AA Central America	AA Ukraine
The Council of Association shall	Article 120 1. The Stabilisation and Association	Article 5 1. The Association Council shall be	Article 462 1. The Association Council shall consist of

¹⁶³ Compare for instance the more elaborate clause on environment in Article 50 of the Central America AA and the embryonic Articles 111 in the Serbia SAA and 84 in the agreement with South Africa.

¹⁶⁴ See European Commission, Associated Countries, http://ec.europa.eu/research/bitly/h2020_associated_countries.html (last accessed 14 January 2019).

¹⁶⁵ For a long time, the decision-making capacity distinguished the institutional framework of association agreements from other types of agreement, such as partnership and cooperation agreements. However, the CEPA with Armenia also empowers the Partnership Council and Partnership Committee with a competence to adopt binding decisions (see Article 362 and 363 CEPA).

¹⁶⁶ It is noteworthy that Article 2 (2) of the EU-Chile AA refers to the established association as 'a process that will lead to a growing relationship and cooperation between the parties structured around the bodies created in this agreement'.

¹⁶⁷ This is the case for the AAs with Ukraine, Moldova and Georgia and the AA with Central America.

¹⁶⁸ Article 460 AA EU-Ukraine.

¹⁶⁹ Case C-192/89, *Sevince*, ECLI:EU:C:1990:322.

<p>consist of members of the Governments of the Member States and members of the Council and of the Commission of the Community on the one hand and of members of the Turkish Government on the other.</p> <p>The members of the Council of Association may arrange to be represented in accordance with its rules of procedure.</p> <p>The Council of Association shall act unanimously.</p>	<p>Council shall consist of the members of the Council of the European Union and members of the European Commission, on the one hand, and of members of the Government of Serbia on the other.</p> <p style="text-align: center;">Article 121</p> <p>The Stabilisation and Association Council shall, for the purpose of attaining the objectives of this Agreement, have the power to take decisions within the scope of this Agreement [...] It shall draw up its decisions and recommendations by agreement between the Parties.</p>	<p>composed of representatives of the EU Party and of each of the Republics of the CA Party at ministerial level, in accordance with the Parties' respective internal arrangements and taking into consideration the specific issues (Political Dialogue, Cooperation and/or Trade) to be addressed at any given session.</p> <p style="text-align: center;">Article 6</p> <p>4. The Association Council shall adopt decisions and recommendations by mutual agreement between the Parties. In the case of the Republics of the CA Party, the adoption of decisions and recommendations shall require their consensus.</p>	<p>members of the Council of the European Union and members of the European Commission, on the one hand, and of members of the Government of Ukraine, on the other.</p> <p style="text-align: center;">Article 463</p> <p>1. For the purpose of attaining the objectives of this Agreement, the Association Council shall have the power to take decisions within the scope of this Agreement [...] It shall adopt its decisions and recommendations by agreement between the Parties, following completion of the respective internal procedures.</p>
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Table 7: Association Council composition and decision-making

In general, association councils are endowed with a number of responsibilities.¹⁷⁰ First, they are responsible for reviewing the implementation of the association agreement and its overall functioning. Second, they play a crucial role in the process of legislative approximation in the sense that they provide a forum for exchange of information on each other's legislative frameworks. Moreover, association councils may amend pre-specified parts of the agreement and its annexes in order to ensure the dynamic development of the established association in light of new developments.¹⁷¹ Third, they are the main decision-making body of the association and play a role in the settlement of disputes (see *infra*). Fourth, association councils are the main channel for the established political dialogue, which also takes place at other levels (for instance within the Parliamentary committees). Fifth, the association councils determine the duties of the association committee and may establish, where necessary, other special committees or bodies.¹⁷²

¹⁷⁰ Phinnemore, *op. cit.* note 20, p. 57.

¹⁷¹ See Article 463(3) of the Ukraine AA, Article 226(6) of the Central America AA, etc.

¹⁷² For instance, Association Council Decision 1/95 established a Customs Union Joint Committee (CUJC) to monitor the implementation of the customs union between the EU and Turkey.

The *association committee*, bringing representatives of the parties at senior official level, is generally regarded as the 'workhorse' of the association.¹⁷³ It meets more frequently in comparison to the association council and assists the latter in the performance of its duties. An association committee may create sub-committees to deal with the more technical aspects of the association.

A third typical institution established under an association agreement is the *association parliamentary committee*, bringing together directly elected representatives of the parties. The function of these inter-parliamentary bodies is always limited to a *droit de regard*. The association council may be asked to give information on the state and progress of the association and the inter-parliamentary body may make recommendations to the association council but is never granted any decision-making powers.

Article 125 SAA Serbia	Article 9 AA Central America	Article 467 AA Ukraine
A Stabilisation and Association Parliamentary Committee is hereby established. It shall be a forum for Members of the Parliament of Serbia and of the European Parliament to meet and exchange views. It shall meet at intervals that it shall itself determine.	1. An Association Parliamentary Committee is hereby established. It shall consist of members of the European Parliament, on the one side, and of members of the Parlamento Centroamericano (PARLACEN), and in the case of Republics of the CA Party that are not members of PARLACEN, representatives designated by their respective National Congress, on the other side, who shall meet and exchange views. It shall determine the frequency of its meetings and shall be chaired by one of the two sides alternately.	1. A Parliamentary Association Committee is hereby established. It shall be a forum for Members of the European Parliament and of the Verkhovna Rada of Ukraine to meet and exchange views. It shall meet at intervals which it shall itself determine.

Table 8: Inter-parliamentary bodies

In the most recent association agreements, the institutional framework is further developed through the establishment of Civil Society Platforms,¹⁷⁴ bringing together civil society representatives of both the EU and the associated third country. This institutional development is connected to the inclusion of new provisions devoted to civil society cooperation in order to ensure a better mutual knowledge and understanding between the parties.¹⁷⁵ Civil society institutions are expected to play a role in the field of trade and sustainable development¹⁷⁶ and are to be involved in social and cultural dialogues.¹⁷⁷ This evolution illustrates once again how, over time, the scope of the established association has continuously expanded.

Finally, it is noteworthy that the institutional framework established under the EEA agreement includes a number of unique features. For instance, it includes an EEA Consultative Committee made up of members

¹⁷³ Phinnemore, *op. cit.* note 20, p. 57.

¹⁷⁴ See e.g. Article 469 of the EU-Ukraine AA.

¹⁷⁵ Chapter 26, including Arts 443-445 of the EU-Ukraine AA.

¹⁷⁶ Article 299 of the EU-Ukraine AA.

¹⁷⁷ Article 421 and 438 of the EU-Ukraine AA.

of the EU's Economic and Social Committee and its EFTA counterpart.¹⁷⁸ Moreover, while formally not established on the basis of the EEA agreement, the creation of parallel structures such as the EFTA Surveillance Committee and the EFTA Court is of crucial importance for the effective functioning of the established association, which is based upon the objective of homogeneity (cf. *supra*).

4.3. Dispute settlement

All association agreements include a specific chapter on dispute settlement, typically involving different steps such as consultations within the framework of the association council (or committee) and the possible establishment of an arbitration panel. For the trade and trade-related aspects, specific provisions inspired by the WTO Dispute Settlement Understanding may be included. The latter is not typical for association agreements but may also be found in most free trade agreements.

Notwithstanding the existence of certain common features, there is no standard dispute settlement mechanism for association agreements. The precise provisions on dispute settlement develop over time and differ depending upon the type of association. For instance, in the case of the AA with Central America, the Association Committee is merely kept informed of the parties' attempts to come to a settlement on any dispute they have. However, the Association Council (or Committee) is not formally involved in setting up ad hoc panels or on monitoring the implementation of panel rulings. Instead, the Association Council only adopts the rules of procedure of the panel and establishes the list of possible panelists.¹⁷⁹ In contrast, the Stability and Association Councils (established pursuant to the SAAs concluded with the countries of the Western Balkans) are empowered to settle disputes between the parties and contain clauses on compulsory and binding arbitration with detailed rules on procedures and compliance.¹⁸⁰ The more recent AAs with Ukraine, Moldova and Georgia are even more sophisticated in the sense that they also include provisions on conciliation (concerning urgent energy disputes) and mediation (on certain trade measures).¹⁸¹ As long as the dispute does not involve trade or trade-related measures, the Association Council is entitled to settle the dispute on the basis of a binding decision.

It is noteworthy that the arbitration panels established under the association agreements are precluded from interpreting (internal) EU legislation.¹⁸² This is a direct result of the case law of the CJEU, which stressed on several occasions its exclusive jurisdiction in ensuring the uniform interpretation and application of EU law.¹⁸³ As a result, the arbitration panels are bound to interpret the association agreements in accordance with customary rules of interpretation of public international law. The fact that a provision in an association agreement is 'identical in substance' to a provision of internal EU legislation is not decisive for its interpretation. It follows that disputes relating to the interpretation or application of the EU *acquis*, which may arise in the context of obligations relating to the process of legislative approximation, require the involvement of the CJEU. Such a specific mechanism is included in the AAs with Ukraine, Moldova and Georgia.¹⁸⁴ The association agreement with Turkey and the EEA Agreement

¹⁷⁸ See: <http://www.efta.int/eea/eea-institutions/eea-consultative-committee>.

¹⁷⁹ Arts 308-313 of the EU Central America AA.

¹⁸⁰ See e.g. Article 130 and Protocol No 7 of the EU-Serbia SAA.

¹⁸¹ On the various mechanisms for dispute settlement, see also: A. Rosas, 'The EU and International Dispute Settlement', *Europe and the World: A Law Review*, 2017, <https://doi.org/10.14324/111.444.ewlj.2017.03>.

¹⁸² This, for instance, with so many words expressed in Article 13 of Protocol No. 7 on dispute settlement to the EU-Serbia SAA.

¹⁸³ See i.a. Opinion 1/91 re EEA, ECLI:EU:C:1991:490; Opinion 1/09 re Unified Patent Litigation System, ECLI:EU:C:2011:123; Opinion 2/13 re ECHR, ECLI:EU:C:2014:2454. It is to be expected that this issue will also figure prominently in the Court's Opinion 1/17 on CETA. See the Opinion of AG Bot in the Opinion procedure 1/17, ECLI:EU:C:2019:72. However, Opinion 1/17 is concerned with an investor-state dispute settlement mechanism, not with a mechanism through which disputes between the parties are settled. In addition, under recent practice, and as a result of Opinion 2/15, the EU is concluding separate Investment Protection Agreements based on Article 207 TFEU. As a result, these agreements and the dispute settlement mechanisms fall outside the scope of the notion of association which is linked to Article 217 TFEU.

¹⁸⁴ See e.g. Article 322(2) of the association agreement with Ukraine.

also provide for the possible involvement of the CJEU, albeit under different modalities.¹⁸⁵ However, these clauses have so far never been used in practice.

¹⁸⁵ See Article 25 (2) of the Ankara Agreement, involving the general possible for the *Association Council* to submit a dispute to the Court of Justice and Article 111 (3) of the EEA agreement, involving the possibility for the *contracting parties* to address the Court of Justice if a dispute has not been settled within three months after it has been brought before the EEA Joint Committee.

5. CONCLUSIONS

Despite the rather vague description of the concept 'association' in Article 217 TFEU, the analysis of the EU's treaty practice revealed a number of essential characteristics which, taken together, define the nature of association under EU law.

First, the keyword for understanding the meaning of association in the EU legal order is **flexibility**. Association may take different forms. The precise scope and objectives of the established relationship depends upon the state of EU integration itself as well as the general (geo)political context. They may include tailor-made provisions targeting the specific challenges of a particular country or region. The established institutional framework allows for the further deepening of the relations in light of political evolutions. Accordingly, association agreements that are concluded without a membership perspective may develop into pre-accession instruments without a formal amendment of the agreements. Alternatively, they may provide a framework for integration without membership.

Second, association agreements are **comprehensive** in nature. They bring together all areas of cooperation with a particular country (or group of countries) in one legal framework. An association agreement typically includes the establishment of a political dialogue, provisions on trade liberalisation and a wide range of areas for sector specific cooperation. Whereas other types of agreement may cover similar areas of cooperation, association agreements typically include more far-reaching commitments in terms of trade integration and legislative approximation.

Third, association agreements establish a **long-term institutional framework** for cooperation. Most association agreements have been concluded for an unlimited period of time or have been updated on several occasions without affecting the core institutional structures. The existence of joint institutions with decision-making capacities allows for the further development of the association. Hence, association may be regarded as a **dynamic process**.

Fourth, association agreements are of **political significance**. They are typically the most-ambitious and most far-reaching types of agreement concluded with third countries in a particular geographical area. As a result, association agreements introduce a certain level of differentiation in the EU's relations with third countries. Accordingly, the prospect of association is often used as a policy instrument in order to upgrade the EU's relations with certain partners. The establishment of an association signals the parties' eagerness to entertain privileged legal, economic and political relations.

Fifth, whereas the conclusion of an association agreement may lead to a form of 'integration without membership', there are certain limits to what is feasible under the association formula. In particular, the **procedural and institutional rights of the associated countries are limited to decision-shaping** and cannot involve any rights of representation or decision-making within the EU institutions.

The identified characteristics make association a very suitable instrument for streamlining the EU's relations with a variety of partners. It is, therefore, no coincidence that a further proliferation of new association agreements may be expected in the future. Reference can be made to the ongoing negotiations with Mercosur and the European micro-states Andorra, San Marino and Monaco. Article 217 TFEU may also play a role in relation to the envisaged conclusion of an institutional framework agreement with Switzerland, even though the term 'association' has never been explicitly used in this context.

Last but not least, the association formula may be used for defining the post-Brexit relations with the United Kingdom. In this respect, it is noteworthy that the political declaration setting out the framework

for the future relationship between the European Union and the United Kingdom¹⁸⁶ explicitly provides that the overarching institutional framework could take the form of an association agreement.

Such a solution would definitely have a number of advantages. From a pragmatic point of view, it avoids potentially complex discussions regarding the choice of the correct legal basis for the new legal arrangement. In addition, the experience of the EU's bilateral relations with Switzerland illustrates the importance of a well-designed institutional structure in order to guarantee legal certainty for citizens and businesses. Moreover, the establishment of joint bodies with decision-making powers allows for the dynamic development of the future relationship.

The inherent flexibility of 'association' as a legal concept also means that the actual format of the new relations is not pre-defined. This may either be a comprehensive framework agreement, such as the association agreements with Ukraine, Moldova and Georgia, or a more focused agreement on market integration, such as the EEA agreement.

Whether or not the term 'association' is mentioned in the title of the agreement may have a political significance but it is not very relevant from a legal point of view. As has been illustrated in this study, recourse to Article 217 TFEU is in essence a reflection of the EU's internal competence to engage in a privileged relationship with third countries or international organisations. Since the Lisbon Treaty, the neighbourhood clause of Article 8 TEU specifies the Union's constitutional mandate to establish special links with neighbouring countries without, however, affecting the traditional broad conception of association agreements under Article 217 TFEU. Hence, the practical legal added value of Article 8 TEU for the post-Brexit legal arrangement seems rather limited but it may help to clarify the background of a process leading to the development of a special relationship with a former member state.

Finally, the role of the European Parliament in the process leading to the conclusion of association agreements may be further developed without amending the Treaties themselves. In particular, the Interinstitutional Agreement (IIA) between the European Parliament, the Council and the Commission on Better Law-making may be used to clarify the role of the Parliament with respect to issues such as access to the negotiation guidelines, decisions on provisional application and monitoring of the implementation and potential suspension of agreements.

¹⁸⁶https://ec.europa.eu/commission/publications/political-declaration-setting-out-framework-future-relationship-between-european-union-and-united-kingdom_en.

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, analyses the law and practice of EU association agreements. It maps out different types of association agreements concluded on the legal basis of Article 217 TFEU and identifies the key features characterising the nature of association under EU law.

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