The good neighbourliness principle in EU law

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E. Basheska

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Abbreviations

ACFC	Advisory Committee on the Framework Convention
AEL	Academy of European Law
AJIL	American Journal of International Law
AJPH	Australian Journal of Politics and History
AJPS	American Journal of Political Science
AP/s	Accession Partnership/s
BGBI	Bundesgesetzblatt (Federal Law Gazette)
Bull.	Bulletin
CEE/c	Central and Eastern Europe/an countries
CEPS	Centre for European Policy Studies
CETS	Council of Europe Treaty Series
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CJEL	Columbia Journal of European Law
CoE	Council of Europe
CLEER	Centre for the Law of EU External Relations
CLJ	The Cambridge Law Journal
CML Rev	Common Market Law Review
CSCE	Conference on Security and Cooperation in Europe
CUP	Cambridge University Press
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECMI	European Centre for Minority Issues
ECN	European Convention on Nationality
ECPSD	European Convention for the Peaceful Settlement of Disputes
ECRML	European Charter for Regional or Minority Languages
ECR	European Court Reports
ECtHR	European Court of Human Rights
EEC	European Economic Community
EHRR	Essex Human Rights Review
EIoP	European Integration online Papers
EJIL	European Journal of International Law
EL Rev	European Law Review
EP/s	European Partnership/s
EPIL	Encyclopedia of Public International Law

ETS	European Treaty Series
EU	European Union
EUI	European University Institute
FCNM	Framework Convention for the Protection of National Minorities
fYROM	former Yugoslav Republic of Macedonia
GAOR	General Assembly Official Records
GATT	General Agreement on Tariffs and Trade
GC	General Court
HL	House of Lords
HRC	Human Rights Committee
IBFD	International Bureau of Fiscal Documentation
IBIS	Institute for British-Irish Studies
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
Int'l	International
JCMS	Journal of Common Market Studies
LNOJ	League of Nations Official Journal
LS	Law Studies
NATO	North Athlantic Treaty Organisation
NJ	New Jersey
NYU	New York University
OECD	Organisation for Economic Co-operation and Development
OSCE	Organisation for Security and Cooperation in Europe
OUP	Oxford University Press
PHARE	Poland and Hungary: Assistance for Restructuring their Economies
PCIJ	Permanent Court of International Justice
PUP	Princeton University Press
SAA/s	Stabilisation and Association Agreement/s
SAP	Stabilisation and Association Process
SEC	Internal document of the Secretariat-General
SEE/c	South East Europe/an countries
SIEPS	Swedish Institute for European Policy Studies
SNP	Scottish National Party
TACIS	Technical Assistance to the Commonwealth of

	Independent States
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRNC	Turkish Republic of Northern Cyprus
UNCLOS	United Nations Convention on the Law of the Sea
UKTS	United Kingdom Treaty Series
UN	United Nations (Organisation)
UNGA	United Nations General Assembly
UNRIAA	United Nations Reports of International Arbitral Awards
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
UP	University Press
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation
YB	Yearbook

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INTRODUCTION

Good neighbourliness is one of the most important principles of international law relating to harmonious interstate relations, if not 'the oldest principle of international law'[1] and one without which 'there can be no orderly world community'.[2] It is the first purpose of the fundamental document of international law – the Charter of the United Nations (UN Charter), which refers to the determination of the UN peoples 'to practice tolerance and live together in peace with one another as good neighbours'[3] and a 'general principle'[4] accepted by all UN member states.

Developing out of the ideas of territorial sovereignty and equality of states in international law, good neighbourliness is the key principle underpinning the peaceful coexistence between states. Sovereign states are equal before the law, enjoying the same rights and having equal legal capacity in their exercise.[5] The exercise of the state rights inherent in full sovereignty is only possible where the good neighbourliness principle is respected in governing interstate relations. In contrast, the violation of the principle, particularly between contiguous states, can lead to serious confrontations or military conflicts.[6]

Nevertheless, respect for the principle of good neighbourliness requires a precise definition of its legal framework or else its application 'is at the mercy of those disposing of force and not under the rule of justice'.[7] Despite its significant importance, the good neighbourliness principle has not been codified in international law. The United Nations has failed to map the principle despite all its attempts and concrete steps in that direction. In addition, the principle has not been addressed sufficiently – if indeed not completely neglected – in the academic literature. While

1) Iftene Pop, *Components of Good Neighbourliness Between States – Its Specific Legal Contents – Some Considerations Concerning the Reports of the Sub-Committee on Good-Neighbourliness Created by the Legal Committee of the General-Assembly of the United Nations* (Editura R.A.I., Bucharest 1991) 67.

2) Clarence Wilfred Jenks, Law in the World Community (David McKay, NY 1967) 92.

3) Preamble of the Charter of the United Nations (adopted 26 June 1945, in force 24 October 1945) 59 Stat. 1031 (UN Charter).

4) Article 74 UN Charter.

5) Article 4 Montevideo Convention on Rights and Duties of States (signed 26 December 1933, in force 26 December 1934).

6) Ulrich Beyerlin, 'Neighbour States', Encyclopedia of Public International Law, vol 3 (Elsevier, Amsterdam 1997) 537–541, 537.

7) *Pop* (n 1).

a number of scholars have contributed to discussion of the principle, this work aims to bring together the many different aspects of the principle and its application in different concrete fields. In particular, the link between the principle as such and its implementation in concrete contexts is either missing from the existing literature or is not explored sufficiently. In addition, the interpretation and application of the good neighbourliness principle has hardly ever been explored in a clear and a straightforward manner in any other field but environmental law. A large number of questions therefore remain unanswered. This work bridges these gaps, and offers answers to many important questions.

Unlike the contributions by its predecessors, this work starts from scratch by asking a number of fundamental questions. What is the legal basis of the principle in international law? What are the legal rights and duties of states in the light of the principle? In which fields and how is the principle applied? How does the principle function outside international law? Is the European Union an authentic model of good neighbourliness? Could the principle be legitimately applied through the conditionality which is often deployed in EU relations with the wider world and would this make a real difference? What does this application of the principle to recent disputes between states tell us about the nature of good neighbourliness and its implementation? Most importantly, how much can law actually achieve to further friendly interstate relations?

Obviously, a large number of other important questions related to the principle can still arise. Without pretending to answering them all, this study merely intends to begin to bridge the gap in the academic literature. To that end, the study provides a detailed assessment of the essence and application of the good neighbourliness principle, answering the above questions, which will hopefully inspire broader discussion. This study consists of five chapters, four of them focusing on the functioning of the good neighbourliness principle in a different legal context and the fifth one drawing conclusions. Having its roots in international law, the many aspects of the good neighbourliness principle are initially explained in the context of international law.

The main claim put forward in the first Chapter and followed throughout the study is that the good neighbourliness principle has a clear legal value. Accordingly, the first Chapter establishes good neighbourliness as a legal principle, dismissing the doubts voiced in the past 'whether the notion of good-neighbourliness correspond[s] to any separate principle of international law'.[8] Contrary to the allegations of the then European Economic Community (EEC) that good neighbourliness lacks specific content,[9] the first chapter clarifies the legal framework of the principle, i.e. its legal basis and the corresponding rights and duties of states in international law.

8) UN Doc A/C.6/41/SR.50, para. 41.

9) *See* for instance: UN Doc A/C.6/42/SR.55, 8–13; UN Doc A/C.6/43/SR.43, 2–17; UN Doc A/C.6/43/SR.44.

A principle without specific content can be nothing more than an empty and formal category. If good neighbourliness was such a meaningless principle, why was it then included in the most important document of international law – the UN Charter? Why are all the provisions of the Framework Convention for the Protection of National Minorities (FCNM) – the first legally binding multilateral instrument devoted to the protection of national minorities, applied in conformity with the principle of good neighbourliness?[10] Why would states, juridical bodies and scholars connect certain legal norms with the good neighbourliness principle if that principle had no specific content? Above all, why would EU translate the principle into an accession condition of overwhelming importance if that principle lacked specific content, i.e. if there were nothing specific to require from the potential candidate countries?

Claims that the principle is empty are emphatically dismissed in this work. The importance attached to the good neighbourliness principle at so many different levels is certainly not without a reason. The linking of certain legal norms to the good neighbourliness principle included in international instruments, state practices and opinio juris, case law and opinions of well-known specialists, proves the importance of the principle in international law and the richness of its specific legal content.

Having analysed the legal framework and fields of application of the good neighbourliness principle in international law, the study proceeds to establish the principle in the EU legal order, focusing on three different contexts – intra-EU interstate relations, foreign EU relations and EU enlargement. Unlike in the first legal context where interstate relations are largely shaped through the Union's supranational framework, in the latter two contexts good neighbourliness is given effect through the conditionality principle. The question that necessarily arises in all three contexts is how successful the EU is in implementing the principle and strengthening the good neighbourly relations between states.

The second Chapter of this study traces the application of the good neighbourliness principle in the new circumstances created by the supranational framework. Good neighbourly relations came to occupy a vital place in EU law, underpinning the very essence of the integration exercise. As viewed by the early EEC, the cooperation between the Member States provided 'an excellent illustration of good-neighbourly relations'.[11] Indeed, the supranational framework was largely aimed at securing good neighbourly relations between European states through integration.[12] Reconstruction and reconciliation among former enemies were

10) Article 2 of the Framework Convention for the Protection of National Minorities (adopted 1 February 1995, in force 1 February 1998).

11) *UN Doc A/C.6/42/SR.55* (n 9) *para.* 37.

12) *E.g.* Karen E Smith, European Union Foreign Policy in a Changing World (2nd edn Polity, Cambridge 2008) 171. *See* also Robert Bideleux, 'European Integration: The Rescue of the Nation State?' in Dan Stone (ed.), *The Oxford Handbook of Postwar European History* (OUP, Oxford 2012) 379−405.

essential components of the integration process.[13] Good neighbourliness has been viewed as an expression of 'the way in which the EU approaches dispute resolutions [i.e.] via cooperation, and preferably integration'.[14]

The functioning of the good neighbourliness principle in EU law may differ from what can be observed in traditional international law. The supranational legal framework has created a new context for the development of good neighbourly relations by changing the structure and the rules of interstate relations. It has fundamentally changed the essence and the very function of state borders, dramatically altering the overall perception of territorial sovereignty around which the good neighbourliness principle in traditional international law initially developed. The protection of states' rights inherent in full sovereignty in the light of good neighbourliness principle could also be challenged within the new context of shared sovereignty.

Following an analysis of its internal aspects, the study proceeds to explore the Union engagement on the international scene in promoting good neighbourliness. As an important international actor, the EU is responsible for acting for the betterment of peace, democracy and human rights across the world and especially in its surroundings. Indeed, conflict prevention has become one of the main objectives of the EU's external relations.[15] At Treaty level, the EU is committed to promote international law, necessarily including the good neighbourliness principle, in its relations with the wider world.[16] However, the EU Treaties do not clarify how the principle should be implemented. The only Treaty provision referring explicitly to 'good neighbourliness' speaks of the relationship between the EU and its neighbours " founded on the values of the Union and characterised by close and peaceful relations based on cooperation[17] – leaving a lot to be desired with respect

13) *E.g.* András Inotai, 'Remarks on the Future Challenges of the European Union' in Richard H Tilly, Paul JJ Welfens and Michael Heise (eds), *50 Years of EU Economic Dynamics: Integration, Financial Markets and Innovations* (Springer, Berlin/Heidelberg/New York 2007) 263.

14) Helene Sjursen and Karen E Smith, 'Justifying EU Foreign Policy: the Logics Underpinning EU Enlargement' in Ben Tonra and Thomas Christiansen (eds), Rethinking European Union Foreign Policy (Manchester UP, Manchester 2004) 134.

15) European Council, 'Draft EU Programme for the Prevention of Violent Conflicts', attachment to Presidency Conclusions of the European Council of 15−16 June 2001.

16) Article 3(5) TEU [2010] OJ C 83/1, stipulates that '[i]n its relations with the wider world, the Union shall […] contribute […] to the strict observance and the development of international law, including respect for the principles of the United Nations Charter'. In the general provisions on the Union's External Action, Article 21 TEU refers to the commitment of the Union to respect the principles of the UN Charter and international law as guiding principles 'which have inspired its own creation, development and enlargement and which it seeks to advance in the wider world'. The Union must further 'define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to [...] preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders'.

17) Article 8(1) TEU.

to the interpretation and application of the principle. Are these values compatible with the good neighbourliness principle as established in international law and if so how is the principle enforced? The third Chapter seeks to answer this question by analysing the different constellations in which the principle of good neighbourliness is applied.

In particular, the process of recognition of new states was a good opportunity for the EU and its Member States to coordinate their positions in the light of the good neighbourliness principle. The EU has been successful in translating the principle of good neighbourliness into a precondition for the recognition of new states. The question that arises however is how successful the implementation of that precondition could be in circumstances where the recognition of states fell formally under the competencies of Member States? This question is answered through an analysis of the process of recognition of new states after the dissolution of Yugoslavia, which assesses in greater detail whether the legal recommendations in the light of good neighbourliness principle have been taken into a consideration by Member States.

The inviolability of frontiers and the protection of the rights of minorities are two other important aspects worthy of scrupulous analysis. In its foreign relations, the EU has put special emphasis on border disputes and minority issues in the light of the good neighbourliness principle. While these two aspects are not new to the principle as established in international law, the use of conditionality in EU foreign relations has certainly lent a somewhat different dimension to the effectuation of the principle. How far was the EU ready to go in implementing the good neighbourliness principle through conditionality? The example of the Central and Eastern European countries (CEEc), illustrating one of the most important EU initiatives in promoting good neighbourly relations, is widely discussed in this context.

The EU initiative for the settlement of border disputes and minority issues to promote good neighbourliness in EU foreign relation has been extended in the enlargement process to all bilateral disputes between neighbouring countries. Effectively employing the conditionality principle, the EU has linked the pre-accession progress of candidate countries to the settlement of their bilateral disputes in the light of the good neighbourliness condition. The reason behind such strict use of conditionality is straightforward – preventing the possible importation of unresolved disputes into the EU.

The peaceful settlement of bilateral disputes is at the core of the good neighbourliness principle. Therefore, the introduction of the good neighbourliness condition into the EU enlargement process should theoretically contribute to the better compliance of candidate countries with the rules of international law, given the prominence of the accession incentive. In other words, the translation of the

principle of good neighbourliness into an accession condition strengthens the possibility of its successful implementation through the enlargement process. Nevertheless, the introduction of the condition in the EU enlargement policy also increases the responsibility of the EU to ensure an effective application of international law in the process of 'appropriating' the principle and in accordance with its commitments to respect and to promote international law in its relations with the wider world.

The question discussed in the fourth Chapter is whether the EU has been successful in implementing the good neighbourliness condition to bilateral disputes in the enlargement process in accordance with the rules of international law. The text illustrates its findings by analysing the aspects of consistency and respect for the legal framework of the good neighbourliness principle as applied to bilateral disputes in the enlargement process. The application of the condition to the main bilateral disputes in this context – the Cyprus issue, the bilateral dispute between Croatia and Slovenia, and the name issue between Macedonia and Greece – is discussed in greater detail.

The fifth, and final Chapter presents the general conclusions of this study. The potential application of the good neighbourliness condition outside its legal framework would likely lead to inconsistent interpretation and even to wrongful implementation of the good neighbourliness principle as established in international law. Such a situation would not only amount to misuse of the good neighbourliness principle in the enlargement process, but would also endanger the outcomes sought by that principle of providing for peaceful coexistence, dialogue and cooperation between states.

In summary, this work clarifies the legal framework of the good neighbourliness principle in international law by explaining its legal basis and the rights and obligations of states stemming from it as well as from fields where the principle is applicable. It further examines the functioning of the principle in EU law, focusing on three different legal contexts – on the functioning of the principle in the intra-EU interstate relations, in EU foreign relations and in EU enlargement. Unlike in the first legal context, where good neighbourliness is manifested through the principles of loyal cooperation and solidarity between the EU and its Member States, in the latter two contexts good neighbourliness is applied through conditionality. Having analysed the strengths or weaknesses of the three legal contexts, the work discusses in its conclusion whether the good neighbourliness principle functions better alone or whether it should be applied in EU law through solidarity or conditionality.

CHAPTER I

Good neighbourliness in International law

1. The connotation of good neighbourliness principle in International law

The principle of good neighbourliness in international law designates a model of interstate relations or certain type of ties among neighbouring states, providing for peaceful coexistence, dialogue and cooperation.[18] Consequently, any analysis of international relations reflecting good neighbourliness presupposes the existence of states for the purposes of international law and international rules regulating respective relations among states. Hence, the first part of this chapter discusses the attributes of states as international actors. It further argues that interstate relations have as their substantial basis the principle of sovereign equality of states, which is most appropriately reflected through the rights and duties of states incorporated in the principle of good neighbourliness.

All states are sovereign and free to deal independently with their internal and external affairs. In circumstances where sovereignty is attributed to all states

18) This general definition of good neighbourliness which is used throughout the book draws inspiration from the writings of several scholars. Edwin Glasser, 'Buna Vecinătate' (1972) 1(15) Revista română de studii internaționale 30, quoted in *Pop* (n 1) 58, writes that 'Good neighbourliness does not designate a geographical situation, but a model, a type of international relations, a certain kind of ties, as between good neighbours'. Pop, himself, starts the same book (p. 7) by adding that coexistence and cooperation require that states do not suppress each other or affect each other significantly. These requirements form the core of the good neighbourliness principle as established in international law and are reflected through the rights and duties of states in this respect. That author, who is one of the very few scholars discussing the principle of good neighbourliness conceptually, shows this interconnection throughout his book. Finally, the dialogue between states represents a respectful mode of communication and a means of avoiding conflicts and moderating contradictions and is therefore an important characteristic of good neighbourly relations between states. As put by Andrew Hurrell, 'International Law and the Making and Unmaking of Boundaries' in Allen E Buchanan and Margaret Moore (eds), *States, Ethics and Nations: The Ethics of Making Boundaries* (CUP, Cambridge 2003) 277, 'the dialogue is especially important because international law seeks both to identify, promote, and institutionalize universal values and also to mediate amongst different and often conflicting ethical traditions'.

individually, equality is the only answer for regulating interstate relations.[19] Neighbours have equal rights to exercise their rights and an equal duty to consider the rights of the others. As noted by Henrikson:

> [n]eighbours are to be accepted as being equal and thus as deserving of considerate regard when an action that might adversely affect them is being contemplated, just as the shoe were on the other foot. "Do unto others as you would have them unto you" "the Golden Rule" obtains.[20]

Therefore, 'mutuality or reciprocity - that is, equivalency of station and interchange' is necessary for good neighbourly relations between states.[21] Sovereignty is exercised within borders and entails (*inter alia*) non-interference by neighbouring states. The principle of good neighbourliness developed around the idea of the territorial sovereignty of states and the requirement for inviolability of frontiers, both having their primordial moment since Westphalia at least.[22]

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19) *E.g.* Michel Cosnard, 'Sovereign Equality – "The Wimbledon Sails on"' in Michael Byers and Georg Nolte (eds), *United States Hegemony and the Foundations of International Law* (CUP, Cambridge 2003) 117–134, 121.

20) Alan K Henrikson, 'Facing across Borders: The Diplomacy of Bon Voisinage' (2000) 21(2) Int'l Political Science Rev 121–147, 124.

21) ibid.

22) The 'Westphalian model' has been largely regarded in the literature as a beginning in the development of the international system of sovereign states. *See*, among many authors on this issue, Leo Gross 'The Peace of Westphalia: 1648–1948' (1948) 42 AJIL 20–41, 28, noting that, '[t]he Peace of Westphalia, for better or worse, marks the end of an epoch and the opening of another' and also that '[t]he idea of an authority or organization above the sovereign states is no longer. What takes its place is the notion that all states form a world-wide political or that, at any rate, the states of Western Europe form a single political system. This new system rests on international law and the balance of power operating between rather than above states' (footnotes omitted); Gianfranco Poggi, *The Development of the Modern State* – A Sociological Introduction (Hutchinson, London 1978) 89, regards Westphalian Peace as a 'cornerstone of the modern system of international relations'; Heinhard Steiger, 'Concrete Peace and General Order: The Legal Meaning of the Treaties of 24 October 1648' in Klaus Bussmann and Hans Schilling (eds), *1648 − War and Peace in Europe*, vol 1, Politics, Religion, Law and Society (Westfälisches Landesmuseum, Münster 1998) 437−446, 440, notes that '[s]overeignty – as a form of complete external and internal independence and self-determination in relation to every other power – became the fundamental principle of the European order'; Daniel Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (PUP, Princeton, NJ 2001) 96, emphasizes that non-intervention is as much a 'constitutive principle' now as it was at the time of the Peace's conception; along similar lines, Andrew Phillips, *War, Religion and Empire: The Transformation of International Orders* (CUP, Cambridge 2011) 145, asserts that the Peace of Westphalia 'signalled the embryonic emergence of norms of non-intervention'. However, the theory that the peace of Westphalia brought something new in terms of sovereignty of states has been challenged by number of authors, *see* in this respect for instance: Randall Lesaffer, 'International Law and Its History: The Story of an Unrequired Love' in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhoff, Leiden 2007) 27–42; Stéphane Beaulac, *The Power of Language in the Making of International Law* (Martinus Nijhoff, Leiden 2004) 71–98; Andreas Osiander, 'Sovereignty, International Relations and the Westphalian Myth' (2001) 55 International Organization 251–287 etc.

The second part of this chapter is dedicated primarily to the clarification of the contents of the good neighbourliness principle in international law in general and within the UN in particular. More specifically, the importance of respecting the duties and rights under the international law for the maintenance of friendly relations between states, which has been repeatedly stressed by the UN General Assembly since the establishment of the organization. In the period from 1979 to 1991, the UN engaged actively in clarifying the legal basis and defining the contents of the good neighbourliness principle. The text follows the activities of the UN to this end in order to define the basic legal framework of the principle. It first analyses the general contents or the legal basis on which the principle of good neighbourliness is founded. Then, it examines the specific content or the rights and duties of states which may be deduced from the principle. Of no less importance are the fields of application, which are also analysed. While developing primarily in the field of international environmental law and being most evidently implemented in this field, the principle of good neighbourliness is by no means confined to environmental protection alone. Instead, the all-embracing nature of the principle provides for its application in many different, if not all fields where the duties and rights of states manifest themselves.

1.1 Relations between neighbouring states

As subjects of international law, states possess international legal personality or legal capacity that conveys on them certain rights and obligations arising from international law.[23] They are distinguished from all other subjects of international law by their specific characteristics, amounting to a full international legal personality implying that they may perform any planned activity and 'are only limited by rules of public international law, by decisions of international organisations and by transfer of competencies to (international organisations)'.[24] The most commonly accepted legal criteria for statehood in international law are those set out in Article 1 of the Montevideo Convention on Rights and Duties of States.[25] Accordingly, a state as a person in international law should possess: (a) a permanent population;[26] (b) a defined

23) As specified by the International Court of Justice (ICJ) in ICJ, *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 179, 'possession of international legal personality indicates that subjects of international law are 'capable of possessing international rights and duties and [having] capacity to maintain [their] rights by bringing international claims'.

24) Rachel Frid, *The Relations Between the EC and International Organizations: Legal Theory and Practice* (Kluwer Law, The Hague 1995) 12.

25) *Montevideo Convention on Rights and Duties of States* (n 5).

26) The criterion refers to the need of stable population, excluding nomadic tribes for the purposes of territorial sovereignty, although these people – according to the opinion of the ICJ in the *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, 63–65, paras 148–152 – do have certain rights with respect to the land they traverse. The requirement does not make any specific reference to the minimum or maximum number of inhabitants neither does it requires homogeneity of population.

territory;[27] (c) a Government;[28] and (d) the capacity to enter into relations with other states.[29] This list has remained mostly static for decades.[30]

As key actors in the international community, states necessarily interact with each other. Traditionally and in its strict sense neighbourliness refers to the external ties of each state with its bordering countries, i.e. states sharing common frontiers or being separated by seas.[31] The broader understanding of neighbourliness, however,

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27) This criterion is the essence of statehood. Frontiers of states do not only geographically delimit territories but also designate jurisdiction and state sovereignty. It, however, does not presuppose fully defined borderlines as long as the state has a control over a recognisable area of territory. This view was clearly supported by Germano-Polish mixed arbitral tribunal in *Continental Gas-Gesellschaft v. Polish State* (1929) 5 ILR 11, 14–15 and reaffirmed by the ICJ in the *North Sea Continental Shelf (Federal Republic of Germany v. The Netherlands and Federal Republic of Germany v. Denmark)* [1969] ICJ Rep 3, 32, para. 46.

28) This criterion is an expression of the need to establish effective political, administrative and executive organs exercising state authority over the territory and the population. The need for effective control as opposed to the mere existence of government has been clearly emphasised by the International Committee of Jurists in its report on the *Aaland Islands Case* (1920) LNOJ Spec Supp 3, recognising that Finland had not become a sovereign state 'until a stable political organisation had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops'. As noted by David Raič, *Statehood and the Law of Self-determination* (Kluwer Law, The Hague 2002) 62–73, however, the practice has shown that in some instances the absence of an effective government for a certain period does not lead to an extinction of a state, nor is it always an obstacle for its recognition.

29) The criterion requires from the entity the capacity to enter into relations with other States. It refers to the ability to enter independently into legal relationships with other entities. As has been already established in PCIJ, *Austro-German Customs Union* (Advisory Opinion) [1931] PCIJ Rep Series A/B, No 41, 41 (Court's opinion) and 57–58 (Opinion of Judge Dionisio Anzilloti) the legal conception of independence is not affected by a state's subordination to international law, neither by its factual dependence upon other states as opposed to dependent states which are legally compelled to submit to the legally imposed will of one or more other states. *See*, in this respect, Malcolm N Shaw, *International Law* (5th edn CUP, Cambridge 2005) 181–182; Peter Malanczuk and Michael B Akehurst, *Akehurst's Modern* Introduction to International Law (7th edn Routledge, London/NY 1997) 78–80; cf Ian Brownlie, *Principles of Public International Law* (7th edn OUP, Oxford 2008) 71–74. For an extensive analysis of the development of statehood in international law, *see* James R Crawford, *The Creation of States in International Law* (2nd edn Clarendon Press, Oxford 2006).

30) *See,* however, Chapter 3 below with regard to the conditions of the EU and its Member States for the recognition of new states in Europe.

31) According to Article 6(1) Convention on the Continental Shelf (adopted 29 April 1958, in force 10 June 1964) 499 UNTS 311, 'Where the same continental shelf is adjacent to the territories of two or more states whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary line is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured'. Some authors, e.g. Sun Pyo Kim, *Maritime Delimitation and Interim Arrangements in North East Asia* (Martinus Nijhoff, Leiden 2004) 31, argue that the good neighbourliness principle is 'important for the States with opposite or adjacent coasts pending final delimitation […] because there is a high possibility of a coastal State exercising its rights or carrying out activities in the disputed areas in such a way as to impair the rights of the other coastal States' (footnote omitted).

is not confined to bordering states only, but extends to the interstate relations of countries from the same geographical region and even the relations of all states of the world.[32]

While the first approach reflects the geographical proximity of states, the second has been notably inspired by the ever growing interdependence between states and explains a substantial part of the international law concerning the good neighbourliness principle. This is because the purposes of the good neighbourliness principle, providing for peaceful coexistence, dialogue and cooperation, largely coincide with the purposes of the UN Charter and international law in general.[33] Notwithstanding the differences between the two approaches regarding the number of states to which neighbourliness applies, both understandings have a view to interstate relations governed by international law. The attribute 'good' attached to the term 'neighbourliness' describes a positive relationship among neighbouring states reflecting a respectful mode of intercommunication as opposed to what by analogy may be entitled 'bad neighbourliness'. Accordingly, good neighbourliness emerges primarily from positive interactions among states governed by international law. As such it is regulated and may only be sustainable by strict observance of international law as explained in the following text.[34] The central part in this respect occupies the principle of the sovereign equality of states, and more importantly the legal rights and obligations of states resulting from this principle, and being well integrated within the good neighbourliness framework. Any further analysis of interstate relations requires a brief overview of the principle of the sovereign equality of states and its importance for the good neighbourliness principle.

32) The Preamble of the UN Charter for instance, reflects the determination of all peoples of the UN, rather than merely peoples from immediately neighbouring states, 'to practice tolerance and live together in peace with one another as good neighbours'. Moreover, Article 74 UN Charter refers to the 'general principle of good neighbourliness' implying that the principle is of general application and not only to the relations of immediate neighbours. This stance is shared by many states in the UN: for instance, according to Germany (UN Doc A/38/336, 25), '[t]he concept of good neighbourliness ought to be extended beyond States sharing common borders'; Philippines (UN Doc A/C.1/37/PV.46, 36) stipulated that '[t]he term good-neighbourliness should not be in its narrow sense; its interpretation should not be confined to the nations that lie within a particular geographical vicinity […]'; Poland (UN Doc A/36/336/Add.1, 36) observed that 'In its objective aspect, good neighbourliness is being presently applied not only to relations among States having common frontiers or separated by seas, but also to relations in a subregion or in a supraregional dimension' etc.

33) *See* I.2 bellow.

34) The strict observance of international law as a primary condition for the fulfilment of the good neighbourliness principle has been most perceivably confirmed by the resolutions of the UN General Assembly establishing the principle's legal basis. For further explanation, see the next section of this work discussing the principle of good neighbourliness within the UN.

1.2 The sovereign equality of states as a basis for the principle of good neighbourliness

The principle of the sovereign equality of states is articulated in the 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the UN Charter' of the UN General Assembly.[35] The Declaration on Friendly Relations was envisaged as a means for the codification and further development of the UN Charter principles.[36] It is embodied in a declaratory resolution of the UN General Assembly – *i.e.* a non-binding document which nevertheless represents 'an important link in the continuing process of development and formulation of new principles of international law'.[37] The Declaration on Friendly Relations stipulates that all states enjoy sovereign equality[38] which presupposes their:

a) judicial equality;
b) rights inherent in full sovereignty;
c) duty to respect the personality of other states;
e) inviolability of territorial integrity and political independence of the state;
f) right to freely choose and develop their political, social, economic and cultural systems;
g) duty to comply fully and in good faith with their international obligations and to leave in peace with other states.[39]

35) Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the UN Charter, UNGA Res 2625 (XXV) (24 October 1970) (*Declaration on Friendly Relations*).

36) *See* Herbert W Briggs, 'Reflection on the Codification of International Law by the International Law Commission and Other Agencies' (1969) 241 Recueil des Cours de l'Academie de Droit International de la Haye 284–293; John N Hazard, 'New Personalities to Create New Law' (1964) 58 AJIL 952–959; Sir I Sinclair, *The Significance of the Friendly Relations Declaration* in Colin Warbrick and Vaughan Lowe (eds), *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurts* (Routledge, London 1994) 1–33 on the framework within which the Declaration on Friendly Relations was prepared.

37) Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia UP, NY 1964) 139; *See* also Leo Gross, *Essays on International Law and Organization* vol 1 (Transnational Publishers, NY and Martinus Nijhoff, The Hague 1984) 257–270.

38) Article 2(1) UN Charter stipulates that the 'Organisation is based on the principle of the sovereign equality of its Members'. For the early ideas on sovereign equality of states, see in particular Hugo Grotius, *On the Law of War and Peace* (tr.) AC Campbell, AM (Batoche Books, Kitchener 2001); Emmerich de Vattel, *Le droit des gens, ou, principes de la loinaturelle: appliqués à la conduite et aux affaires des nations souverains* (repr. by the Slatkine: Henry Dunant Institute, Geneva 1983).

39) *Declaration on Friendly Relations* (n 35).

The elements of sovereign equality reflect the rights and obligations of states resulting from their two generally recognised attributes: sovereignty and equality. Sovereignty is a well-recognised quality of states as international persons denoting their independent course of action. The concept of territorial sovereignty grants all states a maximum of freedom in dealing with their internal and external affairs. Internally, it denotes the territorial integrity of states i.e. their exclusive authority within the territorial limits of national jurisdiction; while externally it refers to the political independence or independent conduct of states in their international relations.[40]

At first glance, internal and external sovereignty seem to have conflicting natures, providing possibilities for clashes between rights and obligations for 'which ultimately the same legal justification, namely territorial sovereignty, can be invoked'[41] by two or more states. While internal sovereignty empowers states to exclude the actions of other states on their territories, external sovereignty gives them freedom of choice and action.[42] They should nevertheless not be considered different types of sovereignty 'but rather [its] complementary, always coexisting, aspects'[43] reflecting rights and duties of states under the international law. The compromise between internal and external sovereignty is most appropriately perceived through the obligation of states to respect each others' territorial sovereignty in their international relations.[44] The power of states to exclude the actions of any other state or entity in exercising their state functions creates a duty

40) On the distinction between internal and external sovereignty, *see* Henry Wheaton, *Wheaton's Elements of International Law,* Coleman Phillipson ed. (5th edn Steven and Sons Ltd, London 1916) 35–37; Hans Kelsen, *Principles of International Law* (Rinehart and Company, NY 1952; repr. by The Lawbook Exchange, Clark, NJ 2003) 112–114; Lassa FL Oppenheim, *International Law: a Treatise,* Ronald F Roxburgh ed.(3rd edn Longmans, NY 1920; repr. by The Lawbook Exchange, Clark, NJ 2006) 170–177; Charles E Merriam, *History of the Theory of Sovereignty Since Rousseau* (Faculty of Political Science of Columbia University, NY 1900; repr. by The Lawbook Exchange, Clark, NJ 1999) 214–216.

41) Jutta A Brunnée, *Acid Rain and Ozone Layer Depletion: International Law and Regulation* (Transnational Publishers, NY 1988) 85–87.

42) In *Island of Palmas (Netherlands v. USA)* (1928) 2 RIAA 829–871, 838, the Arbitrator Judge Max Huber emphasised that '[i]ndependence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations'.

43) Daniel Philpott, 'Ideas and the Evolution of the Sovereignty' in Schail H Hashmi (ed.), *State Sovereignty: Change and Persistence in International Relations* (Pennsylvania State UP, University Park, PA 1997) 20.

44) In the ICJ, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* (Merits) [1949] ICJ Rep 4 the ICJ emphasised that 'between independent states respect for territorial sovereignty is an essential foundation of international relations'.

for states to abstain from exercising their powers in the territory of other states unless there is a permissive rule to the contrary deriving from international law.[45]

Sovereignty is directly connected with the principle of equality of states, which is a corollary of the coexistence of sovereign states. Obviously, the principle of equality does not refer to the unequal position of states in terms of their economic, political or military power. Similarly, equality is not affected by the differentiation among states in terms of the selective conferral of certain rights, such as the permanent membership in the UN Security Council.[46] Instead, the principle refers to the equal application of the law 'in conformity with the law'.[47] Thus it implies equal treatment of states before the law, rather than in the law addressing judicial bodies and not the rights of states.[48] As such, the principle of legal equality is preserved primarily by equal observance of duties and rights of all sovereign states as provided by international law. Accordingly, the greater factual powers of certain states or their legal privileges within the UN should by no means serve the purposes of avoiding duties that equally oblige all sovereign states, and any attempt to abuse these powers should be in breach of the principle of the legal equality of states. Equality emanates from state sovereignty and 'by virtue of the later it is impossible to place States in a kind of hierarchy *vis-à-vis* each other'.[49] The importance of such

45) The obligation of states in international law to refrain from exercising their powers in the territories of other states in absence of a permissive rule to the contrary was expressed by the PCIJ in *Case of the S.S. 'Lotus' (France v. Turkey)* [1927] PCIJ Rep Series A No 10 (para. 45). One year later in *Island of Palmas* (n 42) 839, this stance was reaffirmed by the Arbitrator Judge Max Huber who emphasised that territorial sovereignty 'involves the exclusive right to display the activities of a State. This right has as a corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, *i.e.* to excluding the activities of other states; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian'. The obligation is also expressly provided for in Article 2(4) UN Charter, stipulating that 'All Members shall refrain in their international relations from the threat or use of force against the territorial or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.

46) Hans Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organization' (1944) 53 Yale L.J. 207–220, 209, ensures that 'Equality does not mean equality of duties and rights but rather equality of capacity for duties and rights'. On the equal status of states under the UN Charter, *see* Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Kluwer Law, The Hague 1998) 287–296. For a different opinion, *see* Thomas Fleiner and Lidija R Basta Fleiner, *Constitutional Democracy in a Multicultural and Globalized World* (Springer, Heidelberg 2009) 320.

47) *Kelsen* (n 40) 155.

48) ibid.

49) Jan Wouters, 'Constitutional Limits of Differentiation: The Principle of Equality' in Bruno de Witte, Dominik Hanf and Ellen Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia, Schoten 2001) 301–345, 319.

equality in the light of the good neighbourliness principle results not only from the rules of international law but also from the nature of interstate relations. The establishment of good neighbourly relations implies friendship between states rather than enmity. As Maunier puts it:

> [equality in friendship means] community of interests and feelings, social ties both material and spiritual, solidarity, co-operation and if possible unanimity […] Solidarity and reciprocity are needed. For what creates partnership and equality is the position by both parties of bilateral rights and duties: not rights existing on one side only, not rights of a superior over an inferior, as in the case of domination of master over subject, or even of a father over his children, but bilateral powers, bilateral rights on both sides, exercised reciprocally in both directions.[50]

The existence of good neighbourly relations thus requires symmetric relations between states. Unlike enmity, which 'implies the negation of Other', good neighbourliness 'implies mutual and shared responsibility for Self and Other'.[51] The inequality of states before the law, if not in the law, hinders good neighbourly relations or even makes them impossible where conflicts of interests arise.[52]

1.3 The legal nature of the principle of good neighbourliness

The principle of the sovereign equality of states has necessarily inspired the emergence of many other principles and legal rules reifying the rights and duties of states under international law. One of these principles, guiding the external policies of states and underlying the formulation of international jurisprudence, is the principle of good neighbourliness. Most scholars perceive good neighbourliness as a principle of international law. Thus, for Kelsen, good neighbourliness is a principle which should have been included within the first chapter of the UN Charter, enumerating the purposes and principles of the organisation.[53] Verdross considers good neighbourliness a 'gradually emerging principle […] which has now been solemnly anchored to the Preamble of the Charter of the UN'.[54] Fitzmaurice and Elias see the

50) Rene Maunier, *The Sociology of Colonies (Part 1): International Library of Sociology I: Class, Race and Social Structure* (repr. Routledge 2003 London) 149.

51) Horst Hutter, *Politics as Friendship: The Origins of Classical Notions of Politics in the Theory and Practice of Friendship* (Wilfrid Laurier UP, Waterloo 1978) 11–12.

52) *See* Chapter 4 for a detailed analysis of the consequences of the application of the principle of good neighbourliness through the principle of conditionality.

53) Hans Kelsen, *The Law of the United Nations: A Critical Analyses of its Fundamental Problems* (Stevens and Sons, London 1951) 11–12.

54) Alfred Verdross, *Völkerrecht* (Springer, Vienna 1964) 132, 292–294, translated in Johan G Lammers, *Pollution of International Watercourses* (Martinus Nijhoff, The Hague 1984) 565.

good neighbourliness principle as 'fundamental in the law governing the use of shared resources'.[55] Jenks regards the good neighbourliness principle as 'a potential source of specific legal obligations'.[56] According to Goldie, '[g]ood neighbourliness is an emerging principle of international law with many transnational law qualities'.[57]

Apart from its general acceptance,[58] the crystallisation of the good neighbourliness principle in international law has also aroused different doctrinal approaches. The core question which divides scholars concerns the legal nature of the good neighbourliness principle. While the majority of authors see the basis of the principle of good neighbourliness in customary international law,[59] a smaller group of authors argue that it is a general principle of international law in sense of Article 38(1)(c) of the Statute of the ICJ.[60] Disagreements among scholars over the legal nature of good neighbourliness can be explained with the broad scope of the principle, which complicates its exclusive association with the rules of customary law or with general principles of law. Another reason is the non-existent sharp distinction in

55) Malgosia Fitzmaurice and Olufemi Elias, *Watercourse Co-operation in Northern Europe: A Model for the Future* (T.M.C. Asser Press, The Hague 2004) 5.

56) *Jenks* (n 2) 92.

57) Louis FE Goldie, 'Development of an International Environmental Law – an Apraisal' in John Lawrence Hargrove (ed.), *Law, Institutions and the Global Environment* (Oceana Publications, Dobbs Ferry/A.W. Sijthoff, Leiden 1972) 104–165, 129 (footnotes omitted).

58) Some authors, however, have different approach. For instance, Friedrich J Berber, *Rivers in International Law* (Stevens and Sons, London 1959) 223, draws parallels between municipal and international law in this respect. Although finding such a principle to be recognised in municipal water law, the author concludes that '[t]he existence of a general principle of good neighbourliness cannot be demonstrated from the arrangements to be found in municipal law systems (which) differ from country to country both in principle as well as in details'. Berbers recognizes, however, that '[e]very far-reaching analogy between municipal law and international law restrictions derived from neighbourship relations must be avoided, as the former imply a restriction on property, and the later on sovereignty'. cf Klaus Dintelmann, *Die Verureinigung Internationaler Binnengewässer, Insbesondere in Westeuropa aus der Sicht des Völkerrechts* (Heymann, Cologne 1965) 144–146.

59) *See* for instance: Juraj Andrassy, 'Les relations internationales de voisinage' (1951) 79 Recueil des Cours de l'Academie de Droit International de la Haye, 73–182; Hans Thalmann, *Grundprinzipien des Modernen Zwischenstaatlichen Nachbarrechts* (Polygraphischer Verlag, Zurich 1951) 135–136; Luzius Wildhaber, 'Die Öldestillerieanlage Sennwald und das Völkerrecht der grenzüberschreitenden Luftverschmutzung' (1975) 31 Annuaire Suisse de Droit International 97–120, 102; *Beyerlin* (n 6) 539; *Brunnée* (n 41) 87; Philippe Sands, *Principles of International Environmental Law,* vol 1 (Manchester UP, Manchester 1995) 183–184, etc.

60) George T Hacket, *Space Debris and the Corpus Iuris Spatialis in in Marietta Benko and Willem de Graaf Forum for Air and Space Law* vol 2 (Editions Frontières, Gif-sur-Yvette 1994) 147; less precise in this respect is Friedrich August von der Heydte, 'Das Prinzip der guten Nachbarschaft im Völkerrecht' in Friedrich August von der Heydte et al., *Völkerrecht und rechtliches Weltbild: Festschrift für Alfred Verdross* (Springer Verlag, Vienna 1960) 133–145, 133, who speaks of general principles of law in the sense of Article 38(1)(c) – which may be found in every legal system – and of specific principles of law – which are characteristic of some legal systems – without saying where the principle of good neighbourliness belongs. According to *Lammers* (n 54) 566, von der Heydte probably considers good neighbourliness a general principle of law in the sense of Article 38(1)(c), as he states that the principle *sic utere tuo ut alienum non laedas* is at its heart.

international law between the two, apart from the conclusion that general principles of law are vaguer than customary rules and their establishment does not require the constant practice of states since they emerge at the moment of recognition by states.[61] More important is the fact that customary international law has the upper hand in comparison to general principles of law in the informal hierarchy of sources of international law.[62] In a strict sense, this implies that if classified as a general principle of law, the good neighbourliness principle may be overridden by customary rules of international law. This is, however, not as simple as it appears, since the actual implementation of general principles can transform these sources over time into customary rules of international law, in which case general principles 'do not disappear, but are hidden by customary rules with the same content'.[63]

This could be also be the case with the good neighbourliness principle, which can be considered a general principle of law and also a customary international rule observed repeatedly by the overwhelming majority of states in a multitude of circumstances and thus having been accepted as law by states.[64] While recognising the fact of possible overlaps, detailed analysis of the two different sources in international law subsuming good neighbourliness is beyond the scope of this work, which is confined to the substance and the fields of application of the principle.

The UN Charter spells out good neighbourliness as a 'general principle' accepted by all member states as a basis of their policies with respect to the non-self-governing territories 'due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters'.[65] Although referring to the protection of the non-self-governing territories, the relevant provision explains the view of the UN and its member states towards the principle of good neighbourliness.[66] The principle is also implied in the Preamble to the UN Charter, which highlights the determination of all the peoples of the UN 'to practice tolerance

61) Alfred Verdross, *Les principes généraux de droit dans le système des sources du droit international* in *Recueil d'études de droit international en hommage à Paul Guggenheim* (Faculté de droit de l'Université de Genève, Genève 1968) 521–530, 526.

62) ILC, Report of the International Law Commission on the works of its fifty-sixth session, 3 May to 4 June and 5 July to 6 August 2004, UN Doc. A/59/10 (2004) 286.

63) Nguyen Quoc Dinc et al., *Droit International Public* (5th edn LGDJ, Paris 1994) 304.

64) In *Nicaragua case (Nicaragua v. USA)* (Merits) [1986] ICJ Rep. 98, para. 207, the ICJ has confirmed that custom is constituted by two elements: an objective element implying that the acts concerned should amount to a 'settled practice' and a subjective element according to which the practice should be accompanied by *opinio juris sive necessitatis*, *i.e.* 'either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'.

65) Article 74 UN Charter.

66) *See* for instance *Kelsen* (n 40), who stipulates in his analysis of Article 74 UN Charter that the relevant provision concerning good neighbourliness is binding upon all contracting parties rather than Members administering territories, as much as the other obligations imposed by the Treaty upon all Members.

and live together in peace with one another as good neighbours' in order to achieve the objectives of the UN in preventing war, promoting respect for human rights and international law, as well as promoting social progress and better living conditions.[67] Apart from these two references, however, the Charter does not provide any further explanation as to the meaning and substance of the good neighbourliness principle. In his dissenting opinion regarding the *Legality of the Threat or Use of Nuclear Weapons* under international law, Judge Weeramantry explains the nature and the meaning of the good neighbourliness principle as follows:

> [The principle of good neighbourliness] is one of the bases of modern international law, which has seen the demise of the principle that sovereign states could pursue their own interests in splendid isolation from each other […] The Charter's express recognition of such a general duty of good neighbourliness makes this an essential part of international law.[68]

The classification of good neighbourliness as a general principle of law, but also as being of customary nature, requires further clarification of its substance and application. This necessity results from the vagueness of the principles of international law which, although being precious policymaking tools as such, are usually not precise enough and need specification by other norms of international law – imposing rights and duties on states – in order to be operational.[69]

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67) *See* also in this respect the Resolution on the 'Development and strengthening of good-neighbourliness', UNGA Res 46/62 (9 December 1991) UN Doc/A/Res/46/62 (*UN Doc/A/Res/46/62*), where the General Assembly stresses that 'living together in peace with one another as good neighbours is one of the means by which the ends of the United Nations are to be achieved' and also that 'by acting as good neighbours, States can help to ensure that the ends for which the United Nations was established are achieved'.

68) *Legality of the Threat or Use of Nuclear Weapons* (dissenting opinion of Judge Christopher Gregory Weeramantry) [1996] ICJ Rep 429–555, 505.

69) There are a variety of interpretations with respect to the substance and content of the general principles of law: *Brownlie* (n 29) 16–19, distinguishes between general principles of law as referred to in Article 38(1)(c) ICJ Statute and general principles of international law, which may cover rules of customary law, general principles of law referred in the abovementioned Article 38(1)(c), or to logical propositions which result from judicial reasoning based on international law and municipal analogies; *Malanczuk and Akehurst* (n 29) 48–50 observe that both general principles of national law and general principles of international law can fall under the category referred to in Article 38(1)(c) of the ICJ Statute, recognising that the role of general principles of law is to fill gaps in treaty law and customary law. Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP, Cambridge 2003) 124–131, distinguishes four categories of general principles of law: necessary principles *i.e.* rules of law with 'inherent and necessary validity, in whose absence no system of law can exist or be originated', legal principles derived from municipal laws 'which can be validly transposed to interna-

The principle of good neighbourliness makes no exception in this regard. Its pursuit in the international courts can be more clearly perceived if the concrete rights and duties of states on which the principle is based are invoked. As argued by Goldie in one of his early works, although the principle of good neighbourliness can be identified in case law, 'in many situations [it] becomes a formal category'.[70] In other words, the principle of good neighbourliness 'requires to be supplied with meaning and application by means of subsidiary rules which give it a content reflecting the standards, needs and capabilities of the time and place'.[71] The resolutions of the UN General Assembly and the related discussions within the organisation are helpful to better understanding the content of the good neighbourliness principle.

2. The clarification of the principle of good neighbourliness within the UN

The clarification of the content of the good neighbourliness principle within the UN started almost with the formation of the organisation itself. Accordingly, even at its second session in 1947, the UN General Assembly encouraged cooperation between states on questions related to immigration, adopting a resolution on 'International co-operation for the prevention of immigration which is likely to disturb friendly relations between nations'.[72] It reaffirmed 'that the main task concerning displaced persons is to encourage and assist in every possible way their early return to their countries of origin […] and that no obstacles be placed in the way of the early fulfilment of this task'.[73] To that end, the General Assembly emphasised the importance of implementing the earlier UN resolutions.[74]

In 1957 the General Assembly adopted a more concrete resolution on 'Peaceful and neighbourly relations among States', where it recognised the need to promote the fundamental objectives in maintaining peace, security and friendly relations among states 'in conformity with the Charter, based on mutual respect and benefit, non-aggression, respect for each other's sovereignty, equality and territorial integrity and

tional law', legal principles produced through a process of induction from other rules of 69 law and principles of legal logic. That author recognises that the subsidiary nature of general principles of law is based on their broad character as well as their nature as *lex generalis*, which leaves room for their specification by other norms in international law. For extensive analyses of the general principles of law in general, *see* Vladimir Đ Degan, *Sources of International Law* (Kluwer Law, The Hague 1997) 14–142.

70) Louis FE Goldie, 'Special Régimes and Pre-Emptive Activities in International Law' (1962) 11(3) ICLQ 670–700, 690.

71) ibid.

72) UNGA Res 136(II) (17 November 1947) UN Doc/A/Res/136(II) (*UN Doc/A/Res/136*).

73) *UN Doc/A/Res/136* (n 72).

74) In particular: UNGA Res 8(I) (12 February 1946) UN Doc/A/Res/8(I) on 'Questions of refugees'; UNGA Res 62(I) (15 December 1946) UN Doc/A/Res/62(I) on 'Refugees and displaced persons'; and UNGA Res 103(I) (19 November 1946) on 'Persecution and discrimination',

non-intervention in one another's internal affairs, and to fulfil the principles of the Charter'.[75] It further highlighted the need to broaden cooperation between states as well as to reduce tensions by settling interstate differences and disputes via peaceful means in accordance with the UN Charter. In the following year, the General Assembly adopted a resolution on the 'Measures aimed at the implementation and promotion of peaceful and neighbourly relations among States' recognising once again that the maintenance of friendly relations between states lies in the observance of the UN's purposes and principles.[76] It urged UN Member States, 'while making full use of Article 33 of the Charter, to resort to the Organization for the peaceful solution of problems which interfere with friendly and neighbourly relations among States or threaten international peace'.[77] The General Assembly called on the Member States 'to take effective steps towards the implementation of principles of peaceful and neighbourly relations'[78] and recommended practical arrangements for the further advancement of friendly interstate relations. The compliance with the good neighbourliness principles, as required by the General Assembly, clearly implied the strict observance of the UN principles on which the maintenance of friendly relations rests. This stance was further strengthened in the resolutions of the General Assembly on good neighbourly relations adopted in the period from 1979 to 1991.[79]

In the meantime, the UN also provided a suitable platform for lessening tensions and stimulating friendly relations between the European states with different social and political systems. At Romania's initiative, the question of regional cooperation between these states was also placed on the agenda of the General Assembly.[80] The Resolution adopted by the General Assembly in 1965 called for 'Actions on a regional level with a view to improving good neighbourly relations among European states having different social and political systems'.[81] The discussions, which were mainly led by the nine sponsor states, reflected the need to increase interstate contacts

75) UNGA Res 1236 (XII) (14 December 1957) UN Doc/A/Res/1236(XII).

76) UNGA Res 1301 (XIII) (10 December 1958) UN Doc/A/Res/1301(XIII) (*UN Doc/A/Res/1301*).

77) *UN Doc/A/Res/1301* (n 76).

78) *UN Doc/A/Res/1301* (n 76).

79) The need for the development and strengthening of good neighbourliness between states was regularly emphasised in the Resolutions of the General Assembly on the 'Development and Strengthening of good neighbourliness between States' from this period. In 1991 the General Assembly adopted the last resolution of this kind, UNGA Res 46/62 (9 December 1991) UN Doc/A/Res/46/62, where it '[e]xpressed the conviction that good-neighbourliness is best fostered by each State respecting the rule of law in its international relations, and by practical measures designed to promote good relations with other States'.

80) The first Romanian attempt to include this question in the agenda of the fifteenth session of the General Assembly in 1960 failed and the question was raised again in 1963, when it was placed on the agenda of the eighteenth session of the Assembly but was deferred to the nineteenth session in 1964 due to lack of time, and once again deferred for the same reasons to the twentieth session in 1965, when it was finally discussed - *see* Janie Leatherman, *From Cold War to Democratic Peace: Third Parties, Peaceful Change, and the OSCE* (Syracuse, NY 2003) 71.

81) UNGA Res 2129 (XX) (21 December 1965) UN Doc/A/Res/2129(XX) (*UN Doc/A/Res/2129*).

between the European states with different social and political systems and 'to intensify efforts to improve reciprocal relations, with a view to creating an atmosphere of confidence which would be conducive to an effective consideration of the problems still hampering the relaxation of tension in Europe and throughout the world'.[82] The General Assembly also noted its satisfaction at the increased concern for the development of relations between the affected states on the 'principles of equal rights, respect and mutual interest'.[83] As argued by Leatherman, the nine states 'advocated for basic norms – such as sovereignty, equality, full participation, and cooperation – among European states rather than between the blocks'.[84] While some important attempts were made by these states in the period following the realization of the Resolution, no further action was taken by the UN General Assembly in this respect.[85]

In 1979 the General Assembly returned to the question of good neighbourliness, adopting a resolution on the 'Development and strengthening of good neighbourliness between states'.[86] In the period between 1979-1988, the UN made significant efforts to clarify the legal basis and elements of the good neighbourliness principle. In its final resolution in this period, of 1991, the General Assembly dropped the question of good neighbourliness and the strengthening of good neighbourliness. It can however be concluded from the text of the Resolution, providing that 'the question of development of good-neighbourliness between States […] could be considered in the future', that the item was not entirely removed from the agenda, but rather postponed to a later time by the General Assembly.[87]

Recalling its previous resolutions on the subject from 1956 and 1957, the General Assembly first emphasised in its resolution of 1979 the importance of promoting good neighbourliness for the peace, security and friendly cooperation between states. The General Assembly also underlined the favourable opportunities of geographic proximity among these states 'that should be further promoted and encouraged, in view of their positive influence on international relations as a whole'.[88] It further indicated that good neighbourliness is not a static principle but needs constant development in line with political, economic, social, scientific and technological changes. At the same time, however, the policymaking body expressed its concern at existing and persistent conflicts, particularly among neighbouring states, which endanger peace, security and the progress of nations. Finally the General Assembly considered that 'the generalisation of the long practice and certain norms of good neighbourliness may strengthen friendly relations and co-operation

82) *UN Doc/A/Res/2129* (n 81).
83) *UN Doc/A/Res/2129* (n 81).
84) *Leatherman* (n 80) 72.
85) ibid 69–74.
86) UNGA Res 34/99 (14 December 1979) UN Doc/A/Res/34/99.
87) *UN Doc/A/Res/46/62* (n 67).
88) *UN Doc/A/Res/34/99* (n 86).

among states, in accordance with the Charter'.[89] Although not enumerating any specific norms, it clearly pointed to the foundational basis of good neighbourliness. After calling upon all states to promote good neighbourliness in the interest of maintaining peace and security, the General Assembly,

> affirm[ed] that good neighbourliness conforms with the purposes of the United Nations and is founded upon the strict observance of the principles of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, as well as the rejection of any acts seeking to establish zones of influence and domination.[90]

Thus, once again, after its first resolutions, the General Assembly ensured that the foundational basis of good neighbourliness coincided with the principles embodied in the UN Charter but also in the Declaration on Friendly Relations. Moreover, the General Assembly adopted a number of resolutions on the 'Development and strengthening of good neighbourliness between states' in the following years, where it reconfirmed this position.[91]

2.1 The legal basis of the principle of good neighbourliness

The principles on which the good neighbourliness principle is founded are not merely moralistic expressions but legally binding rules constraining the independent actions of states in the light of the principle of good neighbourliness. Accordingly, these foundational principles form the main legal basis of the good neighbourliness principle. The principles in question are embodied in Article 2 of the UN Charter:

a) sovereign equality of all Members;
b) duty of all Members to fulfil in good faith the obligations assumed in accordance with the Charter;
c) peaceful settlement of international disputes by all Members;
d) obligation of all Members to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state;
e) obligation of all Members to assist actions taken by the UN in accordance with the Charter and to refrain from assisting any state against which the UN is

89) *UN Doc/A/Res/34/99* (n 86).
90) *UN Doc/A/Res/34/99* (n 86) (footnote omitted).
91) The resolutions on good neighbourliness of the General Assembly adopted in the following years

taking preventive or enforcement action;

f) ensuring that action of states which are not Members of the UN are in accordance with the UN principles for the purposes of maintaining international peace and security;

g) non-intervention of the UN in matters falling essentially under the domestic jurisdiction of states or requiring the Members to submit matters to settlement under the Charter (the principle shall not prejudice the action with respect to threats to the peace, breaches of the peace, and acts of aggression).[92]

The legal value of these principles emanates from the binding character of the UN Charter in which they are embodied. They are also largely reiterated in the Declaration on Friendly Relations,[93] which extends the application of the principles to all states rather than the UN Members. This document, however, does not have the same legal force as the Charter.[94] Therefore, the principles contained in the Declaration on Friendly Relations have legally binding effect on the force of the UN Charter rather than on the Declaration itself.[95] Apart from this, the adoption of the named principles as the legal basis of good neighbourliness has been widely confirmed by states[96] and firmly incorporated in their bilateral and multilateral

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contained the same or similar wording, *see* for instance: UNGA Res 36/101 (9 December 1980) UN Doc/A/Res/36/101; UNGA Res 37/117 (16 December 1982) UN Doc/A/Res/37/117; UNGA Res 38/126 (19 December 1983) UN Doc/A/Res/38/126; UNGA Res 39/78 (13 December 1984) UN Doc/A/Res/39/78; UNGA Res 41/84 (3 December 1986) UN Doc/A/Res/41/84;UNGA Res 42/158 (7 December 1987) UN Doc/A/Res/42/158; UNGA Res 43/171B (9 December 1988) UN Doc/A/Res/43/171B, etc.

92) Article 2 UN Charter.

93) The *Declaration on Friendly Relations* (n 35), enumerates the following principles: a) the obligation of states to refrain in their international relations from the threat or use of force against the territorial or political independence of any state; b) peaceful settlement of international disputes by states; c) non-intervention in matters within the domestic jurisdiction of one state; d) co-operation among states in accordance with the Charter; e) equal rights and self-determination of peoples; f) sovereign equality of states; g) duty of states to fulfil in good faith the obligations assumed in accordance with the Charter.

94) *See* I.1.2 above.

95) Gaetano Arangio-Ruiz, *The UN Declaration on Friendly Relations and the System of the Sources of International Law* (Sijthoff and Noordhoff, Alphen aan den Rijn 1979) 96, emphasises that principles of the UN Charter embodied in the Declaration on Friendly Relations are only 'valid *as part of the Charter* and by virtue of the *Charter* alone', while the Declaration '*only adds* a *hortatory* element to those principles which are and remain binding on the strength of the Charter' (emphasis in original). He further notes that other principles 'expressed or implied' in the UN Charter, as well as principles, rules or Treaty law outside the Charter 'are legal on their own strength', *i.e.* either as being embodied in treaties or being part of the general international law. For an extensive summary on the opinions of states regarding the legal value of the Declaration on Friendly Relations *see* RM Witten, 'The Declaration on Friendly Relations' (1971) 12 Harv. Int'l L.J. 517–519.

96) A significant number of statements especially at the UN show that the official positions of states coincide with the Resolutions of the UN General Assembly confirming international principles of

treaties on friendship, based on the fundamental principles of international law and reaffirming their binding legal effect.[97]

The legal basis of the good neighbourliness principle in international law is of pivotal importance to the accuracy of states' foreign policies towards their neighbours. It further determines the developmental framework of various of the specific norms of the good neighbourliness principle and their correct application in the on-going disputes among neighbouring states. In other words, the specific norms and external policies of states which disregard its legal basis are deemed to violate the good neighbourliness principle itself.

2.2 Rights and duties of states under the principle of good neighbourliness

Since its first resolution, debates on the development and strengthening of good neighbourliness within the General Assembly have been held almost every year, and although a firm attempt has been made to 'clarify the elements of good neighbourliness as part of a process of elaborating, at an appropriate time, a suitable international document on the subject',[98] no codification has been achieved yet. Nevertheless, the primary initiative of the General Assembly to clarify the content of good neighbourliness as a way of enhancing the effectiveness of the principle has

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the UN Charter and the Declaration on Friendly Relations as legal basis of good neighbourliness. For overview of some of the positions of states in this respect *see Pop* (n 1) 20–22.

97) The 'Declaration on the promotion of world peace and co-operation' adopted at the Conference of Asian and African Nations at Banding of 1955, adds three additional principles next to the seven UN Charter principles: Recognition of the equality of all races and of the equality of all nations large and small; Respect for the right of each nation to defend itself singly or collectively, in conformity with the Charter of the United Nations; and a) Abstention from the use of arrangements of collective defence to serve the particular interests of any of the big powers and b) Abstention by any country from exerting pressures on other countries. The text of the 'Declaration on the promotion of world peace and co-operation' is available in the Final Communiqué of the Asian–African conference of Bandung (14 April 1955), <http://franke.uchicago.edu/ Final_Communique _Bandung_1955.pdf> last accessed 14 October 2014. Some authors, *e.g.* Sompong Sucharitkul, 'The Principles of Good-Neighbourliness in International Law', 1317, <http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article= 1559 context=pubs> last accessed 14 October 2014, insist that the three additional principles of the 'Declaration on the promotion of world peace and co-operation' must be also taken into account and considered foundational principles (*i.e.* legal bases) of good neighbourliness. Other important instruments reaffirming the basis of the good neighbourliness principle can be found in Article 3 of the Charter of the Organisation of African Unity of 25 May 1963 (disbanded 09 July 2002); Article 3 of the Charter of the Organisation of American States of 1 December 1951; Bangkok Declaration creating the Association of Southeast Asian Nations of 8 August 1967; Article 4 of the Treaty establishing the Economic Community of West African States of 28 May 1975; Article 2.1 of the Charter of the South Asian Association for Regional Cooperation of 8 December 1985. *See* Chapter 3 for examples and further explanation of bilateral and multilateral treaties on good neighbourliness between European states.

98) The determination of the General Assembly to codify the elements of good neighbourliness was first expressed in the Resolution on the Development and strengthening of good-neighbourliness between States UNGA Res 37/117 (16 December 1982) A/Res/37/117.

been more successful.[99] At the insistence of the then ten EEC states,[100] the question was transferred from the Political to the Legal Committee of the UN, which decided at its 40th session to set up a Sub-Committee on good neighbourliness mandated to identify the elements of good neighbourliness.[101] In the ensuing period, the Sub-Committee held a series of meetings to discuss the elements of good neighbourliness, issuing four reports.[102] While no general agreement has been achieved in this respect, the Sub-Committee was successful in enhancing the legal basis of the good neighbourliness principle and underlining the rights and duties of states in this respect. Furthermore, the reports pointed to areas for development and the ways and means of developing good neighbourliness between states, as well as to the actions of international organizations contributing to this aim.

In its reports the Sub-Committee first analysed the legal and other elements relating to the development and strengthening of good neighbourliness as being central to the clarification of the content of the good neighbourliness principle. The reports considered two main points in this respect: a) the generally accepted principles and norms of international law concerning good-neighbourliness; and b) the rights and duties of states concerning good neighbourliness and cooperation between neighbouring states or the development by neighbouring states of legal regimes to enhance their mutual relations and cooperation.[103] Under the first point, the Sub-Committee underlined that the 'observance of generally accepted principles and norms of international law [is] a basic requirement of good-neighbourliness'.[104] In this way, the Sub-Committee reconfirmed the importance of the international legal principles embodied in the UN Charter and in the Declaration on Friendly Relations as the main legal basis of the principle of good neighbourliness. The second important point concerned the specific components of good neighbourliness or the duties and rights of states under this principle. By summarizing the main rights and duties of states in the light of the good neighbourliness principle, the Sub-Committee confirmed their acceptance by the majority of states, providing a solid basis for consistent interpretation and application of the principle in the interstate relations. While detailed analysis of these rights and duties goes beyond the scope of this book, which aims to

99) *UNGA Res 34/99* (n 86).

100)UN Doc A/C.1/37/PV.45.

101)UN Doc A/C.6/40/L.28.

102)UN Doc A/C.6/40/L.28; UN Doc A/C.6/41/L.14; UN Doc A/C.6/42/L.6; and UN Doc A/C.6/43/L.11.

103) In an earlier report of 1986 (UN Doc A/C.6/41/L.14), the first subtitle 'Rights and duties of States concerning good-neighbourliness and co-operation between neighbouring States' was used, while in the reports of 1987 (UN Doc A/C.6/42/L.6) and 1988 (UN Doc A/C.6/43/L.11), the Sub-Committee entitled the part where the rights and duties of states were regulated a 'Development by neighbouring States of legal régimes to enhance their mutual relations and co-operation between them'.

104) UN Doc A/C.6/41/L.14; UN Doc A/C.6/42/L.6; and UN Doc A/C.6/43/L.11.

focus on Europe in particular, some aspects of their development and implementation are particularly important for the application of the good neighbourliness principle.

a) The duty to refrain from harmful domestic activities

The first duty in the light of the good neighbourliness principle, from which all other norms emanate and which was highlighted by the Sub-Committee, is the duty of states to refrain from domestic activities which can clearly have harmful effects on the territory of neighbouring states. The explicit connection between this duty and the law guiding neighbourly relations between states was recognised relatively early on. In 1907, for instance, the prominent Swiss lawyer, Max Huber, argued that certain principles of neighbourship law, which designate independent spheres of property, apply to relations between riparian states.[105] For the same purposes, the author identified six principles of neighbourship law which are largely confined to specifying the rights and duties of states in using their own territories in a manner not to violate the territorial integrity of neighbouring states. Thus, central to Huber's principles is that '[e]very state can in principle deal freely with its territory and exercises within it supreme power; it has no right to interfere in other territory and no obligation to tolerate such interference itself'.[106] Similarly, some early practices of states provide an example to illustrate limitations in the light of the principle of good neighbourliness. Thus, in one of its early rulings, Solothurn v. Aargau, the Swiss Federal Tribunal declared that:

> it is an accepted fact with regard to external relations, that is, relations with other states, that definite absolute rights emanate from sovereignty and territorial jurisdiction which must necessarily be recognized by the other states, among them particularly the right of unrestricted dominion over land and people. This right, however, excludes all influence of another state upon the territory of the first state or of its inhabitants, and indeed not only the usurpation and exercises of sovereign rights of the first state, but also an actual encroachment which might prejudice the natural use of the territory and the free movement of inhabitants. […] in international law, especially in relations within federal states, the principle of law of vicinage holds to

105) Max Huber, 'Ein Beitrag zur Lehre von der Gebietshoheit an Grenzflüβen', (1906) Zeitschrift für Völkerrecht und Bundesstaatsrecht,159–217, 163, 214.

106) Translation suggested by RK Batstone in Friedrich J Berber, *Rivers in International Law* (Stevens and Sons, London 1959) 219–220. The other five principles in the view of that author are: 'Operations which affect the natural or artificial state of things and therefore of rights in other state territory can only be regarded as unauthorized operations going beyond the limits of its own territory'; 'No state has the obligation to bestow an advantage on another state; it has only the obligation not to cause injury'; 'Unimportant effects extending beyond the frontier, if they are the

> the effect that the exercise of one's own rights should not prejudice the rights of one's neighbours: these rights are of equal value, and in a case of dispute a rational compromise must take place according to the natural conditions.[107]

In his dissenting opinion in the Legality of the Threat or Use of Nuclear Weapons case, Judge Weeramantry explained the duty along similar lines, stipulating that:

> [the ICJ] from the very commencement of its jurisprudence, has supported [the principle of good neighbourliness] by spelling out the duty of every State not to "allow knowingly its territory to be used for acts contrary to the rights of other States" (Corfu Channel Case ICJ [1949] Rep 4).[108]

Similarly, Pop recognizes the duty of states to '[abstain] from hostile actions, including the use or permitting the use by a State of its own territory against neighbours or other States' as a first norm of good neighbourliness upon which all other norms build.[109] Such a duty is initially viewed from the perspective of

result of legitimate usage of property must be tolerated'; 'Exceptional restrictions on the legitimate use of property require a special title, such as a treaty or a law of special custom, as they derogate from the general rule'; 'Objects through which the frontier line passes but which, such as brooks, ponds, rivers and lakes, are naturally suited to a common use and not to one based on political divisions, may be used by each of the owners concerned in so far as the already existing or potential legitimate use by the other owner will neither be restricted nor rendered impossible. However the use of such territory belonging to another, like that of innocent usage, is dependent on the discretion of the territorial sovereign, so that the right to use anything within a part of the territory of a foreign state – where there is no treaty guarantee, appears precarious'.

107) Entscheidungen des Schweizerischen Bundesgerichtes, A.S. 26, I. Nr.83, 444 (1900), translation by: Dietrich Schindler, 'The Administration of Justice in the Swiss Federal Court in Intercantonal Disputes' (1921) 15(2) AJIL 149–188, 173.

108) *Legality of the Threat or Use of Nuclear Weapons* (n 68) ICJ Rep 506.

109) *Pop* (n 1) 25-38. This author tends to show the existence of the norm through customary law, conventional law, the unilateral positions of states, case law and the doctrine. He argues 'that the norm is a *customary one*, because it meets the conditions for such a legal norm: its observance by the overwhelming majority of concrete circumstances; its repeatability; its persistence in time and space; the States' awareness of the fact that the norm responds to a necessity of good or normal relations between neighbours (their *opinio juriss sive necessitatis*)'. However, the author goes further with his argument, noting that the norm also forms a part of conventional law and in particular 'conventions concerning water (river or maritime), land, underground or air neighbourliness'. For *Beyerlin* (n 6) 539, the principle of good neighbourliness provides primarily 'that a State must not use its territory or allow its territory to be used for acts contrary to the rights of other States'; Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd edn CUP, NY 2012) 197, emphasize that '[t]he principle of good-neighbourliness underlies the *dicta* of the ICJ that the principle of sovereignty embodies the "obligation of every State not to allow knowingly its territory to be used for acts contrary to the rights of other States"'; *See* along similar lines: Frederic Perron-Welch and Oliver Rukundo, 'Biosafety, Liability, and Sus-

international environmental protection to forbid a state's use of its territory, or a state's permit of such a use by another, in a manner by which a neighbouring state can suffer serious damage. In this sense, the restriction on states is well articulated in many international legal instruments and most notably in the principle 21 of the 'Declaration of the UN Conference on the Human Environment'[110] and in the second principle of the 'Rio Declaration on Environment and Development'.[111] The relevant provisions of the two instruments stipulate in almost identical way that:

> [s]tates have in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental (and developmental) policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[112]

The duty is also affirmed in the international environmental case law. The most commonly quoted case on good neighbourliness principle, the Trail Smelter case, formulated the obligation of states in the following terms:

> under the principles of international law […] no state has the right to use or permit the use of its territory in such a manner as to cause injury […] in or to the territory of another or the properties and persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[113]

In the same, environmental context, the ICJ upheld 'the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control (as) part of the corpus of international law relating to the environment'.[114] Also, the great

tainable Development' in Marie-Claire Cordonier Segger et al. (eds), Legal Aspects of Implementing the Cartagena Protocol on Biosafety (CUP, NY 2013) 188–202, 189; Lotta Viikari, The Environmental Element in Space Law: Assessing the Present and Charting the Future (Martinus Nijhoff, Leiden 2008) 150 etc.

110) Declaration of the UN Conference on the Human Environment (Stockholm Declaration) (16 June 1972) UN Doc. A/CONF.48/14/Rev.1.

111) Rio Declaration on Environment and Development (*Rio Declaration*) (14 June 1992) UN Doc. A/CONF.151/5/Rev/1.

112) The term in parenthesis is contained only in the second principle of the Rio Declaration and not in Principle 21 of the Stockholm Declaration.

113) *Trail Smelter (United States v. Canada)* (1938 and 1941) 3 UNRIAA, 1905, 1965.

114) *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 241–242,

majority of scholars analysing the good neighbourliness principle associate the restrictions imposed on states with the international environmental protection at the level of states.[115] The profound development of the specific legal obligations under the principle of good neighbourliness in the field of international environmental law reflects the geographic proximity of neighbouring states, which are first to perceive most directly the detrimental effects of any transboundary environmental pollution. Nevertheless, the duty of states to refrain from domestic activities which may have harmful effects on the territory of neighbouring state, is not limited to transboundary environmental impact. In fact, there is no limitation or uniform definition of the various harmful acts which may affect the territory of a neighbouring state. As clearly explained by the Council of the League of Nations[116] in relation to one of the disputes concerning the demarcation of a border among neighbouring states, specifically between the (then) Serb-Croat-Slovene state and Albania:

> the assurance given by the representatives of the two States that they intend to live as neighbours maintaining good relations with each other, which implies that neither shall take, either directly or indirectly, any action to provoke or encourage any movement which might disturb the internal peace of its neighbour.[117]

para. 29. The ICJ recalled the same rule in Gabčikovo–Nagymaros Project (Hungary v. Slovakia) (Judgment) [1997] ICJ Rep 41, para. 53.

115) Some examples from the more recent literature include: Philippe Sands, *Environmental Protection in the Twenty First Century: Sustainable Development and International Law* in Richard L Revesz, Philippe Sands and Richard Stewart (eds), *Environmental Law, the Economy and the Sustainable Development* (CUP, Cambridge 2004) 374, according to whom good neighbourliness principle 'applies particularly where activities carried out in one state might have adverse effects on the environment of another states or in areas beyond national jurisdiction'. *See* also: Philippe Sands, *Environmental Protection in the Twenty First Century: Sustainable Development and International Law* in Norman J Vig and Regina S Axelrod (eds), *The Global Environment: Institutions, Law and Policy* (Earthscan, London 1999) 127–128; Philippe Sands, *Principles of International Environmental Law* (CUP, Cambridge 2003) 235–246; Philippe Sands, 'International Law in the Field of Sustainable Development' (1994) British YB Int'l L 303–381; Wendy E Scattergood, *The Social Justice Implications on Global Warming* in Tom Conner and Ikuko Torimoto, *Globalisation Redux: New Name, Same Game* (UP of America, Lanham 2004) 85–86, clarifying the meaning of the good neighbourliness principle in terms prohibiting states from using their environment to infringe another state; *Viikari* (n 109) 150–157; Nancy K Kubasek and Gary S Silverman, *Environmental Law* (4th edn Prentice Hall, NJ 2002) 325–327; Austen L Parrish, *Sovereignty's Continuing Importance?: Traces of Trail Smelter in the International Law Governing Hazardous Waste Transport* in Rebecca Bratspies and Russell Miller (eds), *Transboundary Harms in International Law: Lessons from the Trail Smelter Arbitration* (CUP, Cambridge 2006) 185–186; Helmut Breitmeier, *The Legitimacy of International Regimes* (Ashgate, London 2008) 161–163 etc.

116) The Council, along with the Assembly and the permanent Secretariat were bodies of the League of Nations, which was an intergovernmental organisation established with the Covenant of the League of Nations (adopted 28 April 1919) 225 CTS 195, which constituted the first part of the Treaty of Versailles (signed 28 June 1919) UKTS No. 4 (1919).

117) Minutes of the fifteenth session of the Council of the League of Nations, LNOJ, 2nd year, Nos. 10-12 (1921) 1193.

Accordingly, any action, taken directly or indirectly, which is to provoke or encourage a movement that may cause disturbances in a neighbouring state, shall be in breach of the duty of states to refrain from domestic activities, which may have harmful effects on the territory of neighbouring state. In this sense, the approach of von der Heydte, who distinguishes between material, jurisdictional and political interferences,[118] is more complete than the approaches of Andrassy and Thalmann, the first of whom considered that the law applying to neighbourly relations is concerned only with material or physical harms caused on the territory of another state, while the second included non-physical, jurisdictional interferences that states should avoid.[119] Jurisdictional interferences relate to activities undertaken or tolerated by a state which may impede the jurisdictional sovereignty of a neighbouring state, while political interferences cover such activities which aim at causing disturbances in or even at overthrowing the political system of a neighbouring state.[120] Nevertheless, harm does not have to be limited to physical, jurisdictional and political interference. This is primarily implied by Article 74 of the UN Charter, which provides for application of the principle of good neighbourliness in social, economic and commercial matters. The application of the principle of good neighbourliness in this context also presupposes a duty not to cause harm in the enumerated fields. Moreover, the number of fields where the principle of good neighbourliness is applicable is non-exhaustive and it is therefore hardly possible to foresee all the different kinds of harm that may be relevant in this context.[121]

b) The duty to take measures to eliminate or minimize the harm

The Sub-Committee also recognised the duty of states to take measures to eliminate or minimize the effects of some domestic activities on neighbouring states or on states of the same area. In Article 3 of its 'Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries', the International Law Commission[122] emphasised along similar lines that '[t]he State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof'.[123] Measures would have to be taken to

118) *von der Heydte* (n 60) 133-145.

119) *See* Juraj Andrassy, 'Les relations internationales de voisinage' (1951) 79 Recueil des Cours de l'Academie de Droit International de la Haye 73–182, 78 et seq.; and *Thalmann* (n 59) 36.

120) *Beyerlin* (n 6) 540.

121) *See* the next subsection discussing the fields of application of good neighbourliness principle.

122) The International Law Commission (ILC) was established by the UN General Assembly (21 November 1947) UN Doc A/RES/174(II), to promote the progressive development and codification of international law.

123) ILC, 'Commentaries to the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities' in Report of the International Law Commission, Fifty-Third Session, UN GAOR, 56 Sess, Supp. No. 10, UN Doc A/56/10 (2001) 377 (*UN Doc A/56/10*).

prevent serious or irreversible damage even in the absence of complete certainty about the threats or potential threats.[124] The duty to prevent imposes an obligation on states to act with due care or diligence according to the facts and circumstances in each case.[125] Although in the field of municipal law, Lord Atkin's remarkable statement on the duty of care in the *Donoghue v. Stevenson* case equally explains the obligation among states in international law:

> The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question, "Who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then in law, is my neighbour? The answers seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my acts and omissions which are called in question.[126]

As applied in international law and in relation to the duty of states to refrain from domestic activities which can clearly have harmful effects on the territory of neighbouring states, the duty of due care or diligence requires states to take preventive measures to avoid damage and measures to minimise the unavoidable damage caused.[127] In the Legality of the Threat or Use of Nuclear Weapons, the ICJ recognised that '[t]he existence of the general obligation of States to ensure that activities within

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124) ibid 394–395.

125) In *Alabama Claims Arbitration* (1872) 1 Moore Int'l Arbitrations, 495, 572–573, 612, the Tribunal examined two different definitions on 'due diligence' given by the parties concerned: the US gave a broader view on the issue defining it as a 'diligence proportioned by the magnitude of the subject and to the dignity and the strength of the power which is to exercise it'; Great Britain explained due diligence in less broad terms, defining it as 'such care as Governments ordinarily employ in their domestic concerns'. The tribunal seemingly favoured the broader definition, explaining that in view of the circumstances of the case that the 'British case seemed also to narrow the international duties of a Government to the exercise of the restraining powers conferred upon it by municipal law, and to overlook the obligation […] to amend its laws when they were insufficient'.

126) *Donoghue v. Stevenson* [1932] AC 562 (HL). Many scholars, *e.g.* Mark Lunney and Kent Oliphant, *Tort Law: Texts and Materials* (OUP, Oxford 2008) 116; John R Cooke *Architects, Engineers and the Law* (3rd edn Federation Press, Sydney 2001) 35; Anthony Speaight, *Architect's Legal Handbook: The Law for Architects* (9th edn Elesevier Press, Oxford 2010) 21, consider Lord Atkin's statement as introducing the good neighbourliness principle into English tort law. For a more extensive interpretation of the statement and the role of the good neighbourliness principle in English tort law *see* John Charlesworth, Roger Cooper and Simon E Wood in Christopher T Walton et al., *Charlesworth and Percy on Negligence* (10th edn Sweet and Maxwell, London 2001) 47–51; Rachael Mulheron, *Medical Negligence: Non-Patient and Third Party Claims* (Ashgate, London 2010) 162; Dieter Giesen, *International Medical Malpractice Law: A Comparative Law Study of Civil Liability arising from Medical Care* (J.C.B. Mohr/Martinus Nijhoff, Tübingen/Dordrecht 1988) 77–79.

127) The duty has been firmly established in the International environmental law; *see* for instance: Articles 24–25 of the Convention on the High Seas (adopted 29 April 1958, in force 30 September 1962) 450 UNTS 11, which impose obligations on states to draw up regulations and to take meas-

their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment'.[128] In a more recent case concerning Pulp Mills on the River Uruguay, the ICJ noted that 'a precautionary approach may be relevant in the interpretation and application of the Statute'.[129] The duty has also been invoked in direct connection to the good neighbourliness principle. Thus, in 1948, to name one of the many examples, an explosion of a munitions factory in Arcisate, in Italy near the Swiss border, caused different degrees of damage in several Swiss communities. As a result, the Swiss government 'invoked the principle of good neighbourliness and argued that Italy was liable since it tolerated the existence of an explosives factory, with all its attendant hazards, in the immediate vicinity of international border'.[130]

c) The duties to inform, consult and negotiate with neighbouring states

Another important duty spelled out by the Sub-Committee is that of information and consultation (or exchange of information)[131] between states on activities and events on their own territories, which can clearly affect neighbouring states. In light of the

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ures to prevent pollution of the seas; Article 194 (1 and 2) Convention on the Law of the Sea (adopted 10 December 1982, in force 16 November 1994) 1833 UNTS 3, imposes obligation on states to take individually or jointly all necessary measures to prevent, reduce and control pollution and to ensure that activities under their jurisdiction or control are conducted as not to cause damage by pollution to other state. Similar obligations on states are imposed by Article 2(1) of the Vienna Convention for the Protection of the Ozone layer (adopted 22 March 1985, in force 22 September 1988) 1513 UNTS 323; Article 2 UN Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted 17 March 1992, in force 6 October 1996) 1936 UNTS 270; Article 3 Convention on Biological Diversity (adopted 5 June 1992, in force 29 December 1993) 1760 UNTS 79.

128) *Legality of the Threat or Use of Nuclear Weapons* (n 114) para. 29.

129) *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) [2010] ICJ Rep 2010, para. 164.

130) ILC, 'Report of the International Law Commission on the works of its forty-eight session', 6 May to 26 July 1996, UN Doc. A/51/10 (1996); (1996) 2(2) YB ILC 115. Worth quoting, however, is the statement of the Minister of Foreign Affairs in reply to a written question, Question No. 2201/J/1978 of 28 November 1978, repr. in 30 ÖZÖR 379–380. In relation to the objections of the Austrian Government to the establishment of a nuclear power station by Switzerland near the Austrian border, the Austrian Minister of Foreign Affairs made the following observations on the applicable rules of international law: 'It is not possible to deduce from general international law a general and unqualified prohibition as to an international legal inadmissibility of nuclear power stations in frontier areas. International neighbourship law contains on the other hand the general principle that states must abstain from all acts which may cause damage to a neighbouring state' (*Statement*). For extensive analyses on the application of the due care obligation in general and as an obligation imposed by the principle of good neighbourliness, *see Lammers* (n 54) 206–342.

131) This formulation was used in the two last reports of the Sub-Committee, namely: A/C.6/42/L.6; and A/C.6/43/L.11.

principle of good neighbourliness, this duty is often approached along with the duty of states to negotiate with each other, which was also listed by the Sub-Committee. The two together refer to planned activities, rather than incidents, and impose obligations on states to provide advance information and to negotiate about facts occurring on their territories, which can seriously affect neighbouring or other states. The duty to inform and consult is among the principles for transfrontier pollution recommended by the OECD Council, providing that:

> [p]rior to the initiation in a country of works or undertakings which might create a significant risk of transfrontier pollution, this country should provide early information to other countries which are or may be affected. It should provide these countries with relevant information and data, the transmission of which is not prohibited by legislative provisions or prescriptions or applicable international conventions, and should invite their comments.[132]

Similarly, in its Article 8, the ILC has called on states to notify other states which may be affected by planned activities, the risks of which should be assessed in advance.[133] The duty of prior notification has been integrated into many other international instruments, including the Rio Declaration.[134] In the Corfu Channel case the ICJ characterised the duties to notify and to warn as 'based […] on certain general well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war […]'.[135] In addition, states are required to enter into consultations and to negotiate with other states which are likely to be affected '[…] in order to agree on the measures to prevent significant transboundary harm, or at any event to minimize the risk thereof'.[136]As clearly explained in the statement of the Austrian Minister of Foreign Affairs:

> it is possible to deduce from the principle of good neighbourliness an obligation to engage in discussions with the neighbouring state about those

132) Recommendation of the Council on Principles concerning Transfrontier Pollution (adopted 14 November 1974) OECD Doc C(74)224.

133) *UN Doc A/56/10* (n 123) 402–409.

134) Principle 19 of the *Rio Declaration* (n 111) stipulates that: '[s]tates shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith'. *See* also: Article 198 of the *Convention on the Law of the Sea* (n 127); Article 13 of the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (adopted 22 March 1989, in force 5 May 1992) 1673 UNTS 126; Article 3 of the Charter of Economic Rights and Duties of States (12 December 1974) UN Doc A/RES/29/3281.

135) *Corfu Channel* (n 44) 22.

136) *UN Doc A/56/10* (n 123) 409.

> questions which are of common concern. Agreements about specific measures can thereupon only be reached through negotiations.[137]

Along similar lines is the statement of Belgium in respect to the Dutch insistence of prior consultation in relation to Belgium's plans to establishing new polluting industries in the border area between the two countries. It was highlighted that a '[discussion] is normal procedure of good neighbourship and it goes without saying that [they] will meet the engagements entered into'.[138] The application of the obligation of prior consultation and negotiations has been developed into a number of judicial decisions and is often perceived as an extension of a broader international legal norm imposing obligation on states to cooperate in good faith.[139] Thus, in the Fisheries case, the ICJ stressed that '[t]he task before [the parties] will be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other'.[140] In Railway Traffic between Lithuania and Poland, the PCIJ emphasised that the obligation to negotiate was 'not only to enter into negotiations but also to pursue them as far as possible with a view to concluding agreements'.[141] This obligation on states has been reaffirmed by the jurisdictional bodies in the ensuing years.[142]

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137) *Statement* (n 130).

138) Quotation from *Lammers* (n 54) 214. For further practices illustrative of a states' adherence to the obligation of prior consultations and negotiations in the absence of any specific treaty provisions, *see* also 'International Liability for Injurious Consequences arising out of Acts not prohibited by International Law', UN Doc. A/CN.4/384 (1984); (1985) 2(1) YB ILC 108–113.

139) Philippe Sands, *Environmental Protection in the Twenty First Century: Sustainable Development and International Law* in Richard L Revesz, Philippe Sands and Richard Stewart (eds), *Environmental Law, the Economy and the Sustainable Development* (repr. CUP, NY 2008) 374, underlines that in the context of environmental law, the good neighbourliness principle applies where activities performed in one state may have an adverse effect on other states or areas. The author notes that the principle imposes an obligation on states 'to implement treaty provisions, or to improve relations outside specific treaty arrangements', while in particular 'the obligation can require information-sharing, notification, consultation, or participation rights in certain decision, the conducting of environmental impact assessments, and cooperative emergency procedures, particularly where activities might be ultrahazardous'. *See* also in this respect Patricia W Birnie and Alan E Boyle, *International Law and the Environment* (Clarendon Press, Oxford 1992) 103.

140) ICJ, *Fisheries Jurisdiction (United Kingdom v. Iceland)* (Merits, Judgment) [1974] ICJ Rep 1974, para. 69.

141) PCIJ, *Railway Traffic between Lithuania and Poland* (Advisory opinion) [1931] PCIJ Rep Series A/B No. 42, 116.

142) In *Affaire du Lac Lanoux Arbitration* ILR 24 (1957) 101, the Court emphasised that '[c]onsultations and negotiations between the two States must be genuine, must comply with the rules of good faith and must not be mere formalities'. *See* along similar lines, the ICJ, *North Sea Continental Shelf* (n 27) ICJ Rep 47, para. 85.

d) The duty of tolerance

Next to the duty imposed on states to refrain from domestic activities that can have harmful effects on the territory of neighbouring states, is also the question of the seriousness of the harm caused or the minimum threshold that is required to invoke liability of states. The decision in Trail Smelter case means that in relation to the restrictions in the light of the good neighbourliness principle, the liability of states requires a certain threshold of seriousness or gravity for the injury caused. The arbitral court explicitly refers to cases of a 'serious' consequence, implying a duty of tolerance for states suffering lesser injury.[143] Such an obligation could be also implied from the Sub-Committee reports, which provide for mutual tolerance between states as a duty or a generally accepted principle and norm of international law concerning good neighbourliness.[144] Moreover, the Preamble of the UN Charter is clear that there is a connection between practicing tolerance, peaceful coexistence and good neighbourly relations between states.[145] The direct link between the good neighbourliness principle and the duty or the principle of tolerance was emphasised in the Lac Lanoux case, in which the arbitral tribunal noted that:

> [a] state has the right to use unilaterally the part of a river which traverses it to the extent that this use is likely to cause on the territory of another State

143) Many scholars discuss this aspect: *Pop* (n 1) 42–44, for instance, writes about a 'norm of tolerance that neighbours owe to each other', which in the light of the good neighbourliness principle provides that 'if the interferences do not meet (certain threshold), they are not normally prohibited (and) should be tolerated or accepted'; Veronica Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea: Implementing Global Obligations at the Regional Level* (Martinus Nijhoff, Leiden 2007) 15, notes that not all interferences should be avoided or prevented in accordance with the principles of international law, 'but only those which are "unreasonable", "serious" or "significant" and States have a great deal of discretion in determining these thresholds' (footnote omitted); *see* along similar lines, Marie-Louise Larsson, *The Law of Environmental Damage: Liability and Reparation* (Kluwer Law Int'l, London 1999) 162; Charles B Bourne in Patricia Wouters (ed.), *International Water Law: Selected Writings of Professor Charles B. Bourne* (Kluwer Law Int'l, London 1997) 42 etc.

144) While in the UN Doc A/C.6/41/L.14, 'mutual tolerance' was enumerated amongst the rights and duties of states, in the two later reports, *i.e.* in the UN Doc A/C.6/42/L.6; and UN Doc A/C.6/43/L.11 respectively, it found its place among the generally accepted principles and norms of international law concerning good neighbourliness.

145) As noted by *Jenks* (n 2) 83,'[b]y affirming in this solemn manner the interdependence of peace, tolerance and good neighbourliness (the peoples of the United Nations) have introduced a new scale of values into the assessment of the legal obligations implicit in civilised conduct, a new scale of values no less important than the renunciation of armed force save in the common interest, the principle of uniting their strength to maintain international peace and security, the reaffirmation of faith in fundamental human rights, and the promotion of social progress and better standards of life in larger freedom'.

> a limited harm only, a minimal inconvenience, which comes within the bounds of those that derive from good-neighbourliness.[146]

Accordingly, in the light of good neighbourliness principle, states are expected to tolerate insignificant damage resulting from interferences caused by various state actions. The threshold of the 'seriousness' of the injury is not fixed and is expressed in many international instruments under different terms including: 'substantial' and 'significant' harm.[147] What constitutes a harm that can trigger the liability of states will depend on the circumstances in each case.[148]

e) The duties to refrain from actions which could aggravate a conflict and to take measures to attenuate a conflict

The duties to refrain from actions which could aggravate a conflict situation or a dispute between neighbouring states and to take measures to attenuate gradually such situations result from the states' obligation to peacefully settle disputes.[149] The UN Charter stipulates that all states should 'settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'.[150] This provision is further elaborated in the Declaration on Friendly Relations, where the causal relationship between peaceful settlement of disputes and the sovereign equality of states is particularly emphasized:

> [i]nternational disputes shall be settled on the basis of the Sovereign equality of States and in accordance with the Principle of free choice of

146) Legal Problems relating to the Utilization and the Use of International Rivers, Report by the Secretary General, UN Doc. A/5409 (1963); (1974) 2(2) YB ILC 197.

147) *See* for instance: Article X(1)(a) Committee on the Uses of Water in International Relations, 'The Helsinki Rules on the Uses of the Waters of International Rivers' in International Law Association Report of the Fifty-Second Conference (Helsinki 1967) (International Law Association, London 1967) 484; and Article 7 of the 'Convention on the Law of the Non-navigational Uses of International Watercourses' (21 May 1997) UNGA Res 51/229. For more extensive discussion on the uncertain thresholds of gravity, *see* Arie Trouwborst, *Precautionary Rights and Duties of States* (Konninklijke Brill NV, Leiden 2006) 39–69; Xue Haqin, *Transboundary Damage in International Law* (CUP, Cambridge 2003) 158–165.

148) *See e.g.* Stephen McCaffrey, *The Law of International Watercourses: Non-Navigational Uses* (OUP, Oxford 2001) 365, noting that there is no exact threshold under which the harm caused by a state becomes a wrongful act under the rules of international law, but 'both municipal and international law employ a more flexible standard, one which may aptly be described as use of one's property or territory that is *reasonable* in circumstances *vis-à-vis* one's neighbor or co-riparian'. cf *Bourne* (n 143) 42–50.

149) *Pop* (n 1) 45.

150) Article 2 UN Charter. The number of international treaties incorporating the obligation to peace-

> means. Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality.[151]

The 'Manila Declaration on the Peaceful Settlement of International Disputes' complements the Declaration on Friendly Relations further, by highlighting that 'free choice of means' for the settlement of international disputes should be 'in conformity with [the] obligations under the Charter of the United Nations and with the principles of justice and international law'.[152] The Manila Declaration has further reiterated the duty of states involved in an international dispute to continue to respect the principles of international law in their mutual relations.[153] The importance of observing the principles of international law in the relations between states and in the light of good neighbourliness principle, as well as the accompanying duty to settle disputes peacefully has been further reinforced in the Resolutions of the UN General Assembly on the 'Maintenance of international security – good neighbourliness, stability and development in South-Eastern Europe'. The Assembly has stressed on many occasions that 'the importance of good-neighbourliness and the development of friendly relations among States, [calling] upon all States to resolve their disputes with other States by peaceful means, in accordance with the Charter of the United Nations'.[154]

While the duty to refrain from actions which could aggravate a conflict situation or a dispute between neighbouring states imposes a negative obligation on states, the duty to take measures to attenuate gradually such situations requires active engagement from states to reduce the conflict situations or disputes between states.[155]

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fully settle disputes is vast. Some of the first and most important acts are: The Declaration of the League of Nations adopted by the Assembly on 24 September 1927 according to which all peaceful means were to be used for settling dispute between states; The obligation for the pacific settlement of disputes was embodied in Chapter VI UN Charter; The General Treaty for the Renunciation of War as an Instrument of National Policy (adopted 27 August 1928, in force 24 July 1929) 94 LNTS 97; The General Act for the Pacific Settlement of International Disputes of 26 September 1928, 93 LNTS 343; etc.

151) *Declaration on Friendly Relations* (n 35).

152) Part I, para. 3 of the 'Manila Declaration on the Peaceful Settlement of International Disputes' UNGA Res 37/590 (15 November 1982) UN Doc/A/37/590 (*Manila Declaration*).

153) Part I, para. 4 of the *Manila Declaration* (n 152) stipulates that: '[s]tates parties to a dispute shall continue to observe in their mutual relations their obligations under the fundamental principles of international law concerning the sovereignty, independence and territorial integrity of States, as well as other generally recognized principles and rules of contemporary international law'.

154) Para. 5 UNGA Res A/55/27 (20 November 2000) UN Doc/A/55/27; para. 8 UNGA Res A/56/18 (29 November 2001) UN Doc/A/56/18; UNGA Res A/57/52 (22 November 2002) Doc/A/57/52; UNGA Res A/59/59 (3 December 2004) UN Doc/A/59/59; para. 7 of UNGA Res A/61/53 (6 December 2006) UN Doc/A/61/53.

155) In the ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) – Provisional Measures* [1984] ICJ Rep 187, the Court ordered unanimously

As with the duties to inform and consult, the prevention of aggravating a dispute includes an obligation on the state aware of the conflict situation to notify and invite the other state for an exchange of views.[156] The resolution of the conflict situation has to be carried out through positive acts, which in accordance with the UN Charter denote negotiation, enquiry, mediation, conciliation, judicial settlement, resort to regional agencies or arrangements and other peaceful means.[157]

f) The duty to take measures to improve and develop friendly relations

Finally, the duty to take measures to improve and develop friendly relations primarily appeared in a Sub-Committee report with a reference to all countries, irrespective to their social and political systems.[158] While such a duty could be implied from the principle of good neighbourliness in general, it becomes of even greater importance to the relations between states belonging to opponent political systems and which are a frequent source of confrontation. Nevertheless, as defined by the Sub-Committee, the duty appears too broad to entail concrete obligations in the light of good neighbourliness principle, as it does not provide specification of what measures must be taken to improve friendly relations or the aspects which need to be improved and developed. This however reflects the breadth and depth of the good neighbourliness principle. Thus, the General Assembly highlighted the importance of multifaceted cooperation between neighbouring states for the strengthening of their good neighbourly relations among the Balkan states and more widely, in the

that '[t]he Governments of the United States of America and the Republic of Nicaragua should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court'. In a more recent order, ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) – Provisional Measures* [2011] ICJ Rep 6–28, the Court noted that 'given the nature of the disputed territory […] each Party must refrain from sending to, or maintaining in the disputed territory' (para. 77) and also that '[…] in order to prevent the development of criminal activity in the disputed territory in the absence of any police or security forces, each Party has the responsibility to monitor that territory from the territory over which it unquestionably holds sovereignty' and that 'it shall be for the Parties to co-operate with each other in a spirit of good neighbourliness, in particular to combat any criminal activity which may develop in the disputed territory' (para. 78).

156) Louis B Sohn, *Prevention and Peaceful Resolution of International Conflicts, Crises and Disputes* in Paul B Stephan III and Boris Mikhailovich Klimenko (eds), *International Law and International Security: Military and Political Dimensions: A US–Soviet Dialogue* (M.E. Sharpe, London 1991) 255.

157) Article 33 UN Charter.

158) While in its earlier report, UN Doc A/C.6/41/L.14, the Sub-Committee included the reference 'irrespective to their social and political systems', though noting that the particular point had either raised difficulties or had not been examined due to lack of time, such reference has not appeared in the following two Sub-Committee reports, *i.e.* in UN Doc A/C.6/42/L.6; and UN Doc A/C.6/43/L.11, respectively.

context of South-Eastern European states. In particular, though the General Assembly dropped good neighbourliness from its agenda in 1991,[159] in the ensuing period it adopted a number of resolutions concerning the 'Development of good-neighbourly relations among Balkan States' and the 'Maintenance of international security – good-neighbourliness, stability and development in South-Eastern Europe', where it further reaffirmed the need of interstate cooperation in all fields.[160] With regard to the measures for promoting good neighbourly relations, the General Assembly called the Balkan states to 'undertake unilateral and joint activities, including confidence-building measures as appropriate, in particular within the framework of the Organization for Security and Cooperation in Europe'.[161] The General Assembly used similar rhetoric in the context of South-Eastern Europe, pointing to the major problems afflicting the region and also to the need to cooperate within frameworks of regional initiatives to strengthen good neighbourliness between states.[162]

2.3 Fields of application of the principle of good neighbourliness

Besides the rights and duties of states, the Sub-Committee also identified a few of the fields of application of the good neighbourliness principle. What can be understood from the Sub-Committee reports is that good neighbourliness requires cooperation between states in a wide range of areas, including politics, trade, industry, agriculture, science and technology, the environment and other fields of economic activity, humanitarianism, judicial cooperation, state administration and others.[163] It further

159) *See UN Doc/A/Res/46/62* (n 67).

160) *See* in particular the resolutions on the 'Development of good-neighbourly relations among Balkan States', in UNGA Res 48/84B (16 December 1993) UN Doc/A/Res/48/84B; UNGA Res 50/80B (12 December 1995) UN Doc/A/Res/50/80B; UNGA Res 52/48 (9 December 1997) UN Doc/A/Res/52/48. The resolutions from 1993 and 1997, emphasise 'trade and other forms of economic cooperation, transport and telecommunication, protection of the environment, advancement of democratic processes, promotion of human rights and development of cultural and sports relations'.

161) UNGA Res 48/84B (16 December 1993) UN Doc/A/Res/48/84B; UNGA Res 50/80B (12 December 1995) UN Doc/A/Res/50/80B; UNGA Res 52/48 (9 December 1997) UN Doc/A/Res/52/48. In the resolutions from 1997, the General Assembly also called on the Balkan states and other interested states 'to participate actively in and support the negotiations foreseen in an annex 1B, article v. (*i.e.* with regard to the Regional Arms Control Agreement) of the General Framework Agreement for Peace in Bosnia and Herzegovina, with a view to reaching early results' (footnote omitted, emphasis added).

162) *See* 'Maintenance of international security – good-neighbourliness, stability and development in South-Eastern Europe', UNGA Res A/55/27 (20 November 2000) UN Doc/A/Res/55/27; UNGA Res A/56/18 (29 November 2001) UN Doc/A/Res/56/18; UNGA Res A/57/52 (22 November 2002) UN Doc/A/Res/57/52; UNGA Res A/59/59 (3 December 2004) UN Doc/A/Res/59/59; UNGA Res A/61/53 (6 December 2006) UN Doc/A/Res/61/53.

163) The political fields which develop and strengthen good neighbourliness identified in UN Doc A/C.6/41/L.14 UN Doc A/C.6/42/L.6; and UN Doc A/C.6/43/L.11, Sub-Committee reports, include: 1) promotion of friendly relations, of mutual understanding, knowledge and confidence;

identified the ways and means of developing and strengthening good neighbourliness[164] and the actions of international organizations, in particular regional and subregional, in developing and strengthening good neighbourliness.[165]

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2) acting towards the strengthening of world peace and security, well-being, economic and social progress; 3) promotion of disarmament and limitation of armaments (this point has remained in parentis even in the last Sub-Committee report, which means that the issue has either encountered difficulties or has not been examined due to lack of time); 4) elimination of situations of tension and friction; 5) development of political contacts; 6) consultation and cooperation by states on activities and events on their own territory which clearly may affect neighbouring states; 7) adoption by neighbouring states of reciprocal measures aimed at the prevention and elimination of any attempt on their respective security, as well as strengthening of their mutual security and confidence (UN Doc A/C.6/41/L.14 provided for 'taking of measures with a view to strengthening the security of neighbouring states'). The fields of trade, industry, agriculture, science and technology, environment and other fields of economic activity enumerated in UN Doc A/C.6/42/L.6; and UN Doc A/C.6/43/L.11 include: 1) commercial exchanges; 2) industrial cooperation; 3) cooperation in the fields of agriculture, forestry and fishery; 4) cooperation in the fields of science and technology; protection of the environment; 5) exploration and exploitation of mineral resources, in particular border and adjacent areas; 6) meteorology; 7) cooperation in the field of transportation, including transit of goods in the territory of the state, and in the field of communication (the UN Doc A/C.6/41/L.14 only mentioned '[c]o-operation in the field of transportation and communication'); 8) customs matters (this field was not included in the UN Doc A/C.6/41/L.14); 9) cooperation in the fields of oceanography, hydrology, glaciology, seismology, vulcanology and other related fields; 10) conservation of living resources and use of border rivers and waters. The humanitarian and other fields enumerated in the in the UN Doc A/C.6/41/L.14 UN Doc A/C.6/42/L.6; and UN Doc A/C.6/43/L.11 include: 1) movement of persons and human contacts (or just 'human contacts' in the case of UN Doc A/C.6/41/L.14); 2) cooperation in the protection and promotion of human rights [including the rights of persons belonging to national minorities]; 3) protection of migrant workers and their families; 4) dissemination of information, access to information and exchange of information on various aspects of life in neighbouring states; 5) public health; 6) cooperation in the fields of culture, education and sports. Finally, the legislative, judicial, administrative and other fields enumerated in the UN Doc A/C.6/41/L.14 UN Doc A/C.6/42/L.6; and UN Doc A/C.6/43/L.11 include: 1) exchange of information in legislative fields of common interest (not included in UN Doc A/C.6/41/L.14); 2) cooperation and exchange of information concerning judicial and criminal matters, including, in particular, the elimination of international terrorism and of the illegal use of a trafficking in narcotics; 3) cooperation in the case of natural calamities and other disasters; 4) cooperation on border matters (or 'customs problems and security of border areas' and also another point on 'transit of people and goods' in the case of UN Doc A/C.6/41/L.14).

164) The Sub-Committee identified the following ways and means to develop and strengthen good neighbourliness in UN Doc A/C.6/41/L.14 UN Doc A/C.6/42/L.6; and UN Doc A/C.6/43/L.11: 1) diplomatic and consular relations; 2) contacts and visits; 3) agreements and declarations; 4) programs of cooperation and projects of mutual interests; 5) negotiations and consultations; 6) harmonization of technical norms and standards between neighbouring countries.

165) The actions of international organizations, in particular regional and subregional organizations, in developing and strengthening good neighbourliness as identified in UN Doc A/C.6/41/L.14 UN Doc A/C.6/42/L.6; and UN Doc A/C.6/43/L.11, included: 1) utilization of possibilities and capabilities of the United Nations, its specialized agencies and existing intergovernmental and non-governmental organizations in the political, economic, humanitarian, scientific, cultural and other fields; 2) promotion of common objectives and programmes; and 3) implementation of regional and subregional projects, in particular among developing countries.

Good neighbourliness has been largely regarded as a principle of international environmental law, while the relevant rights and duties of states are most evidently expressed in the cases of transboundary environmental pollution.[166] However, the application of the good neighbourliness principle might not be limited to negative environmental impacts on neighbouring territories. The list of fields enumerated by the Sub-Committee is not exhaustive and cooperation between states in the light of good neighbourliness principle could extend to other areas, and even to all fields.[167] The same applies to the list of rights and duties of states enumerated by the Sub-Committee, which are deduced from the much wider legal principles which lay down the foundations of the good neighbourliness principle and provide for the further deduction of more specific obligations.[168] Thus, the spectrum of specific obligations, which could eventually arise from the good neighbourliness principle, is non-exhaustive due to the all-compassing scope of its legal basis.

Furthermore, the more recent Maastricht principles on the extraterritorial obligations of states in the area of economic, social and cultural rights reconfirmed the importance of Article 74 of the UN Charter referring to the wellbeing of the rest of the world in social, economic and commercial matters to be achieved through the application of the general principle of good neighbourliness.[169] Thus, principle 13 stipulates the duty of states to 'avoid conduct that creates real risk to the enjoyment of economic, social and cultural rights outside the national territory of (their state)'.[170] This principle is a restatement of the duty of states to act with due care or diligence according to the facts and circumstances in each case. The risk referred to in principle

166) *E.g.* Christopher G Weeramantry, *Justice Without Frontiers: Protecting Human Rights in The Age of Technology*, vol 2 (Kluwer Law Int'l, The Hague 1998) 428-429; *See* also Ved P Nanda and George R Pring, *International Environmental Law and Policy for the 21 Century* (2nd edn Martinus Nijhoff, Leiden 2012) 81–82.

167) Thus, while addressing the relations between the European states with different social and political systems, the General Assembly referred in its Resolution, *UN Doc/A/Res/2129* (n 81) to 'the development of reciprocal co-operation in many fields' and to 'any improvement in relations' which have positive impact on the development of good neighbourly relations between states. In its later resolutions on the development and strengthening of good neighbourliness between states, the General Assembly emphasised that the higher interdependence between states has 'given new dimensions to good neighbourliness and increase(d) the need to ensure further development and implementation of good neighbourliness in the conduct of States in all fields'.

168) *See* for instance A/C.6/41/L.14, A/C.6/42/L.6, and A/C.6/43/L.11, which clearly stipulate that the list of elements contained in the reports of the Sub-Committee on good neighbourliness is not exhaustive and does not establish any hierarchy with regard to the headings included.

169) Experts from many universities and organisations, as well as former and (then) actual members of regional and international human rights bodies and Special Rapporteurs of the UN Human Rights Council gathered on 28 September 2011 to adopt principles in the field of extra-territorial human rights obligations (Maastricht principles): Olivier de Schutter et al., 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 Human Rights Quarterly 1085–1169.

170) *de Schutter et al.*, ibid 1112.

13 needs to be 'real' rather than 'hypothetical or theoretical'.[171] States are liable where the infringement of human rights is a 'foreseeable' result of their conduct, which means that they 'knew or should have known' about the consequences of their conduct.[172] The duty of mutual tolerance has also found its place here, allowing reasonable damage for which states are not held internationally responsible.[173] Finally, Article 13 imposes a duty on states to prevent 'threats or potential threats' of serious infringement of economic, social or cultural rights, while the lack of full certainty is not a legitimate reason for approving a planned interference or not applying preventive measures and remedies.[174]

The UN Committee on good neighbourliness explicitly enumerated human rights protection as a field where the good neighbourliness principle applies. The protection and promotion of human rights are well-recognised factors in international law, which contribute to the development of peaceful and friendly relations between states. The UN Charter for instance stipulates that:

> [w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: […] universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[175]

Along similar lines, The Universal Declaration of Human Rights (UDHR) provides in its Preamble that 'it is essential to promote the development of friendly relations between nations', recalling also that:

> recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world (and that) disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind.[176]

171) ibid 1113.

172) ibid 1113–1114. As rightly observed by the creators of the principles, this approach is stricter than the approach adopted in *Corfu Channel* (n 44), where states were obliged 'not to allow knowingly' their territory to be used against the rights of other states. In the case of principle 13, states would be liable if they 'are aware or were made aware' and also if they 'should have been aware' of the risks.

173) *de Schutter et al.* (n 169) 1114.

174) ibid 1114–1115.

175) Article 55 UN Charter. To achieve the stated purposes, Article 56 UN Charter provides a duty for Member States to take joint and separate actions in cooperation with the UN.

176) Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) Preamble.

Stemming from the UDHR, both the Preamble to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Preamble to the International Covenant on Civil and Political Rights (ICCPR) maintain that 'in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.[177] It has been also recognised that the treatment of domestic citizens is no longer considered an exclusive responsibility of individual states. As provided by the Vienna Declaration and the Program of Action,

> The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles, in particular the purpose of international cooperation. In the framework of these purposes and principles, the promotion and protection of all human rights is a legitimate concern of the international community.[178]

The text of the Vienna Declaration confirms that states which violate their international obligation to protect human rights should not be able to avoid their international responsibility on the pretext that such issues fall exclusively within their jurisdiction in line with the principle of state sovereignty.[179] The protection and promotion of human rights is a duty of states and forms an important component of their sovereignty. In other words 'the state that claims sovereignty deserves respect only as long as it protects the basic rights of its subjects (since) it is from their rights

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177) International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, in force 3 January 1976) 999 UNTS 171 Preamble; International Covenant on Civil and Political Rights (adopted 16 December 1966, in force 23 March 1976) 999 UNTS 171 Preamble.

178) Para. 4 Vienna Declaration and Program of Action, Vienna (13 October 1993) UN GAOR, UN Doc.A/CONF.157/24 (Part I) 20–46, 32 ILM 1661.

179) Felipe Gómez Isa, 'International Protection of Human Rights' in Felipe Gómez Isa and Koen de Feyter (eds), *International Protection of Human Rights: Achievements and Challenges* (University of Deusto, Bilbao 2006) 31.

179) Stanley Hoffmann, *World Disorders: Troubled Peace in the Post-Cold War Era* (Rowman Littlefield, Lahnam 1998) 159. *See* also Mervyn Frost, *Ethics in International Relations: A Constitutive Theory* (CUP, Cambridge 1996) 93–159, challenging the notion of dichotomy between sovereignty and protection of human rights; David Copp, 'The Idea of a Legitimate State' (1999) 28 Philosophy and Public Affairs 1, 3–45, according to whom domestic legitimacy derives from a state's moral authority to govern, implying that sovereign states have duty to protect the human rights of their own citizens; cf Mary Caprioli and Peter F Trumbore 'Human Rights Rogues in Interstate Disputes, 1980–2001' (2006) 43(2) J. Peace Research 131–148.

that it derives its own'.[180] The Vienna Declaration further reassures that such protection contributes to friendly relations among states and that it should be conducted in line with the principles of the UN Charter.[181]

The reports of the Sub-Committee on good neighbourliness referred also to the protection and promotion of the minorities' rights.[182] The violation of the rights of minorities has been recognised as one of the major causes of conflicts between

180) Stanley Hoffmann, *World Disorders: Troubled Peace in the Post-Cold War Era* (Rowman Littlefield, Lahnam 1998) 159. *See* also Mervyn Frost, *Ethics in International Relations: A Constitutive Theory* (CUP, Cambridge 1996) 93–159, challenging the notion of dichotomy between sovereignty and protection of human rights; David Copp, 'The Idea of a Legitimate State' (1999) 28 Philosophy and Public Affairs 1, 3–45, according to whom domestic legitimacy derives from a state's moral authority to govern, implying that sovereign states have duty to protect the human rights of their own citizens; cf Mary Caprioli and Peter F Trumbore 'Human Rights Rogues in Interstate Disputes, 1980–2001' (2006) 43(2) J. Peace Research 131–148.

181) Paras 6 and 7 Vienna Declaration provide that: 'The efforts of the United Nations system towards the universal respect for, and observance of, human rights and fundamental freedoms for all, contribute to the stability and well-being necessary for peaceful and friendly relations among nations, and to improved conditions for peace and security as well as social and economic development, in conformity with the Charter of the United Nations. The processes of promoting and protecting human rights should be conducted in conformity with the purposes and principles of the Charter of the United Nations, and international law'.

182) There is no commonly accepted definition on the concept of minorities so far. However, many suggestions have been made in this direction. The PCIJ, Greco-Bulgarian Communities (Advisory Opinion), [1930] PCIJ (Series B) No 17 (July 31) para. 30, emphasised race, religion, language and traditions united by solidarity in defining a minority 'community' as: 'a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other'. While the PCIJ's definition omits national belonging as a differentiating feature, one of the widely accepted definitions created by the UN Special Rapporteur Francesco Capotorti (1977) 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities' E/CN.4/Sub2/384/Rev1, and related to the implementation of Article 27 ICCPR emphasises the importance of nationals belonging to a state as well as a numerical and a dominance threshold. In accordance with this definition, a minority is: 'a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, religion or language'. The European Commission for Democracy through Law has adopted a very similar definition for the term 'minority' in Article 2 Proposal for a European Convention for the Protection of Minorities issued by the European Commission for Democracy through Law (8 February 1991), while the CoE Parliamentary Assembly, 'On an Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights', CoE Rec. 1201 (1993), also adds provision for such minorities at a regional level in Article 1 of the draft text of the Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights. It should be emphasised

states.[183] Therefore, their protection and promotion is an important factor for peaceful coexistence and accordingly, good neighbourly relations between states. This has been explicitly confirmed by the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which highlights the importance of the effective protection of minorities in preserving stability and strengthening cooperation and friendship among states by providing that:

> the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live, [and emphasizing] that the constant promotion and realization of the rights of persons belonging to national or ethnic, religious and linguistic minorities, as an integral part of the development of society as a whole and within a democratic framework based on the rule of law, would contribute to the strengthening of friendship and cooperation among people and States.[184]

Authors suggested relatively early on that states should be held responsible for treating their minorities in ways that would affect neighbouring states adversely. In 1939 for instance, Jennings argued that 'domestic rights must be subject to the principle sic

that there are some suggestions that 'national minorities' differ from 'ethnic minorities' although there remains a lack of consensus over their definitions and differentiation. See for instance the debates over the issue in the Parliamentary Assembly, 'Official Report on Debates' vol 1 (CoE, Strasbourg 1998) 110. Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (OUP, Oxford 1995) 10–11, uses the expression 'national minorities' for formerly self-governing territorial cultures incorporated into a larger state wishing to be separate societies from the major culture and demanding various forms of autonomy or self-governance to ensure their survival, and 'ethnic minorities' as resulting from immigration and wishing to integrate in the majority culture while only requiring a greater recognition of their ethnic identity. Other scholars, however, e.g. Kristin Henrard, Minority Protection in Post-Apartheid South Africa: Human Rights, Minority Rights and Self-Determination (Praeger, Westport 2002) 6, note that both 'national minorities' and 'ethnic minorities' cover the same things and that there are no additional elements that would make national minorities a subcategory of ethnic, religious or linguistic minorities, despite the ongoing debates about the relationship between national and ethnic minorities.

183) As Austria's Federal Chancellor noted to the UN Security Council, S/PV.3105, 11 August 1992, 47 and S/PV.3046, 'The protection of human rights and, in particular, of the rights of ethnic minorities too, has an important impact on the development of peaceful relations between states. There is a direct connection between democratic processes within countries and the evolution of a political culture which is conductive to the peaceful settlement of disputes. From our own history, we know that peace was most threatened when human rights were abolished and minorities persecuted and when democratic processes gave way to totalitarian practices. Human rights, minority rights and democracy, are therefore, important cornerstones of our common endeavour' (31 January 1992) 66.

184) UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UNGA Res 47/135 (18 December 1992) A/Res/47/135 (UN Declaration on the Rights of Minorities) Preamble. Para. 19 of the Vienna Declaration reconfirms the importance

utere tuo ut alienum non laedas and [that] for a State to employ these rights with the avowed purpose of saddling other States with unwanted sections of its population is as clear an abuse of right as can be imagined'.[185] In the light of the good neighbourliness principle this would entail duties for states to refrain from domestic activities related to the treatment of minorities that can have harmful effects on neighbouring states and also to take preventive measures or to minimise the effects of certain domestic activities which can have a negative impact on neighbouring states. The first duty imposes a negative obligation on states and would correspond, for instance, with the obligation of states to refrain from activities of forceful assimilation of ethnic minorities or discrimination against them.[186] The second duty, however, goes beyond mere abstention from violation of the rights minorities, requiring positive measures in the light of the good neighbourliness principle, which amounts to achieving effective equality between the minorities and the majority.[187] The first provision in international law dealing with the rights of minorities that went beyond non-discrimination is Article 27 of the ICCPR, recognising that:

> [i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[188]

In the context of this provision, the Human Rights Committee (HRC) confirmed the negative obligation of states not to deny the existence of the rights of minorities, but also emphasised that the text imposed a duty on states to take positive measures to protect the guaranteed rights against acts of the state itself and also against the acts of other persons within the state.[189] Since the rights enumerated in the provision depend 'on the ability of the minority group to maintain its culture, language or

of protecting and promoting minority rights as established with the UN Declaration on the Rights of Minorities.

185) Robert Y Jennings, 'Some International Law Aspects of the Refugee Question' (1939) 16 BYIL 98, 112–113. *See* in this respect Ranier Hofmann, 'Refugee-Generating Policies and the Law of State Responsibility' (1985) 45 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 694–713, 707.

186) *See* Christophe Van Der Beken, *Unity in Diversity – Federalism as a Mechanism to Accommodate Ethnic Diveristy: The Case of Ethiopia* (LIT Verlag, Münster 2012) 32.

187) The explicit recognition of the need for positive action to achieving real equality of minorities is not a new phenomenon and goes back to the PCIJ, in the *Minority Schools of Albania* (Advisory Opinion) [1935] PCIJ Rep Series A/B No 64, 17 (*Albanian Schools*), observing that: 'equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations'.

188) Article 27 ICCPR.

189) General Comment No. 23, The Rights of Minorities (Article 27), UN Doc. CCPR/C/21/Rev.1/Add.5 (8 April 1994) para. 6.1.

religion', states may also need to take positive measures 'to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group'.[190] Such need for protecting the 'existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and (encouraging) conditions for the promotion of that identity' has been reaffirmed by the UN Declaration on the Rights of Minorities.[191] In addition, European regional organisations have placed special emphasis on the need to protect and promote the rights of minorities in the light of the good neighbourliness principle, including this issue directly or indirectly in a great many legal instruments.[192]

Other examples of the possible application of the good neighbourliness principle include the field of immigration and asylum. Hailbronner, for instance, argues that the obligation to readmit third-country nationals (TCNs) which forms a part of the readmission agreements is rooted 'in the principle of neighbourliness and the responsibility of a state for those impairments to other states emanating from its territory'.[193] Nevertheless, the good neighbourliness principle does not create a duty under international law on states to readmit TCNs who have entered a neighbouring state unlawfully, per se.[194] This duty is enforced through contractual agreements between states, although it should not be excluded off-hand that the same could not be realised in future through the good neighbourliness principle directly.[195] Although illegal crossing of the borders is not sufficient to create an obligation under

190) ibid, para. 6.2. Despite the comments of the HRC, it is still disputed whether Article 27 ICCPR may ensure effective equality and even whether it indeed imposes positive obligations on states. *See* in this respect Kristin Henrard, *Minority Protection in Post-Apartheid South-Africa: Human Rights, Minority Rights and Self-Determination* (Praeger, NY 2002) 10–11. Also, the stated provision is criticized by some scholars, *e.g.* Jennifer Jackson Preece, *Minority Rights: Between Diversity and Community* (Polity Press, Cambridge 2005) 171, for giving states the freedom to determine whether ethnic minorities in their jurisdiction constitute minorities.

191) Article 1 UN Declaration on the Rights of Minorities.

192) The most important initiatives of European organisations and the relevant instruments are discussed in Chapter 3.

193) Kay Hailbronner, 'Readmission Agreements and the Obligation of States under Public International Law to Readmit Their Own and Foreign Nationals' (1997) 57 Zeitschrift für ausländisches öffentliches Recht und Völkerrect 1–49, 31.

194) According to *Hailbronner*, ibid 34, a duty of readmission of TCNs by states cannot be deduced from the good neighbourliness principle 'due to lack of sufficient general state practice and a corresponding *opinio juris*'. *See* also Florian Trauner and Imke Kruse, 'EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood' (2008) CEPS Working Document No. 290/08, 8–9, <http://aei.pitt.edu/9374/2/9374.pdf> last accessed 14 October 2014; Marion Panizzon, 'Readmission Agreements of EU Member States: A Case for EU Subsidiarity or Dualism?' (2012) 31(4) Refugee Survey Quarterly 101–133, 116; and along similar lines Annabelle Roig and Thomas Huddleston, 'EC Readmission Agreements: A Re-evaluation of the Political Impasse' (2007) 9 Eur. J. Migration and Law 363–387, 364.

195) *Hailbronner* (n 193) 35.

international law as such, this is not the case when 'a state intentionally or negligently promotes massive illegal entry of third state nationals into the neighbouring state or tolerates such entry from its territory'.[196] In accordance with established international law, states must refrain from domestic activities that can have harmful effects on the territory of a neighbouring state and should act with due care or diligence according to the facts and circumstances in each case, taking all appropriate measures to prevent harm to other states. This was also emphasised in the 1947 UN resolution on 'International co-operation for the prevention of immigration which is likely to disturb friendly relations between nations'. The General Assembly at that time '(invited) the Member States not to accord aid and protection to individuals or organizations which are engaged in the promoting or operating of illegal immigration, or in activities designed to promote illegal immigration'.[197]

The duty of states to cooperate in preventing uncontrolled migration could thus be seen as an expression of the good neighbourliness principle. However, not all authors are convinced that good neighbourliness can produce legal obligations for states in the field of migration. Coleman for instance, although confirming the legal nature of the good neighbourliness principle, argues that its interpretation in the field of migration is political and therefore cannot provide legal basis for international obligations.[198] While the application of good neighbourliness in the field of migration could indeed be politicised, the legal value of the principle and the obligations emanating from it cannot be disregarded for this reason. This situation does not negate the principle, but could rather stand as an instance of its misinterpretation and misapplication. As clarified by Hailbronner:

> [t]he basic idea is that irregular migration movements can no longer be encouraged by tolerating transit or insufficient border controls. States are obliged under the principles of good neighbourliness and international solidarity to prevent their territory from being used as a transit area for irregular migration movements. If until now precise legal rules are yet to be developed, this does not mean however that the principles of an emerging customary international law of international co-operation and good neighbourliness are meaningless when it comes to the easiest way to get rid of unwanted migrants.[199]

196) ibid.

197) *UN Doc/A/Res/136* (n 72).

198) Nils Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights* (MartinusNijhoff, 2009 Leiden) 45. For rather critical approach of the readmission agreements between the EU and third countries *see* Laure Delcour, 'The European Union: Shaping Migration Patterns in its Neighbourhood and Beyond?' in Dimitry Kochenov and Fabian Amtenbrink (eds), *The European Union's Shaping of the Legal International Order* (CUP, Cambridge 2013) 261–282, 262.

199) Kay Hailbronner, 'Study on "Refugee Status in EU Member States and Return Policies" – Final Report'(European Parliament, Brussels 2005) 55, <http://www.mirovni-institut.si/data/tinymce/osebje-teksti/ Final_ Report_englisch.pdf> last accessed 14 October 2014.

Some suggestions regarding to the application of the good neighbourliness principle have been made within the Ad hoc Committee of Legal Experts on Legal Aspects of Territorial Asylum of the Council of Europe (CoE) in the context of asylum law. These entail that the good neighbourliness principle imposes an obligation on states not to take actions which would increase a burden on other states and also to ensure that persons to whom they grant transit visas can legally enter the country of destination.[200] Moreover, it has been proposed that states which unlawfully allow passage of asylum seekers to another state after having conducted an asylum procedure themselves, would thereby infringe the good neighbourliness principle and would be obliged to readmit such persons.[201] Hurwitz additionally suggests that the principle of good neighbourliness could 'provide useful arguments against the unilateral application of safe third country practices'.[202] In particular, it could be argued, according to that author, that the good neighbourliness principle is infringed in cases where asylum seekers are returned to a state through which they transited despite this state not having agreed to examine their claims.[203] Furthermore, Hurwitz notes that the good neighbourliness principle could apply to the arrangements appropriate for the identification of refugees in the states through which they travel and for ascertaining the itineraries of refugees and asylum seekers.[204] Again, the duty of states to act with due care or diligence would be central to the application of the principle this context. It remains to be seen, however, whether the good neighbourliness principle will be given effect in practice through these duties.

Similar parallels can be drawn for other fields where the duties and rights of states under the good neighbourliness principle apply analogously. Nevertheless, the successful implementation of the principle will depend on the level of state compliance with international law in general and with the treaties regulating states' rights and duties in particular. The following chapter focuses on the development of

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200) Agnès G Hurwitz, *The Collective Responsibility of States to Protect Refugees* (OUP, NY 2009) 167–170, 169, with regard to the comments of the *Ad hoc* Committee of Legal Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons of the CoE (CAHAR (86) 6, 17 December 1986) paras 3 and 8. The author also quotes the consideration of the majority of CoE experts at the same meeting, according to which 'Member States should not allow the transit through their territory of persons whom they know are proceeding to another member State with the intention of entering the latter country illegally' (para. 6).

201) ibid, with regard to the comments made by the German representative (CAHAR, Final Activity Report (88) 9 Final, 25 January 1989) para. 15. The author also points to the comments of several states, in particular: Portugal, Spain, Austria and Italy (CAHAR, Final Activity Report on the Draft Agreement on Responsibility for Examining Asylum Requests (88) 9 Final, 25 January 1989), according to which, such obligation on states should be coupled with harmonised rules on the movement of persons (para. 16).

202) *Hurwitz* (n 200) 170.

203) ibid. *See* also Kay Hailbronner, 'The Concept of "Safe Country" and Expeditious Asylum Procedures: A Western European Perspective', (1993) 5 Int'l J Refugee Law 31–65, 41.

204) *Hurwitz* (n 200) 170.

the principle of good neighbourliness and state compliance in the EU legal order. Departing from the Westphalian model, EU integration has given new impetus to the good neighbourliness principle, reshaping the relations between states in a spirit of solidarity.

3. Conclusion to Chapter I

The good neighbourliness principle in international law designates a model of interstate relations or certain types of ties among neighbouring states, providing for peaceful coexistence, dialogue and cooperation.[205] The principle goes back to the traditional concept of the sovereign equality of states in international law which enables states to enjoy their sovereign rights freely and imposes a duty on them to take into consideration the sovereign rights of other states. The good neighbourliness principle has a clear legal value and can be regarded as a rule of customary law or as a general principle of law.

The good neighbourliness principle is founded upon the strict observance of the principles of the UN Charter and of the Declaration on Friendly Relations. These principles form the main legal basis of the good neighbourliness principle. Furthermore, good neighbourliness is given effect through the concrete duties imposed on states, which form the specific content of the principle. Several duties have been recognised by the UN Sub-Committee on good neighbourliness:

a) the duty to refrain from harmful domestic activities;
b) the duty to take measures to eliminate or minimize the harm;
c) the duties to inform, consult and negotiate with neighbouring countries;
d) the duty of tolerance;
e) the duties to refrain from actions which may aggravate a conflict and to take measures to attenuate a conflict;
f) the duty to take measures for improving and developing friendly relations.

The list of duties is not exhaustive and could develop further within the ambit of the principle's legal basis. There is also no restriction with regard to the good neighbourliness principle's fields of application. While primarily developed in the field of environmental protection, the principle can be applied in any field where the rights and duties of states manifest themselves. Human rights protection and the protection of the rights of minorities or the immigration and asylum cooperation are

205) *See* (n 18).

only some of the fields where the duties and the rights of states in light of the principle can be traced.

CHAPTER II

Good neighbourliness within the EU context

1. The connotation of good neighbourliness in the EU

As has been demonstrated in Chapter 1, international law provides for the legal basis and the specific contents of the good neighbourliness principle and specifies the fields of its application. Consequently, the first perspective from which the implementation of the good neighbourliness principle in the EU can be analysed is that of international law. Nevertheless, the core point for such analysis must be the acknowledgment of the new legal order of the Union, which exists autonomously from international law.[206] EU law demonstrates some properties stemming from the

206) The acknowledgment of this distinct nature of EU law developed over time. Thus, in Case 26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie van Belastingen* [1963] ECR 1 (*van Gend en Loos*), the ECJ affirmed that the EU 'constitutes a new legal order of international law', while in Case 6/64 *Flaminio Costa v. E.N.E.L.* [1964] ECR 585 (*Costa v. ENEL*), the 'new legal order of international law' became EU's 'own legal system' and in Case 294/83 *Parti écologiste 'Les Verts' v. European Parliament* [1986] ECR 1339 (*Les Verts v. Parlaiment*) para. 23, the ECJ characterised the EEC Treaty on which the new legal order was founded as a 'basic constitutional charter'. Some authors, however, still dispute the autonomous nature of the EU legal order – *see e.g.* Bruno de Witte, 'The Nature of the Legal Order' in Paul P Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (OUP, NY 2011) 323–362, 362, who concludes that the EU law functions as 'a branch of international law, albeit a branch with some unusual, quasi-federal, blossoms' after analysing its specific features. In contrast, Piet Eeckhout, 'The Growing Influence of European Union Law' (2011) 33 Fordham Int'l L.J. 1490–1521, 1504, explicitly rejects such claims, asserting that the 'EU law is not a mere branch of international law'. Robert Uerpmann, 'International Law as an Element of European Constitutional Law: International Supplementary Constitutions' (2003) Jean Monnet Working Paper No. 9/03, 44–45, NYU Law School, relates the insistence of the autonomous legal order with the identity deficit of the EU and more precisely, with the 'attempt (of the EU) to achieve and strengthen an identity of its own'. *See* also Eileen Denza, 'Two Legal Orders: Divergent or Convergent?' (1999) 48 ICLQ 257–284, exploring extensively the similarities and distinctions between the International public law and European law. For earlier discussions on the subject *see* Pierre Pescatore, 'International Law and Community Law – A Comparative Analyses' (1970) 7(2) CML Rev 167–183; Derrick Wyatt, 'New Legal Order or Old?' (1982) 7 EL Rev 147–166; Richard Plender, 'The European Court as an International Tribunal' (1983) 42(2) CLJ 279–298.

supranational nature of the organisation, not found in traditional international law.

The first part of this Chapter discusses the supranational nature of the EU, focusing primarily on the concepts of direct effect, supremacy and pre-emption. It further analyses the relationship between EU law and international law. The text does not trace the potentially large number of duties and rights of the Member States and of the Union which emanate from their international obligations in the light of the good neighbourliness principle, but aims to explain the conditions for their implementation in the context of EU law. To that end, the position of international agreements, international legal principles and the international customary law in the new legal order is addressed. Taking into account the legal basis of the good neighbourliness principle in international law, the text provides a detailed analysis of the relationship between the UN Charter and EU law, assessed primarily through the rulings of the EU Courts in the four Kadi cases.[207] It concludes that the international obligations of the Member States and of the Union stemming from the good neighbourliness principle would be implemented to the extent that the autonomous legal framework of the Union is preserved, in particular its high level of fundamental rights protection.

The EU created a new context for the development of interstate relations. The main distinguishing quality of this context consists in the replacement of what Allott characterised as 'diplomacy' in interstate relations with 'democracy'.[208] In other words, relations based on the national interests of states at the expense of the outside world were 'transcended, surpassed, and replaced with a new kind of democratic process',[209] building upon the interests of all Member States.[210]

This systematic change brought about a shift from conflictual to peaceful relations between the Member States of the EU. In return for peace and cooperation, EU Member States transferred certain sovereign rights to the supranational organisation.[211]

207) Two cases came in front of the CFI/the General Court: Case T–315/01 *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities* (*Kadi CFI*) (decision of 21 September 2005) and Case T–85/09 *Yassin Abdullah Kadi v. European Commission*, [2010] ECR II–5177 (*Kadi GC*). Both judgements were challenged in front of the ECJ: Joined Cases C–402/05 P and C–415/05 P *Yassin Abdullah Kadi and Al Barakaat v. Council of the European Union and Commission of the European Communities*, [2008] ECR I–6351 (*Kadi I*) and Joined Cases C–584/10 P, C–593/10 P C–595/10 P *European Commission, Council of the European Union, United Kingdom of Great Britain and Northern Ireland v. Yassin Abdullah Kadi* (decision of 18 July 2013) (*Kadi II*).

208) Philip Allott, 'The European Community is not the True European Community' (1991) 100 Yale L.J. 2485−2500.

209) ibid 2493.

210) ibid.

211) In his Declaration of 9 May 1950, the then French Foreign Minister, Robert Schuman noted that the pooling of resources by the participating states and the establishment of a new institution to bind these states, 'will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace'. The Preamble of the EEC Treaty highlighted

It is clear that the peaceful coexistence between states has been at the core of EU integration since the very beginning. However, the integration process has largely transcended the goal of peaceful coexistence. At the present state of integration, any possibility for violent conflicts between EU Member States has become almost 'inconceivable'.[212] As put by Keens-Soper:

> the assumption of peace, above all between France and Germany, has become so securely grounded to be unworthy of comment. When expectations have taken such hold that their fulfilment goes unnoticed, it suggests that relations based upon them depend on more reliable material than the official undertakings of treaties. Habit has sealed what contract began.[213]

Peace within the Union, as noted by Weiler, became axiomatic.[214] EU law, in the words of Pescatore, was 'established on the most advanced frontiers of the law of peaceful co-operation',[215] and the principles of solidarity and integration have taken it 'to the boundaries of federalism'.[216] This is not to imply that peaceful coexistence is no longer an objective of the integration project or that there are no longer any disputes between the Member States.[217] As pointed by Williams,

> [t]he original peace remains a persistent and significant value underlying the EU's practical as well as theoretical construction. It is entrenched constitutionally and legally. Through a legal system that binds states to each other economically and politically a pacific order has emerged that will not countenance military conflict between Member States. This has been an operating condition since the EU's conception, a brilliant if not original response to the age old rivalries of European history.[218]

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the determination of states to '[pool] their resources to preserve and strengthen peace and liberty'. Rec. 8 of the Preamble of the EEC Treaty (current Rec. 8 TFEU) stipulates the determination of states to '[pool] their resources to preserve and strengthen peace and liberty'. The full text of the Schuman declaration can be found in Anjo G Harryvan and Jan van der Harst (eds), *Documents on European Union* (St Martin's Press, NY 1997) 61−63.

212) *Smith* (n 12) 171.

213) Maurice Keens-Soper, *Europe in the World: the Persistence of Power Politics* (Macmillan, London 1999) 11.

214) Joseph HH Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor' and Other Essays on European Integration* (CUP, Cambridge 1999) 257. According to the author '[t]o continue to posit *intra-Community* peace as a Maastricht ideal does not have much conviction […] it is an ideal during, and in the immediate aftermath, of war, for then it demands the triumph of grace' (at 256).

215) *Pescatore* (n 206) 182.

216) ibid.

217) *E.g.* Lily Gardner Feldman, 'Reconciliation and Legitimacy: Foreign Relations and Enlargement of the European Union' in Thomas Banshoff and Mitchell P Smith (eds), *Legitimacy and the European Union: The Contested Polity* (Routledge, London 1999) 66–90.

218) Andrew Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (CUP, Cambridge

Peace between the Member States has evolved from being merely a 'modus vivendi, a stable balance of forces only for the time being'[219] to a 'democratic peace' based on the reasonable interests of states and promoted through the law as the chief recourse for solving the disputes between them.[220] In particular, 'for as long as democracy is maintained within the Union's membership the legal structures will operate effectively to remove any questions of territorial or economic tensions that was previously endemic in the European theatre'.[221]

The second part of this Chapter discusses good neighbourly relations in the Union based on the principles of sincere cooperation and solidarity, rather than the territorial sovereignty of the Member States. It assesses the development of good neighbourliness within the new democratic framework of interstate relations. It further analyses the role of national borders in the light of European integration's achievements, necessarily including the internal market, EU citizenship and the Schengen area, which have contributed significantly to the reconceptualization of borders, making territorial and border disputes between Member States largely irrelevant in the context of an almost borderless Union.[222]

The EU has probably developed the most advanced mechanisms for the settlement of disputes between its Member States, as far as issues falling under the competence of the Union are concerned. It has envisaged an important role for the Commission in safeguarding the compliance of the Member States with EU law and preventing direct confrontation in the course of the settlement of disputes. The ECJ has exclusive jurisdiction over the interpretation and application of the Treaties in settling disputes between Member States.[223]

The third part of this Chapter discusses the dispute settlement mechanisms within the Union, which provide a legal framework for the resolution of issues between Member States. The text distinguishes disputes between Member States falling under the scope of the EU law from disputes falling outside its scope, analysing the relevant Treaty provisions for their settlement at the EU level.

2010) 64.

219) John Rawls, *The Law of Peoples: with "The Idea of Public Reason Revisited"* (Harvard UP, Cambridge, MA 1999) 45 (italics in original).

220) *Williams* (n 218) 22–69.

221) ibid 64.

222) *See* James Wesley Scott, 'Wider Europe as a Backdrop' in James Wesley Scott (ed.), *EU Enlargement, Region Building And Shifting Borders of Inclusion And Exclusion* (Ashgate, Hampshire/Burlington 2006) 4. For interesting analysis on the reflection of national and other identities on the creation of 'we-images' and 'we-feelings' *see* Pablo Jáuregui, 'National Pride and the Meaning of Europe' in Dennis Smith and Sue Wright (eds), *Whose Europe?: The Turn Towards Democracy* (Blackwell, Oxford 1999) 257−287.

223) A Member State might be held liable under Article 344 TFEU if it refers a dispute for which the ECJ has jurisdiction before a court outside the EU legal framework: *see* Case C–459/03 *Commission of the European Communities v. Ireland* [2006] ECR I–4635 (*Mox Plant*) paras 122−130.

1.1 The legal nature of the EU

The EU is often compared to international organisations,[224] be that because of its origins in international law[225] or the inability to define its legal nature.[226] It is neither exactly an international organisation, nor a state, but stands between both.[227] The new term which was 'to describe the middle ground between the "international" and "national" law would soon be answered by a novel concept – supranationalism'.[228]

The concept of supranationalism has been widely discussed, but neither a precise definition nor a single interpretation has been achieved yet. In fact, as put by Hay, supranationalism 'does not depend on express stipulation, but follows from powers and functions actually accorded an organisation'.[229] Weiler's distinction between 'normative' and 'decisional' supranationalism has established a pattern for understanding the different facets of the concept.[230] 'Normative' supranationalism

224) The prevalent understanding being that it is 'a particular type of international organisation that is empowered to exercise directly some of the powers otherwise reserved to states': Laurence A Helfer and Anne-Marie Slaughter 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 Yale L.J. 273–392, 287.

225) The founding Treaties of the EU are international treaties within the meaning of Article 2(1) Vienna Convention on the Law of Treaties of 1969, UN Doc A/Conf.39/27 (1969) (VCLT). *See e.g.* John F McMahon, 'The Court of the European Communities: Judicial Interpretation and International Organisation' (1961) 37 British YB Int'l L. 320–350, 329; Trevor C Hartley, *The Constitutional Foundations of the European Union* in Paul P Craig and Richard Rawlings (eds), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (OUP, NY 2003) 175–196, 176; Robert Schütze, 'On "Federal" Ground: The European Union as an (Inter)national Phenomenon' (2009) 46(4) CML Rev 1069–1105, 1075; Joseph HH Weiler and Ulrich R Haltern, 'The Autonomy of the Community Legal Order – Through the Looking Glass' (1996) 37 Harv. Int'l L.J. 411–448, 419.

226) Not fitting in the existing legal categories, the EU legal nature has been described as *sui generis*. Yet, such classification is not particularly helpful. As noted by Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP, Oxford/NY 2009) 59, several problems are connected with the *sui generis* description: such description does not explain the EU's nature; it only negates the nature of the EU as international organisation or a Federal State; it does not detect or measure the EU evolution; and is not historically founded.

227) As discussed extensively by *Schütze*, ibid 13–74, the association of the EU with other international organisations is rooted in the Europe's federal tradition which is based on indivisibility of sovereignty: '[t]his *absolute* idea of sovereignty came to operate as a prism that would blind out all *relative* nuances within a mixed or compound legal structure […] Where States form a union but retain their sovereignty, the object thereby created is an international organization (confederation) regulated by international law. By contrast, where States transfer sovereignty to the centre, a new State emerges. Within this State – a Federal State if powers are territorially divided – all legal relationships are now regulated by national law […] the European Union is either an international organization (confederation) or a Federal State. And because the Union was not a State, it must be an international organization' (at 31 and 59) (italics in original).

228) *Schütze* (n 226) 58.

229) Peter Hay, *Federalism and Supranational Organisations: Patterns for New Legal Structures* (University of Illionis Press, Urbana 1966) 29.

230) Joseph HH Weiler, *The Community System: The Dual Character of Supranationalism* (1981) 1 YB E. L. 267–306.

reflects 'the relationships and hierarchy which exist between (the EU) policies and legal measures on the one hand and competing policies and legal measures of the Member States on the other'[231] and is expressed through the concepts of direct effect, supremacy and pre-emption.[232] 'Decisional' supranationalism, reflects 'the institutional framework and decision-making processes by which (the EU) policies and measures are, in the first place, initiated, debated and formulated, then promulgated and finally executed'.[233]

The concept of direct effect, which is inherent to normative supranationalism, provides that EU law can be enforced by individuals before their national courts and administrative authorities in the same way as national laws.[234] This is in contrast to international law, which allows states to choose 'the method and extent to which international obligations may, if at all, produce effects for individuals'.[235]

Secondly, as opposed to traditional international law, the concept of supremacy implies the primacy of the EU law over national law.[236] In particular, the concept of supremacy stems from the direct applicability of the EU law,[237] as it refers to 'two norms (which) must form part of the same legal order'[238] and the lack of the need for Member States to approve national transposition before a measure becomes directly effective.[239] Traditional international law provides for dualist relations with national laws, which protects the latter from being overridden by the former.[240] It does not impose monism on states and if a state 'opens up to international law, this "monistic" stance is a national choice'.[241] With EU law, Member States cannot choose between accepting or not accepting supremacy, at least 'as long as they opt for membership',[242] as this is the only game in town. Both supremacy and direct

231) ibid 271.
232) ibid 279.
233) ibid 271.
234) *van Gend en Loos* (n 206). In the context of the compliance of administrative authorities, *Schütze* (n 225) 1088, notes for instance that 'although national administrations are – from an institutional perspective – not integrated into the European administrative machinery; national administration operate – from a functional perspective – as a decentralized European administration'. *See* also in general Gareth Davies, 'The Humiliation of the State as a Constitutional Tactic' in Fabian Amtenbrink and Peter A. J. van den Berg (eds), *The Constitutional Integrity of the European Union* (T.M.C. Asser Press, The Hague 2010) 147–174.
235) Joseph HH Weiler, 'The Transformation of Europe' (1991) 100(8) Yale L.J., 2403–2483, 2413.
236) *Costa v. ENEL* (n 206).
237) The concept of direct applicability implies that EU law directly becomes part of the national laws in the Member States, without any need or possibility for its transposition. On the distinctions between the concept of direct effect and direct applicability, *see* JA Winter, 'Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law' (1972) CML Rev, 425–438.
238) *Schütze* (n 225) 1080.
239) ibid 1071.
240) ibid 1080.
241) ibid (italics in original).
242) Joseph HH Weiler, 'Israel and the Creation of a Palestinian State: The Art of the Impossible and

effect form the 'constitutional gowns' of the new legal order.[243]

Thirdly, EU law is distinguished by the concept of pre-emption which 'is a quintessential federalism issue'.[244] In the areas where the Treaties confer exclusive competence on the EU, Member States may no longer legislate themselves, if not empowered by the EU or for the purposes of implementing Union acts.[245] In the areas where the EU shares competence with the Member States, the latter may legislate and adopt legally binding acts to the extent that the EU has not exercised its competence and also where it has decided to cease exercising its competence.[246] The actions of Member States are thus pre-empted in areas where the EU has exercised its competence.[247] These three concepts – direct effect, supremacy and pre-emption – were said to attest the approfondissement of normative supranationalism more than thirty years ago.[248]

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the Possible' in Sanford R Silverburg (ed.), *Palestine and International Law: Essays on Politics and Economics* (McFarland and Co., Jefferson, NC 2002) 55–159, 97.

243) Piet Eeckhout, 'A Panorama of Two Decades of EU External Relations Law' in Anthony Arnull, Piet Eeckhout and Takis Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Hart Publishing, Oxford 2008) 329.

244) George A Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94(2) Colum. L.Rev. 341–456, 358.

245) Article 2(1) TFEU. In Case 22/70 *Commission of the European Communities v. Council of the European Communities* [1971] ECR 263 (*Commission v Council*) para. 17, the ECJ held that 'each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules'. This position of the Court has been seen as a way to promote the uniformity of the EU law against unilateral actions of Member States – *see* Marise Cremona, 'External Relations and External Competence of the European Union: The Emergence of an Integrated Policy' in *Craig and de Búrca* (n 206) 217–268, 245. In Joined Cases 3, 4 and 6/76 *Cornelis Kramer and Others* [1976] ECR 1279, the ECJ recognised that Member States had authority to exercise their competences where the Community has not 'fully exercised its function' (para. 39). Such authority, however, was said to be of a 'transitional nature' expiring at the end of the six years period at the latest 'since the Council must by then have adopted, in accordance with the obligation imposed on it [by the relevant Act]' (paras 40 and 41). After the expiration of the period, however, even if the EU has not exercised its powers, contrary to its obligation, Member States may not act in the field unless the Commission has approved such an action: *see* Case 804/79 *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* [1981] ECR 1045, paras 18, 20 and 27. On the further developments leading to the 'partial exclusivity' of the EU powers, *see* in detail *Schütze* (n 226) 167–188.

246) Article 2(2) TFEU.

247) Paul P Craig and Gráinne de Búrca, *EU Law, Text, Cases and Materials* (5th edn OUP, NY 2011) 84. In line with Protocol No. 25 on the Exercise of Shared Competence attached to the Lisbon Treaty and with reference to Article 2(2) TFEU, pre-emption does not cover the whole area of shared competence where the EU has taken action, but only 'those elements governed by the Union act in question'. The ways the Member States may exercise their competences in areas where the EU has ceased exercising its competences are regulated by a 'Declaration in relation to the delimitation of competences' attached to the founding Treaties.

248) *Weiler* (n 230) 292.

'Normative' supranationalism is correlated to decisional supranationalism. The two aspects are described as giving 'a certain balance of action and reaction' in circumstances where the EU influence is felt 'as expressed by the approfondissement of normative supranationalism' and the 'closer national control exercised in the decision making process'.[249] This relationship is manifested as a tension between the EU's interests and the national interests of the Member States. The 'approfondissement' of normative supranationalism, which denotes a deepening of the EU interest, can result in diminution of decisional supranationalism, i.e. with rise in the institutional expression of national interests of Member States and vice versa, the decline in the decisional supranationalism can result in a rise in normative supranationalism.[250] The conflicting relationship between the two aspects has been regarded as a driving force and a distinguishing feature of the supranational system. The decline in decisional supranationalism in the early years of integration[251] enabled the establishing of a high measure of normative supranationalism, which distinguishes the EU from international organisations characterised by a low measure of normative supranationalism.[252]

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249) ibid.

250) ibid.

251) This was, for instance, the case from the foundational period until the early 1980s. *Weiler*, ibid 281, analysed this phenomenon from the foundational period to the early 1980s, approaching the '*approfondissement*' of normative supranationalism expressed through the concepts of direct effect, supremacy and pre-emption as a result of the decline in:'[t]he independence and the autonomous policy-and decision-making role of the intergovernmental institutions […]; the weight of non-intergovernmental institutions in pluri-institutional decision-making process […]; (unique supranational features) within quasi-intergovernmental institutions […]; (the shift) in the execution or detailed legislative implementation of Community policies […] to Member State domination'. The situation changed with the Single European Act and the subsequent Treaty amendments, leading to the strengthening of the position of the Commission which, as asserted later on by *Weiler* (n 235) 2455, '[i]n stark contrast to its nature during the Foundational Period and the 1970's and early 1980's, […] in large measure both sets the [EU] agenda and acts as a power broker in the legislative process'. In addition, and related to the strengthening of the Commission's position, the Single European Act introduced qualified majority voting (QMV), which replaced unanimous voting in the Council to a significant extent, and the same trend has continued in subsequent revisions of the Treaty. With the latest revision of the Treaties, QMV has been greatly extended, covering the whole area of justice and home affairs and making it a general rule in the Council – *see e.g.* Steve Peers, EU *Justice and Home Affairs Law* (3rd edn OUP, Oxford 2011) 41–48. *See* also Laurent Pech, 'The Institutional Development of the EU post-Lisbon: A Case of plus ça change …?' in Diamond Ashiagbor et al. (eds), *The European Union After the Treaty of Lisbon* (CUP, Cambridge 2012) 7–46.

252) *Weiler* (n 230) 305.

1.2 The relationship between EU law and International law

Relations between the Member States are shaped within the framework of EU law rather than international law.[253] However, it is possible to trace in EU law the international obligations of the Member States and of the Union which stem from the good neighbourliness principle. That said, it should be borne in mind that the EU is an autonomous legal order, distinct from the traditional international law.[254]

In principle, EU law coexists in harmony with international law. At the treaty level, the Union is committed to respecting and promoting international law.[255] So far, the ECJ has applied the norms of customary international law and general principles of international law to the delimitation of powers between the Member States and the EU,[256] as rules of interpretation,[257] as gap-fillers in circumstances where there is no explicit provision to govern a certain aspect on which the Court must rule,[258] without clarifying, however, their precise legal position in the edifice of EU law.[259] The good neighbourliness principle, in particular, has neither been invoked nor has it been interpreted as such in judgements before the EU Courts.

It has been established that the EU must respect international law in the exercise of its powers, 'including provisions of international agreements in so far as they codify customary rules of general international law'.[260] In that sense, EU legal acts

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253) *See* II.2 bellow.

254) *See* (n 206).

255) Article 3(5) TEU, stipulates that '[i]n its relations with the wider world, the Union shall […] contribute […] to the strict observance and the development of international law, including respect for the principles of the United Nations Charter'. Article 21 TEU refers in the general provisions on the Union's External Action to the commitment of the Union to respect principles of the UN Charter and of international law as guiding principles 'which have inspired its own creation, development and enlargement and which it seeks to advance in the wider world'. The Union shall further 'define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to […] preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders'.

256) Case 41/74 *Yvonne van Duyn v. Home Office* [1974] ECR 1337, para. 22. *See* also Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 *A. Ahlström Osakeyhtiö and others v. Commission of the European Communities* [1988] ECR 5193, para. 18.

257) Case C–149/96 *Portuguese Republic v. Council of the European Union* [1999] ECR I–8395 (*Portugal v. Council*) para. 35.

258) Case C–37/00 *Herbert Weber v. Universal Ogden Services Ltd* [2002] ECR I–2013, para. 31. In Case 244/80 *Pasquale Foglia v. Mariella Novello* [1981] ECR 3045, para. 24, the Court established that general principles of international law may be invoked in the absence of EU Law provisions.

259) *E.g.* Armin von Bogdandy and Maja Smrkolj, 'European Community and Union Law and International Law' (2009) Max Planck Encyclopedia of Public International Law.

260) Case C–308/06 *The Queen on the application of: International Association of Independent Tanker*

'must be interpreted, and their scope limited, in the light of the relevant rules of the international law'.[261] This entails that rights and duties emanating from international legal order, necessarily including those of the good neighbourliness principle, are binding on the EU insofar as they codify customary rules of general international law. In Poulsen, for instance, the EU effectively applied the United Nations Convention on the Law of the Sea (UNCLOS) as a codifying act of customary rules on the law of the sea, even before this convention had entered into force. In the words of the ECJ, the relevant Convention 'has not entered into force, but many of its provisions are considered to express the current state of customary international maritime law [to which a number of ICJ judgments testified]'.[262] Accordingly, EU legal acts can be invalidated on the basis of customary international law. This is done either by translating customary international law through an already established principle of the EU law,[263] or in its original form, where by adopting the act, the EU institution made 'manifest errors of assessment concerning the conditions for applying [the relevant] rules'.[264]

In this context, it will be recalled that UNCLOS also contains important provisions emanating from the good neighbourliness principle, such as the duty of due care or diligence, which requires states to take preventive measures to avoid damage and measures to minimise any unavoidable damage caused.[265] Member States cannot bring proceedings against each other under UNCLOS, insofar as such proceedings are related to matters under EU competence.[266] The same would be

Owners (Intertanko) and Others v. Secretary of State for Transport (decision of 3 June 2008) (Intertanko) para. 51; Case C–286/90 Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp. [1992] ECR I–6019 (Poulsen) paras 9 and 10; Case C–405/92 Etablissements Armand Mondiet SA v. Armement Islais SARL [1993] ECR I–6133, paras 13–15; Case C–162/96 A. Racke GmbH & Co. v. Hauptzollamt Mainz [1998] ECR I–3655 (Racke) para. 45.

261) *Poulsen* (n 260) para. 9. *See* along similar lines, the interpretation provided by the ECJ in cases involving international agreements to which the EU is a contracting party: Case C–284/95 *Safety Hi-Tech v. S. T.* [1998] ECR I–4302, para. 22; Case C–341/95 *Bettati v. Safety Hi-Tech* [1998] ECR I–4355, para. 20; Case C–61/94 *Commission of the European Communities v. Federal Republic of Germany* [1996] ECR I–3989 (*Commission v. Germany*) para. 52. On the implementation of UNCLOS *see* also C–410/03 *Commission of the European Communities v. Italy* [2005] ECR I–3507 and Case C–111/05 *Aktiebolaget NN v. Skatteverke* [2007] ECR I–2697.

262) *Poulsen* (n 260) para. 10. The ECJ referred in this respect to the judgements of the ICJ proving the existence of a relevant customary international law: ICJ, *Delimitation of the Maritime Boundary in the Gulf of Maine Region Case (Canada v. United States of America)* [1984] ICJ Rep 1984, para. 94; ICJ, *Libyan Arab Jamahiriya v. Malta* [1985] ICJ Rep 1985 (*Continental Shelf Case*) para. 27; ICJ, *Nicaragua v. United States of America, substantive issues* [1986] ICJ Rep 1986, paras 212 and 214.

263) In Case T–115/94 *Opel Austria GmbH v. Council of the European Union* [1997] ECR II–00039, para. 83, the CFI annulled a Community act which did not conform with a principle of international law, despite transposing it through an already established principle of the EU law.

264) *Racke* (n 260) para. 52.

265) *See* (n 127).

266) *Mox Plant* (n 223) paras 151–154.

presumably be the case with a large number of rights and duties stemming from the international obligations of states in the light of the good neighbourliness principle found in other instruments of international law. Whether such provisions would have binding effect on the Union must be assessed on a case-by-case basis. This is first and foremost because of the all-embracing nature of the good neighbourliness principle, which is expressed in all fields of law where its accompanying rights and duties manifest themselves. Secondly, the helpful rulings of the ECJ notwithstanding, EU law does not provide any general test for where such rights and duties in the light of the good neighbourliness principle could be enforced, i.e. for when international treaty provisions are considered to codify customary rules of general international law. Therefore, in Intertanko, the EU did not consider itself bound by the International Convention for the Prevention of Pollution from Ships (Marpol 73/78) which, unlike UNCLOS, was not regarded as an expression of customary international law.[267]

The story of the international agreements concluded by the EU is different. Cherished by the ECJ, they 'from the coming into force thereof, form an integral part of the [EU] law'[268] and are binding on the EU institutions and the Member States.[269] However, the integration of international agreements is conditioned on conformity with EU primary law. In particular, Article 218(11) TFEU provides for ex ante control of the compatibility of international agreements with EU law. The envisaged international agreement cannot be concluded if the ECJ finds that it is incompatible with the Treaties.[270] The EU Treaties do not explicitly provide for ex post control, i.e. a control based on the compatibility of international agreements with the Treaties after they have become binding on the EU and the Member States. Nevertheless, after an international agreement has been incorporated into EU law, it can be subject to a reference for a preliminary ruling[271] on a point of interpretation

267) *Intertanko* (n 260) para. 51 – in particular, the ECJ underlined that 'it does not appear that Regulations 9 and 11(b) of Annex I to Marpol 73/78 and Regulations 5 and 6(b) of Annex II to that Convention are the expression of customary rules of general international law'. *See* also the Opinion of AG Kokott in the case.

268) Case 181/73 *R. V. Haegeman v. Belgian State* [1974] ECR 449 (*Haegeman*) para. 5. As established in Case C–188/91 *Deutsche Shell AG v. Hauptzollamt Hamburg–Harburg* [1993] ECR I–363 (*Deutsche Shell*) para. 17, the same approach applies to the measures of bodies established by an international agreement, if they have been 'entrusted with responsibility for its implementation [and] are directly linked to the agreement which they implement' and to mixed agreements, as noted in Case C–13/00 *Commission of the European Communities v. Ireland* [2002] ECR 2943, para. 14.

269) Article 216(2) TFEU.

270) Article 218(11) TFEU. In Opinion 1/75 [1975] ECR–1355, the ECJ clarified that its advisory competence relates to 'any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation'.

271) The preliminary ruling procedure provides for national courts to refer a matter to the ECJ for interpretation and validation under EU law. To be admissible for a preliminary ruling, the reference should be submitted by a national court or tribunal *i.e.* a body established by law which is permanent and independent, ruling on disputes defined in general terms and bound by *inter partes*

or validity under Article 267 TFEU.[272] In addition, the ECJ can, in accordance with Article 263 TFEU,[273] review the legality of the internal act which approved the international agreement and annul it in accordance with Article 263 TFEU.[274]

Under certain conditions, international agreements that have been integrated into EU law can also become directly effective.[275] The general test requires that for a measure to be directly effective it has to be sufficiently clear, precise and unconditional.[276] Prior to applying the basic test, the ECJ will also consider the

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governing rules, acting as a 'proper judicial body' whose determination must be binding on the parties which are in turn obliged to apply for the settlement of their dispute to the respective court, and bound to apply the rules of law: Case C–54/96 *Dorsh Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH.* [1997] ECR I–4961, paras 22–38. For detailed analysis *see* Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (2nd edn OUP, NY 2014).

272) *Haegeman* (n 268) paras 4–6. In addition to the international agreements concluded by the EU, the ECJ can also interpret other acts, such as the decisions of bodies established under an international agreement – *see* Case C–192/89 *S. Z. Sevince v. Staatssecretaris van Justitie* [1990] ECR I–3461, paras 9–11; *see* also Case C–237/91 *Kus v. Landeshauptstadt Wiesbaden* [1992] ECR I–6781, para. 9 or recommendations made under such agreement – *see Deutsche Shell* (n 268) paras 17–18.

273) Article 263(1) TFEU provides for a judicial review of acts adopted by the Council, Commission, European Central Bank, European Parliament and the European Council, and of bodies, offices or agencies of the Union. The provision in question expressly refers to legislative acts *i.e.* regulations, directives and decisions adopted by (ordinary or special) legislative procedure and acts intended to produce legal effects *vis-à-vis* third parties, thus excluding recommendations and opinions. To that end, acts which are not legally binding are not open to judicial review – *see* Case 22/70 *Commission v. Council* (n 245) 42. As an exception, acts adopted on provisions relating to the Common Foreign and Security Policy (CFSP) are exempted from the jurisdiction of the ECJ. However, as an exception to this exemption, the Court has jurisdiction to monitor compliance with Article 40 TEU, providing that the implementation of the CFSP does not affect the application of the procedures and the extent of the powers of the institutions established by the Treaties for the exercise of the exclusive, shared and complementary competences of the Union, as referred in Articles 3 to 6 TFEU. In line with Article 263(2), there are four possible grounds for challenging an act, which are not mutually exclusive: lack of competence (on the part of the institution adopting the act); infringement of an essential procedural requirement; infringement of the Treaties or any rule of law relating to their application; misuse of powers, implying using a power for an improper or illegitimate purpose.

274) *See e.g.* Case C–327/91 *French Republic v. Commission of the European Communities* [1994] ECR I–3641; *See* also Case C–122/95 *Federal Republic of Germany v. Council of the European Union* [1998] ECR I–973.

275) The doctrine of direct effect started to develop in *van Gend en Loos* (n 206). In particular the ECJ affirmed that EU law 'not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage' (para. 10). The direct effect of the international agreements cannot be automatically implied from Article 216(2) TFEU – *see* in this respect Piet Eeckhout, *EU External Relations Law* (2nd edn OUP, Oxford 2011) 326.

276) The test was described in the Opinion of AG Trabucchi in the Case 43/75 *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455 (*Sabena*) as follows: '[u]nder the criterion established by the case law of the European Court a Community provision produces direct effects so as to confer on individuals the right to enforce it in the courts, provided

structure and the nature of the agreement.[277] For instance, the ECJ has continuously denied direct effect to GATT/WTO law within the EU legal order, the only exception being where the EU intended to implement a particular obligation[278] or where the EU act refers explicitly to GATT/WTO law.[279] The main argument of the Court for denying a direct effect has been that these agreements, being based on 'reciprocal and mutually advantageous arrangements [and] characterized by (a) great flexibility of (their) provisions, in particular those conferring (a) possibility of derogation',[280] are not sufficiently precise to confer rights on individuals.[281] The 'object and purpose' of the agreement must be taken into account when assessing whether it is unconditional and sufficiently precise to produce a direct effect.[282] The lack of reciprocity has been another major obstacle to confirming a direct effect for these agreements. The practice of other contracting parties not to follow the concept of direct effect has also prevented the ECJ from doing so. In particular, granting GATT/WTO law direct effect, according to the Court, 'may lead to disuniform application of the WTO rules'[283] and 'would deprive the legislative or executive organs of the [EU] of the scope for manoeuvre enjoyed by their counterparts in the [EU's] trading partners'.[284]

that it is clear, precise in its content, does not contain any reservation and its complete in itself in the sense that its application by national courts does not require the adoption of any subsequent measure of implementation either by the States or the Community' (p. 486). The effects of international agreements in EU law are widely covered in the literature – *see* among others: Christine Kaddous, 'Effects of International Agreements in the EU Legal Order' in Marise Cremona and Bruno de Witte (eds), *EU Foreign Relations Law, Constitutional Fundamentals* (Hart Publishing, Oxford 2008) 291–312; Panos Koutrakos, 'International Agreements in the Area of the EU's Common Security and Defence Policy' in Enzo Cannizzaro et al. (eds), *International Law as Law of the European Union* (Martinus Nijhoff, Leiden 2012) 157–188; Mario Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques* (OUP, Oxford 2013); Rass Holdgaard, *External Relations Law of the European Community: Legal Reasoning and Legal Discourse* (Kluwer Law Int'l, Alphen aan den Rijn 2008).

277) In ECJ, Joined Cases 21–24/72 *International Fruit Company v. Produktschap for Groenten en Fruit* [1972] ECR 1219, para. 20, the ECJ considered 'the spirit, the general scheme and the terms' of the GATT (*International Fruit Company*).

278) Case C–69/89 *Nakajima All Precision Co. Ltd v. Council of the European Communities* [1991] ECR I–2069.

279) Case 70/87 *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission of the European Communities* [1989] ECR 1781.

280) *International Fruit Company* (n 277) para. 21.

281) For a detailed analysis of the relevant case law *see* John Errico, 'The WTO in the EU: Unwinding the Knot' (2011) 44 Cornell Int'l L.J. 179–208, 191 et seq. For broader analysis of the general denial of direct effect in WTO cases *see* Antonello Tancredi, 'On the Absence of Direct Effect of the WTO Dispute Settlement Body's Decisions in the EU Legal Order' in *Cannizzaro et al*. (n 276) 249–268; *See* also Antonello Tancredi, 'EC Practice in the WTO: How Wide is the 'Scope for Manœuvre'? (2004) 15(5) EJIL 933–961.

282) Case 104/81 *Hauptzollamt Mainz v. C.A. Kupferberg Cie KG a.A.* [1982] ECR 3641, para. 23.

283) *Portugal v. Council* (n 257) 45.

284) *Portugal v Council* (n 257) 46.

The ECJ applied a similar approach to the UNCLOS case law, denying direct effect of that Convention as a whole due to its 'nature and broad logic'.[285] This is notwithstanding the findings of the ECJ in *Poulsen* that the EU was bound by the Convention through customary law even before the UNCLOS entered into force or was incorporated in EU law.[286] The Court did not refer to reciprocity nor to the Convention enforcement mechanisms as highlighted in GATT/WTO case law, preferring to analyse the substantive obligations stemming from the Convention i.e. the rights and duties granted to individuals under international law.[287] Consequently, the ECJ affirmed that the 'UNCLOS does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States'.[288]

GATT/WTO and UNCLOS case law is helpful in predicting the possible effect of certain provisions inherent to the good neighbourliness principle. Nevertheless, the list of fields where such rights and duties can be applied is non-exhaustive, which complicates tracing their expression in EU law. It can be concluded from the rulings of the Court in general that the effect of international agreements in EU law will be assessed in the light of the nature and the substance of the agreement. It has been presumed that 'direct effect will follow as long as the contrary situation does not follow from the agreement, the main – and possibly only – exception to this principle being the GATT/WTO Agreements'.[289] According to some analyses, the EU has attached direct effect so far to 'international obligations of agreements where the [...] EU has been the politically hegemonic force and has therefore had political control over the obligation, whereas it has denied direct effect in other constellations, in particular WTO law and the United Nations Convention on the Law of the Sea'.[290] This could also be implied from the distinction the ECJ drew between the application of WTO agreements in the EU legal order – which are not directly effective in that they are founded 'on the principle of negotiations with a view to "entering into reciprocal and mutually advantageous arrangements"'[291] - and 'the agreements concluded between the [EU] and non-member countries which introduce a certain

285) *Intertanko* (n 260) para. 65.

286) The UNCLOS has been signed by the EU and approved by 'Council Decision of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof', OJ L 179/1.

287) *Intertanko* (n 260). In particular, the ECJ noted that '[i]ndividuals are in principle not granted independent rights and freedoms by virtue of UNCLOS. In particular, they can enjoy the freedom of navigation only if they establish a close connection between their ship and a State which grants its nationality to the ship and becomes the ship's flag State' (para. 59).

288) *Intertanko* (n 260) para. 64.

289) Henrik Ringbom, *European Union Maritime Safety Policy and International Law* (Martinus Nijhoff, Leiden 2008) 112.

290) *von Bogdandy and Smrkolj* (n 259).

291) *Portugal v. Council* (n 257) para. 42.

asymmetry of obligations'.[292]

Notwithstanding their effect in EU law, international agreements concluded by the EU are binding on the Union and its Member States and their provisions 'must, so far as is possible, be interpreted in a manner that is consistent with those agreements'.[293] However, it must be noted that EU Courts do not feel bound by decisions of other international juridical bodies.[294] While in the past, the ECJ had recognised that decisions of international courts are binding on EU Courts when interpreting the treaty under which the international judicial body was established in cases where the EU was a contracting party to the international agreement in question,[295] this has never been accepted in actual cases.[296] Instead, the ECJ has always referred to decisions of international courts that support its preferred interpretation.[297]

In comparison, international agreements which are not concluded by the EU do not form an integral part of the EU legal order, although the Court will interpret EU

292) *Portugal v. Council* (n 257) para. 42. *See* in particular Steve Peers, 'Fundamental Right or Political Whim' WTO law and the Court of Justice' in Gráinne de Búrca and Joanne Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing, Oxford/Portland, Oregon 2001) 111–130, 118. cf the editor's note in Trevor C Hartley, *European Union Law in a Global Context: Text, Cases and Materials* (CUP, Cambridge 2004) 250.

293) *Commission v Germany* (n 261) para. 52. Moreover, even where international agreements are not directly effective they can still set aside the application of any contradictory national law – in Case C–377/98 *Kingdom of the Netherlands v. European Parliament and Council of the European Union* [2001] ECR I–7079, para. 54, the Court confirmed that '[e]ven if, as the Council maintains, the (Convention on Biological Diversity) contains provisions which do not have direct effect, in the sense that they do not create rights which individuals can rely on directly before the courts, that fact does not preclude review by the courts of compliance with the obligations incumbent on the (EU) as a party to that agreement'.

294) *See* for a detailed analysis Marco Bronckers, 'The Relationship of the EC Courts with Other International Tribunals: Non-Committal, Respectful or Submissive?' (2007) 44(3) CML Rev 601–627; For a more recent discussion *see* Gráinne de Búrca, 'The ECJ and the International Legal Order: A Re-evaluation' in Gráinne de Búrca and Joseph HH Weiler (eds), *The Worlds of European Constitutionalism* (CUP, Cambridge 2012) 105–149.

295) ECJ, Opinion delivered pursuant to the second subparagraph of Article 228(1) of the Treaty – Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area [1991] ECR I–6079, para 39.

296) *Bronckers* (n 294) 626.

297) Anne Thies, *International Trade Disputes and EU Liability* (CUP, NY 2013) 95. As analysed by *Bronckers*, ibid 604, the EU Courts feel most comfortable to refer to the ECtHR rulings. While the EU has still not acceded to the ECHR, the provisions of that Convention form part of the general principles of EU law. For reference to the ECtHR rulings *see e.g.* Case C–185/95 P *Baustahlgewebe GmbH v. Commission of the European Communities* [1998] ECR I–8417. *See* also: Joined cases C–238/99 P, C–244/99 P, C–245/99 P, C–247/99 P, C–250/99 P to C–252/99 P and C–254/99 P *Limburgse Vinyl Maatschappij NV and Others v. Commission of the European Communities* [2003] ECR I–8375, para. 274, where the ECJ clarified that the ECtHR interpretation of the Convention must be taken into account by EU judicature when interpreting fundamental rights. To that end, *see e.g.* C–94/00 *Roquette Frères SA v. Directeur général de la concurrence,*

law in the light of the obligations undertaken by all Member States.[298] The freedom of Member States to carry on their obligations under international treaties is conditional upon their compliance with the EU Treaties. In particular, Member States are obliged to take all appropriate measures to eliminate any incompatibilities found.[299]

The application of the good neighbourliness principle would also depend on the relationship between the UN Charter and EU law. It will be recalled that the main principles of the UN Charter lay down the legal basis of the good neighbourliness principle as established in international law, while Article 74 of the UN Charter provides for its application in social, economic and commercial matters.[300] Nevertheless, while the importance of the UN Charter has been well recognised in the EU Treaties,[301] none of the relevant provisions determine its effect or the effect

de la consommation et de la répression des fraudes, and Commission of the European Communities [2002] ECR I–9011 (*Roquette Frères*). *See* also Case C–301/04 P, *Commission v. SGL Carbon* [2006] ECR I–5915. The EU Courts, however, reserved the possibility to interpret the ECHR fundamental rights in the light of EU law – *see e.g.* Case 36/75 *Roland Rutili v. Ministre de l'intérieur* [1975] ECR 1219, para. 32. *See* also Case 44/79 *Liselotte Hauer v. Land Rheinland–Pfalz* [1979] ECR 3727, para 14. Similarly, in respect to the fundamental rights guaranteed by the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171 Preamble, the ECJ argued in Case C–249/96, *Lisa Jacqueline Grant v. South-West Trains Ltd* [1998] ECR I–636, para. 45, that 'although respect for the fundamental rights which form an integral part of […] general principles of law is a condition of the legality of (EU) acts, those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the (EU)'. The ECJ disregarded the findings of the UN Human Rights Committee in the same case as non-binding (para. 46). For a detailed discussion of the relationship between the EU Courts and other international juridical bodies *see Bronckers*, ibid. *See* also Matthew Parish, 'International Courts and the European Legal Order' (2012) 23(1) EJIL 141–153.

298) *Sabena* (n 276) para. 20.

299) Article 351(2) TFEU. In Case C–84/98 *Commission of the European Communities v. Portuguese Republic* [2000] ECR I–5215, para. 25, the ECJ underlined that in cases where such incompatibilities are established, Member States must adjust or if no such a possibility exists, denounce the agreement. In Cases C–249/06 *Commission of the European Communities v. Kingdom of Sweden* [2009] ECR I–1301 and C–205/06 *Commission of the European Communities v. Republic of Austria* [2009] ECR I–1301, the ECJ went a step further to establish that even a potential conflict can be regarded as an incompatibility within the meaning of Article 351(2) TFEU. Nikolaos Lavranos, 'Revisiting Article 307 EC: The Untouchable core of fundamental European Constitutional Law Values and Principles' in Filippo Fontanelli et al. (eds), *Shaping Rule of Law Through Dialogue: International and Supranational Experiences* (Europa Law Publishing, Groningen 2009) 119–146, argues that the ECJ has used Article 351 TFEU as a tool to strengthen the position of EU law in relation to international law, internally and externally. The author notes that internally, the ECJ uses the article to shape distributions of external powers between the EU and the Member States in favour of the former, while externally, it provides the Court an opportunity to export EU law to the outside world. *See* also *Eeckhout* (n 275) 397–399, arguing convincingly that the EU would accept the succession of a Member State's obligations only in areas in which the EU has exclusive competence.

300) *See* Chapter 1.

301) *See* in particular: Article 3(5) TEU, Article 21(1) TEU; Article 347 TFEU; and Article 351 TFEU.

of UN law in general.[302] This has been clarified by the EU Courts in the more recent *Kadi* saga.

The rulings of the EU Courts in *Kadi* have been widely discussed[303] and although not particularly ground-breaking,[304] they are of significant importance to understanding the relationship between the UN law, which largely summarizes the good neighbourliness principle, and EU law. In general, in *Kadi I* and in the most recent *Kadi II* judgement, the ECJ had to decide on appeal over a clash between the fundamental rights recognised and protected in the EU legal order and UN measures instituting economic sanctions against individuals listed as suspected of supporting terrorism. At issue in *Kadi I* is the autonomy and the constitutionality of the EU legal order and the central role of the fundamental rights in that order.[305] *Kadi II* deals largely with the extent to which fundamental rights are protected.

In the first case before the CFI (now the General Court),[306] Mr Kadi (the applicant), whose European assets were frozen following the inclusion of his name on a list annexed to an EU Regulation,[307] alleged breaches of several fundamental rights.[308] The contested Regulation gave effect to an EU Common Position that implemented a series of UN Security Council (SC) Resolutions aimed at defeating international terrorism.[309] The applicant claimed an infringement of his rights to a fair hearing, respect for property and effective judicial review, which form an integral part of the EU legal order.[310] The CFI turned down the application, underlining that a review of the lawfulness of the EU Regulation would amount to an illegitimate review of the UN Resolution in the light of the fundamental rights as protected by EU law and that the 'institutions have […] acted under circumscribed powers (of

302) *Eeckhout* (n 275) 401.

303) For a detailed overview of the literature discussing the *Kadi* rulings, *see* Sara Poli and Maria Tzanou, 'The *Kadi* Rulings: A Survey of the Literature' (2009) 28(1) YB E. L. 533–558.

304) *E.g. Eeckhout* (n 206) 1947 et seq.

305) *E.g.* Paul James Cardwell, Duncan French and Nigel White, 'Case Note on Joined Cases C–402/05 P and C–415/05 P *Yassin Abdullah Kadi and Al Barakaat v. Council of the European Union and Commission of the European Communities*, [2008] ECRI–6351, judgement of 3 September 2008' (2009) 58(1) ICLQ 229–240, 233.

306) *Kadi CFI* (n 207).

307) *See* Council Regulation (EC) 881/2002 of 27 May 2002, imposing specific restrictive measures directed against persons and entities associated with Osama bin Laden, the Al–Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, [2002] OJ L 139/9 (contested Regulation).

308) The same allegations were made by the claimant in Case T–306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II–2387 (*Yusuf*). The two cases, *Kadi CFI* and *Yusuf* were joined for the purposes of the oral procedure.

309) *See* UNSC Res 1390 (16 January 2002) UN Doc/S/RES/1390; UNSC Res 1333 (19 December 2000); UN Doc/S/RES/1333; UNSC Res 1267 (Oct. 15, 1999) UN Doc/S/RES/1267.

310) *Kadi CFI* (n 207) paras 138 and 139.

UN law), with the result that they had no autonomous discretion'.[311] That court thus gave an absolute primacy to the UN acts over all EU Treaty obligations, including the fundamental rights on which these Treaties are based.[312]

The CFI erred in granting absolute primacy to the UN acts over those of EU law. The ECJ overruled this on appeal, adopting a completely different approach. Unlike the CFI, the ECJ did not consider a review of the SC Resolution, but focused on the EU internal act which enabled the domestication of the international act, reviewing its lawfulness in the light of the fundamental rights as a part of the very foundations of the EU legal order.[313] The ECJ recalled that the EU is 'based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the (EU Treaties)',[314] and that 'an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the (EU) legal system'.[315] The 'fundamental rights form an integral part of the general principles of law whose observance the Court ensures',[316] and 'obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the (EU Treaties), which include the principle that all (EU) acts must respect fundamental

311) *Kadi CFI* (n 207) para. 214.

312) *Kadi CFI* (n 207) para. 183 and *Yusuf* (n 308) para. 233. In support of the reasoning of the CFI and in particular of the binding character of the UN Charter on the EU, *see* Luis M Hinojosa Martínez, 'Bad Law for Good Reasons: The Contradictions of the *Kadi* Judgment' (2008) 5(1) Int'l Organizations L.Rev. 339–357, 339. *See* also Christian Tomuschat, 'Case Note on Case T–306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation* v. *Council and Commission*, judgment of the Court of First Instance of 21 September 2005; Case T–315/01, *Yassin Abdullah Kadi v. Council and Commission* judgment of the Court of First Instance of 21 September 2005' (2006) 43 CML Rev 537–551; and Andreas von Arnauld, 'UN-Sanktionen und gemeinschaftsrechtlicher Grundrechtsschutz' (2006) 44 Archiv des Völkerrechts 201–216. For a rather balanced approach, *see* Judicaël Etienne, 'Loyalty Towards International Law as a Constitutional Principle of EU Law?' (2011) Jean Monnet Working Paper No. 3/11, NYU Law School. In comparison and rather critically, *see e.g. Cardwell, French and White* (n 305) 234. *See* in general *Eeckhout* (n 206) and Juliane Kokott and Christoph Sobotta, 'The *Kadi* Case – Constitutional Core Values and International Law – Finding the Balance?' (2012) 23(4) EJIL 1015–1024.

313) *Kadi I* (n 207) paras 304 et seq. As put by Ramses A Wessel, 'The *Kadi* Case: Towards a More Substantive Hierarchy in International Law?' (2008) 5 Int'l Organizations L.Rev. 323–327, the 'Security Council resolutions remain "untouchable" but the acts by which the (EU) implements the resolutions are not and are subject to the fundamental rights and principles that form the basis of the (Union) legal order'. Agreeing with the approach of the ECJ with respect to the review of the Council Regulation *vis-à-vis* the acts stemming from the UN Charter *see e.g.* Bjørn Kunoy and Anthony Dawes, 'Plate Tectonics in Luxembourg: The Ménage à Trois between EC Law, International Law and the European Convention on Human Rights Following the UN Sanction Cases' (2009) 46(1) CML Rev 73–104, 98.

314) *Kadi I* (n 207) para. 281.

315) *Kadi I* (n 207) para. 282.

316) *Kadi I* (n 207) para. 283.

rights'.[317] While Member States are allowed to carry out their treaty obligations preceding their EU accession,[318] and to give effect to their international obligations to maintain peace and security,[319] this 'cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms […] of the Union'.[320] If the obligations under the UN Charter were to be classified in the hierarchy of norms within the EU legal order, they would have primacy over acts of secondary EU law, but not to primarily law, in particular to the general principles of which fundamental rights form part.[321]

The approach of the ECJ to international law after its ruling has been viewed as 'sharply dualist'[322] in terms of setting 'distinct and separate legal spheres'[323] with the EU legal order, 'with the latter setting the conditions under which international law enters the domestic system, and dictating the legal consequences of such domestication of international law'.[324] Indeed, the ECJ firmly defended the autonomous position of the EU legal order, but this approach can be traced back to van Gend en Loos[325] and may therefore not be novel in any sense.[326] In general legal terms, dualism implies that the 'international law can only be effective when incorporated in municipal law, by means of some act of transformation'.[327] In this

317) *Kadi I* (n 207) para. 285.

318) *Kadi I* (n 207) para. 301. Article 351(1) TFEU (former Article 307(1) EC Treaty), provides that '[t]he rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties'. In its previous case law, ECJ even allowed certain derogations from the primary law to give effect to this provision – *see*, for instance, Case C–124/95, *The Queen, ex parte Centro-Com Srl v. HM Treasury and Bank of England* [1997] ECR I–81, paras 56–61.

319) *Kadi I* (n 207) para. 302. Under Article 347 TFEU, 'Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security'.

320) *Kadi I* (n 207) para. 303. On the misinterpretation and misconception of Article 351 TFEU, allegedly allowing EU Member States to disregard EU law in order to comply with their international obligations stemming from agreements concluded before their accession, *see* Nikolaos Lavranos, 'The Impact of the *Kadi* Judgement on the International Obligations of the EC Member States and the EC' in Marise Cremona et al. (eds), *Challenging the EU Counter-Terrorism Measures Through the Courts*, EUI Working Papers AEL, 2009/10, 47–56.

321) *Kadi I* (n 207) paras 305–309.

322) Gráinne de Búrca, 'The European Court of Justice and the International Legal Order After *Kadi*' (2010) 51(1) Harv. Int'l L.J., 1–49, 2.

323) ibid.

324) ibid.

325) *van Gend en Loos* (n 206).

326) *See e.g. Eeckhout* (n 206) 1501.

327) ibid.

sense, as noted by Eeckhout, it was not the ECJ but the EU legislator which took a dualist approach by transforming the international act through a domestic one.[328] The ECJ has, much like other domestic courts, assessed the implementing act 'against municipal, not international law',[329] acting as a 'constitutional court of [a] municipal legal order'[330] and safeguarding the autonomous legal order.

The constitutional perspective of the ECJ is particularly emphasized in relation to the obligation of the EU Member States to comply with international law according to Article 103 of the UN Charter.[331] In that light, the obligations of the UN Members under the UN Charter prevail over any other agreement, technically including the EU Treaties.[332] However, what is missing in this respect is the different status the EU Treaties enjoy at the current stage of integration. The EU Treaties can no longer merely be regarded as international agreements. Since Les Verts v. Parliament, the (then) EEC Treaty has been characterised as a 'basic constitutional charter'.[333] In *Kadi I*, the ECJ insisted on the EU Treaty as a constitutional charter, containing constitutional principles which do not allow any derogation and which stand as a condition for the incorporation of international law.[334] As discussed by Schütze, the normative force of EU law no longer derives from international law.[335] The constitutionalization of the EU Treaties is an inevitable consequence of the evolutionary nature of the integration process and '[a]s soon as we accept that the status of a legal norm depends on the function a society gives it, it is hard to deny that the European treaties have been – socially – elevated to a constitutional status [evolving] into a "Treaty-Constitution"'.[336]

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328) ibid.

329) Veronika Fikfak, '*Kadi* and the Role of the CJEU in the International Legal Order' (2012/13) 15 Cambridge YB E. LS 587-618.

330) *Kadi I*, Opinion of AG Poiares Maduro, para. 37. For the similar approaches to review of acts between the ECJ and the domestic courts *see* in detail *Fikfak*, ibid.

331) As asserted by Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (OUP, Oxford 2011) 134, '[s]tate(s) would be forced not to comply with their international obligations under the resolution and the Charter'. For somewhat different opinion *see* Martin Scheinin, 'Is the ECJ Ruling in *Kadi* Incompatible with International Law?' in *Cremona* (n 320) 57–69, 65, arguing that the ECJ's ruling in *Kadi* is not incompatible with the UN Charter or with the international law in general. That author points out that '[h]uman rights are universal, not 'European' in nature' and therefore, the insistence of the ECJ to secure the compliance with the human rights is in accordance with the EU's commitments to comply with the international law.

332) Article 103 UN Charter stipulates that '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

333) *Les Verts* (n 206) para. 23. *See* also III.3.1.

334) *Eeckhout* (n 206) 1504.

335) *Schütze* (n 225) 1082.

336) ibid 1080.

In addition, the ECJ's approach has been compared to the early Solange I case,[337] where the German Federal Constitutional Court, considering that the EU's protection of fundamental rights is lower than the national protection of these rights, reserved the right to review the conformity of EU law with the fundamental rights enshrined in the German Constitution, effectively giving priority to the latter as long as there was insufficient protection at an EU level. Due to the improved protection of fundamental rights at the EU level, the German Federal Constitutional Court decided in its Solange II judgement,[338] handed down twelve years later, that no further review of EU law was required as long as the EU maintained the enhanced standards of protection of fundamental rights. The ECJ did not explicitly refer to the 'Solange' concept in *Kadi I*, but it also did not exclude the possibility of such an approach, arguing that the re-examination procedure before the UN Sanction Committee, which 'is still in essence diplomatic and intergovernmental'[339] and 'does not offer the guarantees of judicial protection',[340] cannot 'give rise to generalised immunity from jurisdiction within the internal legal order of the Community'.[341] Eeckhout notes in this respect that:

> [i]f the Security Council puts its house in order, one would accept the Court of Justice to defer to the U.N. system of protection. But for now, the court's position is akin to the first "Solange" judgement of the Federal Constitutional Court of Germany: as long as the U.N does not itself guarantee effective judicial protection, the court will enforce European human rights norms, as it does in all other circumstances.[342]

Viewed along these lines, the ECJ judgement might have contributed to the strengthening of the protection of fundamental rights at the UN level.[343] In fact, such improvements had already started in 2008, with the introduction of the Narrative Summaries of the SC Sanctions Committee, which set out the main reasons for listing suspected individuals, groups, undertakings or entities.[344] They continued with the establishment of the independent Ombudsperson in 2009[345] – further enhanced in 2011[346] – in charge of processing requests for delisting concerned individuals, groups,

337) *Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratstelle für Getreide und Futtermittel* [1974] 2 CML Rev, 540.
338) *Re Wünsche Handelsgesellschaft* [1987] 3 CML Rev 225.
339) *Kadi I* (n 207) para. 323.
340) *Kadi I* (n 207) para. 322.
341) *Kadi I* (n 207) para. 321.
342) *E.g. Eeckhout* (n 206) 1505. For a different opinion, *see de Búrca* (n 322) 25.
343) *See e.g. Kokott and Sobotta* (n 312) 1019. cf *Eeckhout* (n 206) 1506.
344) UNSC Res 1822 (30 June 2008) UN Doc/S/Res/1822, para. 13.
345) UNSC Res 1904 (17 December 2009) UN Doc/S/Res/1904 (UNSC Res 1904)
346) UNSC Res 1989 (17 June 2011) UN Doc/S/Res/1989, paras 22 and 23.

undertakings or entities.[347] However, as noted by Kokott and Sobotta, 'to envisage a Solange II relationship between the EU and the SC, the judicial protection at the UN level has to improve substantially in comparison to the situation examined by the Court in *Kadi* (I)'.[348] Indeed, the need for substantial improvements in the protection of fundamental rights at the UN level came to the fore in the *Kadi* GC and *Kadi II* rulings.

Before the Commission froze the assets of Mr Kadi again, it gave him an opportunity to comment on the Narrative Summary of the Sanctions Committee.[349] The EU did not however provide any further evidence in support of the allegations therein, contrary to the applicant's request, but proceeded to adopt a Regulation to freeze his funds and economic resources.[350] In his action before the General Court, the applicant claimed that the Commission should be required to disclose all documents related to the adoption of the contested Regulation and that this act should be annulled insofar as it concerns the applicant.[351] The General Court ruled in favour of the applicant, finding that 'the applicant's rights of defence have been "observed" only in the most formal and superficial sense',[352] since the Commission considered itself bound by the UN Narrative Summary and did not envisage the possibility of departing from it in the light of applicant's observations.[353] This amounted, according to the General Court, to a failure by the Commission to take the applicant's comments into account,[354] while 'the procedure followed by the Commission, in response to the applicant's request, did not grant him even the most minimal access to the evidence

347) *UNSC Res 1904*, para. 20 et seq.

348) *Kokott and Sobotta* (n 312) 1020.

349) After the decision of the ECJ in *Kadi I* (n 207), France, acting on behalf of the EU, requested the UN Sanctions Committee to make available on its website the Summary of reasons for listing Mr. Kadi as suspected of supporting terrorism: *Kadi GC* (n 207) para. 49. The UN Sanctions Committee communicated the requested Summary to the France's Permanent Representative to the UN and subsequently published it on its website: *Kadi GC* (n 207) paras 50 and 51. Upon receiving the Narrative Summary of the Sanctions Committee, the Commission sent a letter to the applicant, enclosing this information and explaining that it intended to adopt a legal act which would have maintained his listing in Annex I to Regulation No 881/2002, but is 'giv[ing] him the opportunity to comment on the grounds included in the summary of reasons and to provide any information to the Commission that he might consider relevant before it took its final decision': *Kadi GC* (n 207) para. 53. In his response, the applicant requested the Commission to provide 'evidence supporting the assertions and allegations made in the summary of reasons' on the basis of which he attempted to build his arguments, *Kadi GC* (n 207) para. 55.

350) Regulation (EC) No 1190/2008 amending for the 101st time Regulation No 881/2002, [2008] OJ L 322, 25. The main argument of the Commission was that by inviting the applicant to comment on the summary of reasons, the institution has complied with the ECJ's ruling in *Kadi I* (n 207) which 'did not require the Commission [to] disclose the 'further evidence' requested by the applicant', *Kadi GC* (n 207) para. 60.

351) *Kadi GC* (n 207) para. 71.

352) *Kadi GC* (n 207) para. 171.

353) *Kadi GC* (n 207) para. 171.

354) *Kadi GC* (n 207) para. 172.

against him'.[355] Since the applicant was only provided with a summary of reasons, he was not in a position to challenge the allegations against him.[356] Consequently, the General Court annulled the Regulation so far as it concerned the applicant.[357]

This ruling was then challenged before the ECJ by the Commission, the Council and the UK, all requesting the setting aside of the General Court's judgment and dismissing as unfounded Mr. Kadi's application for the annulment of the contested Regulation insofar as it concerned him.[358] In essence the ECJ considered three grounds: alleged errors of law in that the Regulation was not recognised as having immunity from jurisdiction; alleged errors of law with regard to the level of judicial scrutiny required; alleged errors in the examination of Mr Kadi's pleas with regard to the infringement of his rights of defence, of effective judicial protection and also of the infringement of the proportionality principle.[359]

On the basis of the first ground, the ECJ was actually required to revisit its reasoning in *Kadi I* with regard to the judicial review of an EU act implementing SC Resolution measures. In particular, the Council argued that the General Court 'erred in law […] by refusing, pursuant to the *Kadi* judgment, to recognise that the contested regulation had immunity from jurisdiction'.[360] That refusal, according to the Council, 'amount[ed] to reviewing the legality of Security Council resolutions in the light of European Union law'.[361] The ECJ rejected the first ground on appeal, concluding that the General Court did not make an error of law. Following its decision in *Kadi I* and subsequent judgements,[362] the ECJ rejected allowing the contested Regulation immunity from jurisdiction on the basis that it intended to implement SC resolutions[363] and insisted on the 'full' rather than 'limited' review in the cases arising from the UN counter-terrorist sanctions.[364]

The second and the third grounds of appeal were examined together by the ECJ, as both were connected to the interpretation by the General Court of the right of defence and the right to effective judicial protection.[365] The ECJ noted that the Commission did not possess evidence for the listing of Mr Kadi other than the Narrative Summary of the Sanctions Committee. The competent EU authority had to 'ensure that that individual [was] placed in a position in which he [could] effectively

355) *Kadi GC* (n 207) para. 173.
356) *Kadi GC* (n 207) para. 177.
357) *Kadi GC* (n 207) para. 195.
358) *Kadi II* (n 207) paras 49–52.
359) *Kadi II* (n 207) para. 59.
360) *Kadi II* (n 207) para. 60.
361) *Kadi II* (n 207) para. 61.
362) In particular, Case C–550/09 *E and F* [2010] ECR I–6213, para. 44; and C–335/09 P *Poland v. Commission* (decision of 26 June 2012) para. 48.
363) *Kadi II* (n 207) paras 65–69.
364) *Kadi II* (n 207) para. 85.
365) *Kadi II* (n 207) para. 70.

[make] known his views on the grounds advanced against him'[366] and to seek, if necessary, the assistance of the Sanctions Committee to obtain the evidence which would have allowed it to undertake its duty of careful and impartial examination of the reasons.[367] The statement of reasons needs to identify 'the individual, specific and concrete reasons' for the listing of the individual concerned.[368] It is for the competent EU authority to prove that the reasons are well founded and not for the individual to prove the opposite.[369] Nevertheless, the General Court erred in law when finding that the Commission did not discharge its duty to give reasons by only providing the summary to Mr Kadi.[370] According to the ECJ, this duty was satisfied, though the allegations in the summary were either too vague or not substantiated by evidence to justify the measures imposed.[371] Therefore, the ECJ dismissed the appeal. It remains to be seen whether and to what extent this judgement will influence the further strengthening of the UN mechanisms.[372] For the time being, however, the improvements at the UN level do not provide effective judicial protection of fundamental rights, something which cannot be tolerated at the EU level.

It follows from the above that the compliance of Member States and of the Union with their obligations under international law is preconditioned by the conformity of such obligations with primary EU law. Such conditionality results from the autonomous nature of EU law, which has become the main framework for the development of the interstate relations between the Member States. The supranational context, which now shapes these relations, is essentially different from the traditional international law in which the principle of good neighbourliness initially developed.

2. The impact of the supranational context

The EU integration process reshaped interstate relations, diluting the rigid concept of national sovereignty.[373] The reconciliation between France and Germany is not

366) *Kadi II* (n 207) para. 112.
367) *Kadi II* (n 207) para. 115.
368) *Kadi II* (n 207) para. 116.
369) *Kadi II* (n 207) para. 121.
370) *Kadi II* (n 207) para. 138–139.
371) *Kadi II* (n 207) para. 141 et seq.
372) On the possible consequences, *see* Lisa Ginsborg and Martin Scheinin, 'You Can't Always Get What You Want: The *Kadi II* Conundrum and the Security Council 1267 Terrorist Sanctions Regime' (2011) EHRR Special Issue on Protecting Human Rights While Countering Terrorism After 9/11.
373) Philip Allott, *The Health of Nations: Society and Law Beyond the State* (CUP, Cambridge 2002) 177, notes unequivocally that '[the] fantasy of an inviolable and inviolate constitutionalism is a lie, an ignoble lie, and a fraud on the people of Europe' (footnotes omitted). The author sums up '[t]he true social reality of the European Union is, and always has been, something quite different from its self-denying, self-distorting and self-disabling myth (at 179). *The European Union is a union of European societies whose legal constitutions are integrated in the legal constitution of the Union*' (italics in original).

only symbolic but signifies a profound change in the relations between these states.[374] Antagonism has been reduced by 'increasing the salience and weight of parallel or interlocking interests'[375] of states. The integration process made 'dissonant interests less weighty and salient, while making consonant ones more clearly perceived and stronger'.[376] Strong cooperative ties and economic interdependence overshadowed nationalist rivalries. Democratic dialogue or 'talk' between states has overtaken diplomacy. Such talk is distinguished from the unilateral speech which seeks to express individual interests. As clearly illustrated by Barber:

> talk as communication obviously involves receiving as well as expressing, hearing as well as speaking, and empathizing as well as uttering […] "I will listen" means to the strong democrat not that I will scan my adversary's position for weakness and potential trade-offs […]. It means, rather, "I will put myself in his place, I will try to understand, I will strain to hear what makes us alike, I will listen for a common rhetoric evocative of a common purpose or a common good." […] Good listeners may turn out to be bad lawyers, but they make adept citizens and excellent neighbours […] Listening is a mutualistic art that by its very practice enhances equality. The empathetic listener becomes more like his interlocutor as the two bridge the differences between them by conversation and mutual understanding.[377]

The integration process invoked a democratic mode of communication between Member States who became 'excellent neighbours'. They learned how to listen to each other and enjoyed the democratic privilege of being heard. The affective power of talk transformed 'the I of private self-interest' into 'a we that [made] possible civility and common political actions'.[378]

The relations between the Member States started to build on the principles of solidarity and loyal cooperation, as the national interests of Member States do not entirely overlap. Neither disagreements nor disputes between Member States have been entirely resolved nor completely subsumed within the supranational EU

374) For an empirical analysis of the relations between France and Germany, *see* Mattei Dogan, 'The Erosion of Nationalism in the West European Community' in Max Haller and Rudolph Richter (eds), *Toward a European Nation? Political Trends in Europe: East and West, Center and Periphery* (M.E. Sharpe, NY 1994) 31−54, 41.

375) Karl Wolfgang Deutsch, *The Analyses of International Relations* (3rd edn Prentice Hall, London 1988) 210.

376) ibid.

377) Benjamin R Barber, *Strong Democracy, Participatory Politics for a New Age* (California UP, Berkley/Los Angeles 2003) 174–176, in respect to the power of talk in political interaction between subjects.

378) ibid 190 (italics in original).

framework. They have rather been contained within a political framework which prevents them from exacerbating circumstances further or escalating into serious conflicts.[379] The transfer of democracy beyond states necessarily meant strengthening the economic interdependence between Member States and lessening the significance of their national borders.

2.1 Intra-EU interstate relations

The EU Treaties rely on good neighbourly relations to which numerous legal provisions testify. The relevant Treaty provisions serve primarily the principles of loyal cooperation and solidarity by which the Union and the Member States are bound. The first and probably most important is the principle of loyal cooperation enshrined in Article 4(3) TEU, which establishes the basis for all compliance procedures.[380] In the words of Temple Lang, that provision,

> has gradually given rise to a large body of case law on a wide variety of subjects, including several profoundly important constitutional principles of [EU] law: the duty of national courts to give effective protection to rights given by [EU] law, the duty to give direct effect to directives against the State, the duty to interpret national law so as to be compatible with [EU] law, and the right to judicial review. These principles are the foundation of the constitutional structure that the Court of Justice has built, in which national courts ensure the rule of [EU] law in most of the circumstances in which it applies.[381]

Article 4(3) TEU stipulates an obligation on the Union and the Member States to cooperate 'in full mutual respect, assist[ing] each other in carrying out tasks which flow from the Treaties'.[382] The Member States 'shall take any appropriate measure,

379) Harry Anastasiou, 'The EU as a Peace Building System: Deconstructing Nationalism in an Era of Globalization' (2007) 12(2) Int'l J. Peace Studies 31−50, 38.

380) *E.g.* Marise Cremona, 'Introduction' in Marise Cremona (ed.), *Compliance and the Enforcement of EU Law* (OUP, Oxford 2012) xl. *See* also John Temple Lang, 'Article 10 EC – The Most Important "General Principle" of Community Law' in Ulf Bernitz et al. (eds), *General Principles of EC Law in a Process of Development* (Kluwer Law Int'l, The Hague 2008) 75–113, 77 (italics in original), in respect to Article 10 EC Treaty, which was replaced by Article 4(3) TEU under the Lisbon Treaty.

381) John Temple Lang, 'The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions Under Article 10 EC' (2007/08) 31(5) Fordham Int'l L.J. 1483–1532, 1483. *See* also Laurence W Gormley, 'Some Further Reflections on the Development of General Principles of Law within Article 10 EC' in Ulf Bernitz et al. (eds), *General Principles of EC Law in a Process of Development* (2nd edn Kluwer Law Int'l, The Hague 2008) 303–313.

382) Article 4(3) TEU.

general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'.[383] The ECJ has confirmed that the general duty to cooperate under the establishing Treaties also addresses the EU institutions.[384] In addition, Article 24(3) TEU requires Member States to support the Union's external and security policy actively and unreservedly and to comply with EU actions in this area.[385] Member States must also 'refrain from any action which is contrary to the interests of the Union or likely to impair the effectiveness as a cohesive force in international relations'.[386]

Another important principle securing the achievement of the EU's goals is the principle of solidarity.[387] This principle testifies to the strong bond between the Member States within the supranational framework, which largely transcends national borders, and the spheres of interest of individual states. In that sense, solidarity has been approached as a 'principle which distinguishes the EU and its members from other parts of the world and international organisations'[388] and also as a 'conceptual transition from a Union based on international relations to the Union as a federal polity'.[389] While not precisely defined at Treaty level, the notion of solidarity has been

383) Article 4(3) TEU.

384) *See*, for instance, Case 230/81 *Grand Duchy of Luxembourg v. European Parliament* [1983] ECR 255, para. 37; Case C–2/88 Imm. *JJ Zwartveld and others* [1990] ECR I–3365, para. 17; *Roquette Frères* (n 297) para. 31; Case C–275/00 *European Community, represented by the Commission of the European Communities v. First NV and Franex NV* [2002] ECR I–10943, para. 49; Case C–339/00 *Ireland v. Commission of the European Communities* [2003] ECR I–11757, para. 71; Case C–45/07, *Commission of the European Communities v. Hellenic Republic* [2009] ECR I–701, para. 25.

385) Article 24(3) TEU.

386) Christophe Hillion and Ramses Wessel, 'Restraining External Competences of EU Member States under CFSP' in *Cremona and de Witte* (n 276) 79-121.

387) In the words of the Commission, 'Renewed social agenda: Opportunities, Access and Solidarity in 21st Century Europe' COM (2008) 412 final, '[s]olidarity is part of how European society works and how Europe engages with the rest of the world' (p. 6).

388) Ines Hartwig and Phedon Nicolaïdes, 'Elusive Solidarity in an Enlarged European Union' (2003) 3 Eipascope 19–25, 19.

389) Armin von Bogdandy, 'Constitutional Principles for Europe' in Eibe H Riedel and Rüdiger Wolfrum (eds), *Recent Trends in German and European Constitutional Law: German Reports Presented to the XVIIth International Congress on Comparative Law, Utrecht, 16 to 22 July 2006* (Springer, Berlin 2006) 1–37, 32. As a comparison to international law, *see* Ronald St. John Macdonald, 'Solidarity in the Practice and Discourse of Public International Law' (1996) 8(2) Pace Int'l L.Rev. 259–302, 259, who defines solidarity in the international context as a 'first and foremost a principle of cooperation which identifies as the goal of joint and separate state action an outcome that benefits all states or at least does not gravely interfere with the interests of other states […] on the legal plane it reflects and reinforces the broader idea of a world community of interdependent states'. Interpreted as such, the principle of solidarity overlaps to a significant extent the principle of good neighbourliness as established in international law. Within the Union, solidarity is established around the common EU interest and shared (rather than individual) interests of Member States.

used in various legal contexts: in the context of the EU values,[390] as solidarity between generations and among Member States,[391] as solidarity in relations with the wider world,[392] as political solidarity between the Member States,[393] as solidarity between the Member States in respect to the EU's common policy on asylum, immigration and external borders control,[394] as solidarity when a Member State is facing difficulties in the supply of certain products, notably in the energy area,[395] as solidarity guiding the aims of the EU energy policy,[396] as solidarity between the EU and the Member States in cases where 'a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster',[397] or even as financial solidarity between nationals of the EU Member States, as referred to by the ECJ.[398]

390) Article 2 TEU stipulates that the values upon which the Union is founded 'are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.

391) Article 3(3) TEU.

392) Article 3(5) TEU. Furthermore, in accordance with Article 21(1) TEU, the EU shall be guided on the international scene by the principle of solidarity.

393) Article 24 (2) and (3) TEU provides that Member States shall develop mutual political solidarity and shall support the external and security policy of the Union in mutual solidarity. In accordance with Article 31(1) TEU, decisions under the CFSP chapter are taken unanimously by the European Council and the Council, unless provided otherwise. When a Member States abstains in a vote, it is not obliged to apply the decision, 'but shall accept that the decision commits the Union'. That Member State must also '[i]n a spirit of mutual solidarity […] refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position'. Furthermore, in line with Article 32(1), 'Member States shall show mutual solidarity' and 'shall ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene'.

394) Article 67(2) TFEU. In accordance with Article 80 TFEU, policies on border checks, asylum and immigration, is governed 'by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States'.

395) Article 122 (1) TFEU declares that the Council may decide 'in a spirit of solidarity between Member States' to assist a Member States which faces difficulties in supply of certain products, in particular in the energy area. The Council may grant 'Union financial assistance' to Member States affected 'by natural disasters or exceptional occurrences beyond its control', Article 122(2) TFEU.

396) Article 194 (1) TFEU.

397) Article 222 TFEU inserts a 'solidarity clause' providing for the Union and the Member States to act jointly. Additionally, in accordance with Article 42(7) TEU, '[i]f a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter'. With respect to the 'solidarity clause' and some related provisions, *see* Panos Koutrakos, *The EU Common Security and Defence Policy* (OUP, Oxford 2013) 68−72; *see* also: Sara Myrdal and Mark Rhinard, 'The European Union's Solidarity Clause: Empty Letter or Effective Tool?' (2010) Ulpapers No. 2; Andrea Sangiovanni, 'Solidarity in the European Union' (2013) OJLS 1−29; and more generally Malcolm Ross, 'Solidarity – A New Constitutional Paradigm for the EU' in Malcolm Ross and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (OUP, NY 2010) 23–45.

398) In Case C–184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I–6193 (*Grzelczyk*) para. 44, the ECJ noted that 'Directive 93/96, like Directives 90/364 and 90/365, […] accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a

Drawing on the Treaty provisions, the principle of solidarity generally requires that all the Member States and the Union take each other's interests into account.[399] Both the principle of loyal cooperation and the principle of solidarity, result in a situation where the Union and its Member States share and work towards common vital interests.[400] Shared interests become attached to each other and inseparable from each other. This somewhat alters the concept of the sovereignty of states around which the good neighbourliness principle developed in international law.[401]

2.2 National borders in the supranational context

The EU integration process started as a transboundary security project and has further 'promoted inter-state security through a system of cross-border networks (turning) external security relations among Member States […] into "domestic" EU policies and law'.[402] In achieving their first and principal goal of re-establishing peace and security, Member States have built a multinational integration scheme by framing their common interests and creating real solidarity between each other.[403] The economic dimension has dominated the integration process. As argued by Moravcsik, Member States were motivated by their economic interests and the desire for economic interdependence, while national or geopolitical goals enjoyed primacy '[o]nly where economic interests were weak, diffuse, or indeterminate'.[404] Peace was preserved and strengthened by 'pooling of resources' in a supranational legal framework

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beneficiary of the right of residence encounters are temporary'. *See* also Case C–413/99, *Baumbast and R v. Secretary of State for the Home Department* [2002] ECR I–07091 (*Baumbast*) paras 91–93; Case C–209/03, *The Queen, on the application of Dany Bidar v. London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I–2119, para. 56, Case C–456/02 *Michel Trojani v. Centre public d'aide sociale de Bruxelles* (*CPAS*) [2004] ECR I–07573, paras 34 and 45.

399) Although the principle of solidarity has not been invoked as such before of the EU courts, it did reinforce other important legal concepts – *see*, on this particular aspect *von Bogdandy* (n 389) 1–37, 33.

400) Sven Biscop (ed.), 'The Value of Power, the Power of Values: A Call for an EU Grand Strategy' (2009) Egmont Paper No 33, 16. The text clearly distinguishes between two terms: 'to have an interest' and 'being interested'. Notwithstanding the many overlapping vital interests, EU Member States can be certainly interested, to varying degrees, in different things. Thus, 'Belgium may be more interested in Central Africa and Poland in Ukraine, but objectively the stability of both is equally important to, and thus equally in the interest of both Brussels and Warsaw'.

401) *See*, in general, *Allott* (n 208).

402) Steven Blockmans and Ramses A Wessel, 'The European Union and Crisis Management: Will the Lisbon Treaty Make the EU More Effective?' (2009) CLEER Working Paper No. 1/2009 <http://www.asser.nl/upload/ documents/9212009_14424clee09-1full.pdf > last accessed 14 October 2014.

403) Nicholas Moussis, *The European Union With or Without a Constitution: A Response to Citizens' Questions* (European Study Service, Rixensart 2005) 6.

404) Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Mesina to Maastricht* (Cornell UP, Ithaca 1998) 7.

of economic relations between states.[405] As noted by Williams, it was the construction of a 'single market [which was to] bind states together in a compact of mutual interest [and when] those interests conflicted resort would be to law to solve disputes'.[406] On the way towards establishing the internal market, borders have been regarded not only as barriers to economic cooperation between Member States, but also as 'administrative, legal, political, cultural and even psychological barriers'.[407]

The single market or the internal market of the EU comprises 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties'.[408] It provides for the establishment of a common space where obstacles to the four freedoms created by national legal systems or borders between the Member States have been removed.[409] Put another way, the internal market has been successful at creating conditions where

405) *See* (n 211).

406) *Williams* (n 218) 31.

407) Liam O'Dowd, 'The Changing Significance of European Borders' in James Anderson, Liam O'Dowd and Thomas M Wilson (eds), *New Borders for a Changing Europe: Cross-Border Cooperation and Governance* (Frank Cass, London 2003) 13–36, 21. For earlier discussion on the negative effects of the borders on the interstate economy in the wider, international context, *see* John R MacKay, 'The Interactive Hypothesis and Boundaries in Canada' (repr.) in Brian JL Berry and Duane F Marble (eds), *Spatial Analyseis: a Reade*r *in Statistical Geography* (Prentice Hall, Englewood Cliffs 1969) 122–129.

408) Article 26(2) TFEU. The use of the term 'frontier' in the Treaties is intended for the purposes of the internal market and as such does not fully correspond to its other uses by the EU. *See* in this context Charles Ricq, 'Handbook on Transfrontier Co-operation for Local and Regional Authorities in Europe' (3rd edn CoE, Strasbourg 1996) 14, observing that both the CoE and the EU regard frontier regions 'as a public territorial entity situated immediately bellow state level and having a common land frontier with one or several entities of the same type situated in a neighbouring state'. *See* also for a better understanding of the classification of frontier zones in the EU and different purposes of frontiers, Charles Ricq, 'Handbook on Transfrontier Co-operation' (CoE Strasbourg 2006) 20–23. Also, frontiers relating to the internal market do not necessarily have to be between states, but also between regional frontiers within a single Member State. In Joined Cases C–363 407–411/93 *René Lancry SA v. Direction Générale des Souanes and Société Dindar Confort, Christian Ah-Son, Paul Chevassus-Marche, Société Conforéunion and Société Dindar Autos v. Conseil Régional de la Réunion and Direction Régionale des Douanes de la Réunion* [1994] ECR I–3957, para. 29, the ECJ observed that the Customs Union 'requires the free movement of goods generally, as opposed to inter-State trade alone, to be ensured within the Union'. For a more comprehensible explanation *see* Alina Tryfonidou, 'The Overseas Application of the Customs Duties provisions of the TFEU' in Dimitry Kochenov (ed.), *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Kluwer Law, The Hague 2011) 221–244, 235.

409) Legally speaking, the internal market was preceded by the establishment of the common market. As Kamiel Mortelmans, 'The Common Market, the Internal Market and the Single Market, What's in a Market' (1998) 35 CML Rev 101–136, 103, observes, '[f]rom a legal point of view, according to Article 8 EEC (later Article 7 EC), the common market was established between the six original Member States as from 1 January 1970' (footnote omitted). The idea of bringing national markets together has dominated the integration process ever since the formation of the EEC. The first economic community was based on a customs union covering all trade in goods and prohibiting customs duties and charges having equivalent effect on imports and exports between Member

people, goods, services and capital move freely, more as though they are within a state than moving between states. The principle of non-discrimination on the basis of nationality is at the heart of the four freedoms, requiring states to treat goods, persons, services and capital from other Member States like their domestic equivalents.[410] It creates a model which erases the differences in the treatment between 'domestic and imported goods, and national and migrant persons, services and capital'.[411]

In addition, the Maastricht Treaty formally introduced the concept of EU citizenship, which goes beyond the economic activities of individuals either as employees or as providers of services.[412] The new concept emphasised that any national of a Member State is also an EU citizen enjoying a number of specific rights, including essentially the right to move and reside freely throughout the Union.[413] Since its formal inception, the concept of EU citizenship has developed to cover

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States, and included the adoption of common customs tariffs in their relations with third states – Article 9(1) EEC Treaty (later Article 23(1) EC Treaty and current Article 28(1) TFEU). Despite the relatively successful establishment of the customs union, the common market project had barely been accomplished by the end of the twelve year transitional period in accordance with Article 8 of the EEC Treaty – *see* Jacques Pelkmans, 'Economic Concept and Meaning of the Internal Market' in Jacques Pelkmans, Dominik Hanf and Michele Chang (eds), *The EU Internal Market in Comparative Perspective: Economic, Political and Legal Analyses* (P.I.E. Peter Lang, Brussels 2008) 29–76, 29. For a comprehensive analysis of the process *see* Laurence W Gormley, 'The Internal Market: History and Evolution' in Niamh Nic Shuibhne (ed.), *Regulating the Internal Market* (Edward Elgar, Cheltenham/Northampton 2006) 14–28. Finally, the internal market was formally launched on 1 January 1993, once the majority of the envisaged measures had been achieved. Nevertheless, even at the current stage of integration, the internal market cannot be considered complete. As Alan Butt Philip and Martin Porter, *Business, Border Controls and the Single European Market* (Royal Institute of International Affairs, London 1995) 1, noted at a time after the 'accomplishment' of the market, 'the struggle to establish and to maintain the single market is likely to continue indefinitely'. Indeed, as a dynamic process, the internal market is in a constant need of further development and improvement and might thus never be completely accomplished. In the understanding of the European Commission, the establishment of the internal market is an ongoing process which requires continuous efforts, vigilance and updating. Therefore, the internal market is regularly adjusted to the new needs and challenges of the integration process: Rita de la Feria, *European Union Value Added Tax System and the Internal Market* (IBFD, Amsterdam 2009) 35.

410) Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (4th edn OUP, Oxford 2013) 17.

411) ibid.

412) At the Treaty level, the EU citizenship is regulated separately from the internal market, being primarily confined to articles 20–25 TFEU. For a detailed analysis of the relationship between EU citizenship and the internal market *see* Dimitry Kochenov, '*Ius Tractum* of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights' (2009) 15(2) CJEL 169–237.

413) Article 20 TFEU (former Article 17 TEC) stipulates:

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

many important aspects of citizens' lives, slowly corroding the national sovereignty of states.[414] As summarised by Kochenov:

> [a]nalysis of the law of the Member States demonstrates that it is already possible to decipher a trend in the accommodation of the Member States' nationalities to the new reality, which is likely to have far-reaching consequences for the very essence of the concept of nationality itself, as well as, potentially, having the ability to affect the core relationship between statehood, sovereignty and nationality through a profound reinterpretation of the notion of the "people" of each Member State.[415]

Since rights granted by the EU law are supranational in nature, 'citizenship can no longer be confined within the framework of national–statist communities'.[416] Put differently, citizenship protects the rights of Member State nationals which are not granted by their states but by the Union itself, transcending national jurisdictions and state borders.[417] Citizenship of the Union is intended to be 'the fundamental status of nationals of the Member States'.[418] It offers its citizens a range of opportunities which may not be offered on national level, including the 'possibility of choosing where to live their lives, which ultimately amounts to choosing friends, foes, and the law, by voting with their feet'[419] and enables them 'to live their lives as

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2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
(a) the right to move and reside freely within the territory of the Member States;
(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.
These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

414) *See* in particular Jürgen Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe' in Ronald Beiner (ed.), *Theorizing Citizenship* (State University of NY Press, Albany 1995) 255−282. *See Davies* (n 234).

415) Dimitry Kochenov, 'Member State Nationalities and the Internal Market: Illusions and Reality' in Niamh Nic Shuibhne and Laurence W Gormley (eds) *From Single Market to Economic Union: Essays in Memory of John A Usher* (OUP, Oxford 2012) 241–263.

416) Theodora Kostakopoulou, 'Nested "Old" and "New" Citizenship in the European Union: Bringing out the Complexity' (1999) 5 CJEL 389−413, 391.

417) *See* in this context the analysis of *Davies* (n 234).

418) Case C–135/08 *Janko Rottman v. Freistaat Bayern* (decision of 2 March 2010) para. 43; *Grzelczyk* (n 397) para. 31; *Baumbast* (n 398) para. 82.

419) Dimitry Kochenov, 'The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon' (2013) 62(1) ICLQ 97–136, 130.

they, as opposed to a State where they were born and of which they are nationals, see fit, from work to marriage, from healthcare to education'.[420]

Affecting all citizens, rather than a limited group, the right to enter and stay in another Member State 'is at the core of what the essential legal essence of the citizenship status is now about'.[421] Enabling longer residence periods and better integration in the host Member States, expulsion of EU citizens is rendered possible only under 'exceptional circumstances'.[422] Even then, the deportation of EU citizens within the almost borderless Union, although still practiced by the Member States,[423] becomes largely irrational, if not absolutely aimless and in probable contravention of the substance of EU citizenship.[424]

Furthermore, the Schengen acquis has been incorporated in EU law. The Schengen cooperation provided for the abolition of border checks between the participating states and the creation of a single external border for the Schengen area, for which common immigration procedures apply.[425] Regular passport controls are no longer maintained, while travelling from one Schengen state to another is handled as a domestic trip.[426] The lack of controls at the internal borders has been substituted by the transfer and reinforcement of these controls at the 'external borders', which

420) ibid (footnotes omitted). In respect to the lack of duties resulting from the EU citizenship *see* Dimitry Kochenov, 'EU Citizenship Without Duties' (2014) 20(4) ELJ 482–498.

421) Dimitry Kochenov and Benedikt Pirker, 'Deporting the Citizens Within the European Union: A Counterintuitive Trend' (2013) 19(2) CJEL 341–362, 346.

422) *See* in particular Recitals 22–24 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77 (*Directive 2004/38/EC*). In respect to the 'integration' condition and its imprecise meaning, *see* Dimitry Kochenov, '*Mevrouw de Jong Gaat Eten*: EU Citizenship and the Culture of Prejudice' EUI Working Papers RSCAS 2011/06.

423) *See e.g.* Case C–348/09 *P.I. v. Oberbürgermeisterin der Stadt Remscheid* (decision of 22 May 2012). For a critical approach to that judgement, *see Kochenov and Pirker* (n 421). *See* also in general Niamh Nic Shuibhne, 'Derogating from the Free Movement of Persons: When Can EU Citizens Be Deported?' (2006) 8 Cambridge YB E. LS 187–227.

424) *Kochenov and Pirker*, ibid 357.

425) The core provision is Article 77(1) TFEU, providing that there should be no border controls at internal borders, and requiring efficient ones at external borders. The system on border checks is regulated in detail by the Schengen Borders Code Regulation (EC) No 562/2006 of the European Parliament and of the European Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L 105/1 (as amended).

426) In accordance with Article 23 of the Schengen Borders Code, a Member State can reintroduce border control at its internal borders for only a limited period and only in exceptional cases, *i.e.* where there is a serious threat to public policy or internal security. The procedures for reintroducing border controls and the duties of the Member State in this respect are regulated under Articles 24–31 of the Schengen Borders Code.

are often seen as being designed to protect the almost borderless Union, while building up a 'defensive wall' towards third states.[427]

The Schengen project introduced a different conceptualization of the borders of respective participating states with these 'internal' and the 'external' borders.[428] The 'internal' borders were a precondition for the existence of 'external' borders, which in turn, delimitated a new area, comprising the territory of all Schengen states.[429] However, the question of the internal and external borders is more complex than it may at first appear. This is primarily because the different goals of the internal market and of the Schengen initiative, which also define different territories.[430] For instance, the territory of the customs union on which the internal market is based does not coincide with the Schengen territory, as the UK and Ireland do not participate in Shengen and Denmark is conferred a special position.[431] In addition, the Schengen

427) *E.g.* Tassilo Herrschel, *Borders in Post-Socialist Europe: Territory, Scale, Society* (Ashgate, Farnham 2011) 50. *See* along similar lines George Petrakos and Lefteris Topaloglou, 'Economic Geography and European Integration: The Effects on the EU's External Border Regions' (2008) 3(3/4) Int'l J. Public Policy 146–162; Lefteris Topaloglou et al., 'A Border Regions Typology in the Enlarged European Union' (2005) 20(2) J. Borderlands Studies 67–90; Andrew Geddes, *Immigration and European Integration: Towards Fortress Europe* (2nd edn Manchester UP, Manchester 2008).

428) At the Treaty level, the term 'internal borders' has been used for 'ensuring the absence of any controls on persons, whatever their nationality' in accordance with Article 77(1)(a) TFEU, when such borders are being crossed. The term 'external borders' is used in the context of 'carrying out checks on persons and efficient monitoring of the crossing of external borders', in accordance with Article 77(1)(b) TFEU, and for 'the gradual introduction of an integrated management system for external borders' in accordance with Article 77(1)(c) TFEU. The two terms are more precisely defined in Article 2(1) of the *Schengen Borders Code*, providing that 'internal borders' mean for the purposes of the respective Regulation: 'a) the common land borders, including river and lake borders, of the Member States; b) the airports of the Member States for internal flights; c) sea, river and lake ports of the Member States for regular ferry connections'. In the same context, Article 2(2) provides for the 'external borders' referring to 'Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders'.

429) Ruben Zaiotti, *Cultures of Border Control: Schengen and the Evolution of European Frontiers* (Chicago UP, Chicago 2011) 71–72.

430) *See* Michael Foucher, 'The geopolitics of European Frontiers' in Malcolm Anderson and Eberhard Bort (eds), *The Frontiers of Europe* (Pinter, London 1998) 235–250, 236.

431) In accordance with Article 3 of the Protocol No. 19 on the Schengen Acquis Integrated into the Framework of the European Union attached to the founding Treaties, '[t]he participation of Denmark in the adoption of measures constituting a development of the Schengen *acquis*, as well as the implementation of these measures and their application to Denmark, shall be governed by the relevant provisions of the Protocol on the position of Denmark'. Moreover, the customs union does not entirely map to the territory of the Union. While there are also minor exceptions in this respect for the European part of the territories of the Member States, the exclusion of overseas countries and territories from the territorial scope of the customs union is more striking. For extensive analysis on the number of different types of territories within the EU and also regarding the notion of EU territory *see* Dimitry Kochenov, 'The EU and the Overseas: Outermost Regions, Overseas Countries and Territories Associated with the Union, and Territories' in Dimitry

area includes the EEA states and Switzerland as well as (de facto) a number of European micro states,[432] while excluding Bulgaria, Croatia, Cyprus,[433] Romania and the non-European territories of the Schengen states.[434] Furthermore, the frontiers and borders of the internal market and of the Schengen area are not static, but flexible and in a constant state of change. The enlargements of both the Union and the Schengen area call for regular revision of frontiers and borders and often transformation of some of the pre-enlargement 'external' borders into 'internal' frontiers.[435]

The new border framework entails a situation where Member States no longer have any exclusive control over the definition and position of borders.[436] This can be probably best illustrated in the context of the admission of third country nationals at the external borders of the Schengen territory, which has become the shared responsibility of partners rather than the exclusive responsibility of individual Member States.[437] Thus, to borrow an example from Guild,[438] Article 109(4) and (5) of the Dutch Aliens Act provides that the border of the Netherlands stretches to the external frontiers of all other Schengen states for the purpose of the admission of aliens[439] and that the 'national security' of the Netherlands shall be construed as including the national security of other Schengen states.[440] To that end, the uniform regime for the EU external border and the abolition of the internal borders has become an important aspect in the creation of mutual trust and solidarity between Member States.[441] This is in particular the case with the border checks performed by

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Kochenov (ed.), *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Kluwer Law, The Hague 2011) 3–68, and in particular, 3–15.

432) These are: Andorra, Liechtenstein, Monaco, San Marino and the Vatican City.

433) On the definition of the borders of Cyprus *see* Nikos Skoutaris, 'The Application of the Acquis Communautaire in the Areas not under the Effective Control of the Republic of Cyprus: The Green Line Regulation' (2008) 45 CML Rev 727–755.

434) In accordance with Article 138 of the 'Convention implementing the Schengen Agreement of 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders' (signed 19 June 1990) (CISA) [2000] OJ L 239/19, its provisions only apply to the European territories of the French Republic and of the Kingdom of Netherlands.

435) *E.g.* Gerard Delanty and Chris Rumford, *Rethinking Europe: Social Theory and the Implications of Europeanization* (Routledge, Abingdon/NY 2005) 31–35.

436) Elspeth Guild, 'Moving the Borders of Europe', Inaugural lecture, Publicaties van de Faculteit der Rechtsgeleerdheid nr. 14 (Katholieke Universiteit, Nijmegen 2001) 2–3.

437) Article 67(2) TFEU.

438) *Guild* (n 436) 2.

439) Article 109(4) of the Aliens Act (2000) (*Aliens Act*), available in the English language at: <http://www.legislationline.org/documents/id/4680> last accessed 14 October 2014.

440) Article 109(5) of the *Aliens Act*, ibid.

441) In that sense, as noted by *Kochenov and Pirker* (n 421) 344, the deportation of EU citizens from one Member State to another does not make much sense – 'since the Union is not safer if a criminal is moved from one Member State to another'.

peripheral states as well as with the sharing of the financial and operational burden between all states.[442]

The strengthened cooperation between Member States in abolishing their borders did not presuppose the settlement of their long-standing border disputes. Most of these remain, pending a solution, much as they were before the integration of the Member States in question. What has changed, however, is their dynamics. The democratic framework of interstate relations largely overshadowed the territorial tensions from the past, making the existing disputes between the Member States largely irrelevant.

2.3 Border disputes between EU Member States

When asked to list the EU Member States where the definition of borders is in dispute, the UK Secretary of State for Foreign and Commonwealth Affairs, Denis MacShane enumerated the following: the disputed border between Ireland and the UK in Lough Foyle and Carlingford Lough, where the delimitation of the territorial water boundaries have not been fully agreed between the two states;[443] the dispute between Portugal and Spain regarding the status of Olivenza, where Portugal does not recognize Spanish sovereignty of Olivenza's territory (including the municipality of Táliga) due to a different interpretation of the 1815 Congress of Vienna and the Treaty of Badajoz of 8 August 1801;[444] and the dispute between Spain and the UK over the status of the isthmus between Gibraltar and Spain emanating from the long-lasting dispute between the two states concerning the status of Gibraltar itself.[445]

442) Article 80 TFEU provides that 'the politics of the Union in the field of borders management, asylum and immigration (Articles 77 to 79) shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implication, between the member states such measures are necessary'.

443) For better insight into the history of the Irish-UK dispute and the delimitation of the borders *see* Clive R Symmons, 'The Maritime Border Areas of Ireland, North and South: An Assessment of Present Jurisdictional Ambiguities and International Precedents Relating to Delimitation of "Border Bays"' (2009) 24 Int'l J. Marine and Coastal L., 457–500.

444) While Article 3 (Article III) of the Treaty of Badajoz recognises the Spanish conquest of the fortress 'of Olivenza, with its territories and inhabitants from the Guadiana', Article 115 (Article CV) of the General Treaty signed in the Congress at Vienna (signed 9 June 1815) available in Arthur Aspinall and Ernest Anthony Smith (eds), *English Historical Documents 1783–1832* (Routledge, London 1996) 938–949, recognises the injustice to Portugal of the Badajoz Treaty and provides for restitution and retrocession of the territories by amicable means. With respect to the former Treaty, Portugal claims that it was revoked under its own terms with the invasion of Portugal by Spain in the Peninsular War, while Spain claims that the Treaty of Badajoz was never revoked. With respect to the latter Treaty, Spain considers Article 105 non-binding, while Portugal bases its case on it. The annexation of Olivenza to Spain and the years after are well presented in Shirley J Black 'Olivenza: An Iberian "Alsace/Lorraine"' (1979) 35(4) The Americas 527–537.

445) Other disputed borders enumerated by the Secretary of State included the borders between EU Member States and other states/prospective Member States (Greece and Turkey: eastern Aegean; Slovenia and Croatia: Piran Bay/Dragonja River/Sveta Gera/Tvrdin Vrh; Spain and Morocco: Ceuta, Melilla) and three border disputes between prospective EU Member States and other states

With respect to the latter dispute, Spain claims back the territory of Gibraltar under the conditions of the Treaty of Utrecht of 1713 and the isthmus, which according to Spanish allegations is illegally occupied, was not included in the Treaty of Utrecht.[446] Some other territorial or border disputes involving Member States can also be added to this list. These arise, for instance, out of the different views held by Austria, Germany and Switzerland over the boundaries between the three states in Lake Constance, in the absence of a binding agreement on the boundaries applicable to a large part of the lake.[447] Another involves the state border between Germany and the Netherlands running through the Ems estuary and Dollart Bay, for which the two bordering states 'agreed to disagree' in the Ems-Dollard Treaty of 1960.[448] The two neighbouring states have only recently reached agreement on the disputed questions regarding the management of the Ems-Dollard estuary, which has been approved by the Netherlands and is awaiting approval from Germany, which would lead to the opening of negotiations on drafting a treaty.[449] Denmark and Poland have also not yet agreed on the delimitation of the maritime border between the two states,[450] and neither have Latvia and Lithuania.[451] In addition, there is a dispute involving Ireland and the UK, but also Iceland and Denmark (for the Faroe Islands), which relates to

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(Macedonia and (then) Serbia and Montenegro: Kosovo – the northwest Shara Mountain Region and Kudra Fura elevation; Romania and Ukraine: Serpent's Island; Turkey and Armenia). The discussion is available at: <http://www.publications.parliament.uk/pa/cm200405/cmhansrd/vo050113/text/50113w17.htm> last accessed 14 October 2014.

446) The history of Gibraltar and the dispute over its sovereignty, including the arguments of the states involved are extensively discussed in Keith Azopardi, 'Sovereignty and the Stateless Nation: Gibraltar in Modern Legal Context' (Hart Publishing, Oxford 2009). *See* also in this respect Peter Gold, *Gibraltar: British or Spanish?* (Routledge, NY 2005). On the arguments of Spain and the UK in the course of the dispute and also regarding the position of Gibraltar *see* Surya Prakash Sharma, *Territorial Acquisition, Disputes, and International Law* (Kluwer Law, The Hague 1997) 311–312.

447) On the facts of the dispute *see* Jochen Abraham Frowein, 'Lake Constance' (1990) 12 EPIL 216–219.

448) Treaty between the Kingdom of Netherlands and the Federal Republic of Germany concerning Agreements for Cooperation in the Ems Estuary (signed 8 April 1960, entered into force 1 August 1963) The Hague, 509 UNTS 64. More facts about the dispute can be found in Rüdiger Wolfrum and Johann-Christoph Woltag, 'Ems-Dollard', <http://www.mpepil.com> last accessed 14 October 2014. On some of the actions taken in the course of resolving the dispute *see* Tanja J Gerard, 'A New Treaty Regime for the Ems-Dollard Region' (1987) 2(3) Int'l J. Estuarine and Coastal L. 123–143.

449) The information is published on the official website of the Government of the Netherlands <http://www. government.nl/news/2013/08/16/broad-agreement-on-ems-dollard-estuary.html> last accessed 14 October 2014.

450) For more details, *see*, for instance, *Kim* (n 31) 115. *See* also Erik Franckx, 'Region X: Baltic Sea Boundaries' in Jonathan I Charney et al. (eds), *International Maritime Boundaries* vol 5 (Martinus Nijhof, Leiden 2005) 3507–3535, 3508.

451) *See Franckx*, ibid 3528. *See* also, in general, Igor V Karaman, *Dispute Resolution in the Law of the Sea* (Martinus Nijhof, Leiden 2012).

the remote islet of Rockall, to which all four states lay claim.[452] Moreover, Iceland, Ireland and the UK dispute that the Faroe Islands' continental shelf extends beyond 200 nautical miles, as claimed by Denmark.[453] Even more issues have been suggested by some scholars as capable of occasioning disputes over the international borders of EU Member States. These have been described, however, as 'internal matters of the member states'[454] rather than situations involving disputes between two or more states.

While the supranational cooperation underpinned changes in interstate relations, the Member States involved have shown little appetite to confront each other to resolve their territorial or border disputes. Territorial and border disputes have lost much of their relevance within the Union in the sense that, although lasting for decades and sometimes even for centuries, none are regarded today as having the potential of escalating into serious conflicts.[455] In fact, the Union has been looked upon as an 'antidote' to the abuse of borders in Europe, including physical or other forms of aggression of one state towards others and as an entity which will finally

452) On disputes and the definitions of islands, including the Rockall case, *see* Clieve Schofield, 'The Trouble with Islands: The Definition and Role of Islands and Rocks in Maritime Boundary Delimitation' in Seoung-Yong Hong and Jon M Van Dyke (eds), *Maritime Boundary Disputes, Settlement Process, and the Law of the Sea* (Martinus Nijhoff, Leiden 2009) 19–39.

453) Commission on the Limits of the Continental Shelf (CLCS) Outer Limits of the Continental Shelf Beyond 200 Nautical Miles from the Baselines: Submissions to the Commission: Submission to the Kingdom of Denmark, <http://www.un.org/Depts/los/clcs_new/submissions_files/submission_dnk_54_2010.htm> last accessed 14 October 2014.

454) Eberhard Bort, 'Regionalism and Subregionalism in Europe' in Heather N Nicol and Ian Townsend-Gault (eds), *Holding the Line: Borders in a Global World* (British Columbia UP, Vancouver 2005) 61−89, 65. The author lists several 'border-related conflicts' between EU Member States including: The unsolved dispute between Spain and the UK over the status of Gibraltar; The Euzkadi Ta Askatasuna (ETA) campaign for independence of Euzkadi, formed in the framework of a reunified Basque state and encompassing Basques from both sides of the international frontier between Spain and France; or persistent aspirations to unite Ireland even after the Belfast Agreement (or Good Friday Agreement) of 1998; militant groups advocating Corsican independence; the Scottish National Party's (SNP) campaign for Scotland's independence; the movement for the independence of Padania led by Umberto Bossi; and the campaigns of the Scotish National Party for Scotland's independence including the referendum on the parting from the UK. While capable of disrupting the international borders between EU Member States, the 'border conflicts' named by the author cannot be qualified as disputes between EU Member States as they do not involve a dispute between two or more states, and the author recognises that most of these cases are viewed as internal Member State matters. The separatist movement for Catalan independence can also fit such classification of the author. For detailed explanation on Catalonia's fight for independence *see* Liz Castro (ed.), *What's Up with Catalonia?: The Causes Which Impel Them to the Separation* (Catalonia Press, Ashfield, MA 2013).

455) Malcolm Anderson, 'Border Regimes and Security in an Enlarged European Community: Implications of the Entry into Force of the Amsterdam Treaty' EUI Working Paper RSCAC 2000/8. For detailed analysis of territorial disputes as major causes for armed conflict *see* John Vazquez and Marie T Henehan, 'Territorial Disputes and the Probability of War 1816−1992' (2001) 38(2) J. Peace Res., 123−138. Also note that while the terms 'conflict' and 'dispute' are often used

bring an end to Member State nationalism within a federal political framework.[456] Viewed through the prism of a conflict transformation theory, the new situation is seen as 'a change in the goals, structure, parties or context of the conflict, which removes or changes the contradiction or incompatibility at its heart'.[457] Put differently, while the integration process did not provide for the settlement of existing border disputes, it did, in general, draw Member States together in eliminating or

interchangeably, as in this book, many scholars in the field of conflict studies draw distinctions between them. For instance, although recognising the fact that disputes may be the main cause of conflicts between states, Ademola Abass, *Complete International Law* (OUP, Oxford 2012) 434−435, concludes that disputes involve 'a specific matter of law, fact, or interest', in contrast to conflicts which denote 'a general state of hostility'. The author underlines that the resolution of the dispute which caused the conflict does not always promise an end to the general unfriendliness or the conflict between states. The problem with this classification is that disputes between states, and particularly territorial and border disputes, although involving 'a specific matter of law, fact, or interest', are often surrounded with a dose of hostility which might also persist after the resolution of the dispute. To this end, the distinction between disputes and conflicts, and in particular non-violent conflicts which aim at resolving disputes creatively – *i.e.* with a win-win solution –in contrast to violent conflicts – *i.e.* armed conflicts or wars characterised by differences between states – is difficult to make: *see* Jennifer Turpin and Lester R Kurtz, 'Untangling the Web of Violence' in Manfred B Steger and Nancy S Lind (eds), *Violence and Its Alternatives: An Interdisciplinary Reader* (St. Marti's Press, NY 1999) 334−350, 342. Another distinction between disputes and conflicts is suggested by John W Burton, *Conflict: Resolution and Prevention* (St. Martin's Press, NY 1990) 5, for whom disputes are short-term disagreements which concern 'negotiable interests', while 'conflicts' last for a longer period and are more serious than disputes, involving interests which are not negotiable. *See* also John W Burton, 'Conflict Resolution as a Political Philosophy' in Dennis JD Sandole and Hugo van der Merwe (eds), *Conflict Resolution Theory and Practice: Integration and Application* (Manchester UP, Manchester/NY 1993) 55−94, 56, suggesting that negotiable problems or disputes are subjected to judicial and arbitral processes, while conflicts require analytical problem solving. Therefore, it is this author's view that the confusion over the two terms could prevent tackling a problem appropriately. While certainly a useful definition, it remains unclear how to classify long unresolved issues between states which also involve interests which regarded as 'negotiable' by the parties involved.

456) *Weiler* (n 214) 341. *See* along similar lines Hugh Miall, *Emergent Conflict and Peaceful* Change (Palgrave Macmillan, NY 2007) 14. Similarly, Raimo Väyrynen, 'To Settle or to Transform? Perspectives on the Resolution of National and International Conflicts' in Raimo Väyrynen (ed.), *New Directions in Conflict Theory: Conflict Resolution and Conflict Transformation* (SAGE, London 1991) 1–25, who follows the transformation of the Northern Ireland conflict in the context of the EU environment to establish the positive changes. Other scholars, *e.g.* Brigid Laffan, 'Ireland, Britain, Northern Ireland and the European Dimension' (2003) IBIS Working Paper No. 27. *See* also Dennis Kennedy, 'The European Union and the Northern Ireland Question' in Brian Barton and Patrick J Roche (eds), *The Northern Ireland Question: Perspectives and Policies* (Avebury, Aldershot 1994) 166–88, and Etain Tannam, 'The European Union and Conflict Resolution: Northern Ireland, Cyprus and Bilateral Cooperation' (2012) 47(1) Government and Opposition, 49−73, draw similar conclusions, regarding the EU as an actor which either directly or indirectly affects the circumstances of Member States.

457) *Miall*, ibid 4, although focused on the transformation of violent conflicts, notes that things relevant to the conflict experience change due to 'the social, economic and political dynamics of societies',

minimizing the negative effects of borders. Positive relations beyond the unresolved territorial and border issues result from the changed circumstances, which include the reconceptualization of borders and the prevalence of the common interest over individual national preferences. Should such disputes, however, be brought in connection with EU law, as threatening to undermine the achievements of the integration process, it would be for the EU dispute settlement mechanism to safeguard the compliance of the Member States involved.[458]

3. Resolution of disputes between EU Member States

The mode of dispute resolution at the EU level depends largely on whether the issue falls within or outside the scope of EU law. Disputes which fall within the scope of EU law are dealt under Article 258 TFEU and Article 259 TFEU. The ECJ has

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the static framework of conflicts 'belies social reality' and therefore their analysis must be dynamic. The author distinguishes between four different types of change that could lead to transformation of conflicts: actor transformation (change in the existing parties or appearance of new ones); issue transformation (change in the priority of interests and more particularly '[reducing] the relative importance of issues on which antagonism exists and [emphasizing] the issues on which commonality prevails'); rule transformation (change in the norms in interstate relations); and structural transformation (change in the relationship between actors). Two additional types of changes have been added by other scholars: Oliver Ramsbotham, Tom Voodhouse and Hugh Miall, *Contemporary Conflict Resolution* (3rd edn Polity Press, Cambridge/Malden 2011) 175, consider changes in the social, regional or international context which surround a conflict as important, and Thomas Diez, Stephan Stetter and Mathias Albert (eds), 'Introduction' in *The European Union and Border Conflicts: The Power of Integration and Association* (CUP, Cambridge 2008) 1−12, 7, add changes to the communication that constructs the conflict. Cathal McCall, 'Postmodern Europe and the Resources of Communal Identities in Northern Ireland' (1998) 33 Eur. J. Political Research 389−411, 392, argues that '[b]y challenging the power of the nation-state centre, initiating supranational citizenship and encouraging a multilevel system of government, the EU polity is beginning to display a reconstructivist impulse'. In the context of the Northern Ireland conflict, the author notes that 'political representatives are beginning to perceive change in the European state system', observing also that '[c]onsequently, the EU may well be a potential catalyst for the renewed mobilization of the territorial, economic and cultural resources of communal identities in Northern Ireland'.

458) Thus, Case C–145/04 *Kingdom of Spain v. United Kingdom of Great Britain and Northern Ireland* [2006] ECR I–7917 (*Spain v. UK*), has been largely connected, at least indirectly, with the unsolved dispute between the two states over the status of Gibraltar. Moreover, this could apply to the more recent tensions over Gibraltar and the threats by the Spanish government to impose a fee on vehicles crossing its borders, either when entering or leaving Gibraltar, in response to the construction of an artificial reef designed to prevent Spanish fishing over the Rock. The suggested entry tax could impede the free movement rules under the EU law – as explained by European Commission spokesman Olivier Bailly, 'any tax or fees imposed at the border of a member state will be illegal under EU law. Illegal. Not in line with EU law' (quoted in Brian Reyes and the news agencies, 'European Commission says border toll 'would be illegal'', *Gibraltar Chronicle* (20 August 2013) <http://www.chronicle.gi/headlines_ details.php?id=30500> last accessed 14 October 2014.

exclusive jurisdiction to settle disputes between Member States related to the interpretation and application of the Treaties in accordance with Article 344 TFEU.[459] Within this context, Member States may not use traditional measures under international law to address a perceived failure by another Member State to fulfil its obligations or take unilateral measures to counteract breaches of EU law by another Member State.[460]

In contrast, bilateral disputes which fall outside the scope of the EU law remain within the competence of the Member States and are in principle resolved under the rules of international law.[461] However, Article 273 TFEU provides the unique possibility of 'borrowing' the ECJ to settle disputes between the Member States falling outside the scope of EU law which are merely connected to the 'subject matter' of the Treaties. Unlike where the issue falls within the scope of EU law and is as such covered by the exclusive competence of the Court, Article 273 TFEU provides for the optional jurisdiction of the Court.

3.1 Bilateral disputes within the scope of EU law

The Commission plays an important role in procedures where a Member State has failed to fulfil its obligations under EU law.[462] As an institution defending the common EU interest, it endeavours to improve the chances 'that effective action will be taken than if the decision depended exclusively on Member State's estimation as to what would best serve their particular interests'.[463] Moreover, having a central role in the commencement of infringement procedures, the Commission contributes significantly to the preservation of friendly relations between Member States by preventing their direct confrontation. Two treaty provisions are important in this respect – Article 258 TFEU and Article 259 TFEU.

Article 258 TFEU is a standard infringement procedure which empowers the Commission to act against a Member State that fails to meet its obligations under the Treaties.[464] In the great majority of cases, it is the Commission who brings a Member

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459) *See* (n 223).

460) Joined Cases 90 and 91/63 *Commission of the European Economic Communities v. Grand Duchy of Luxemburg and the Kingdom of Belgium* [1964] ECR 625, 1323; Case 232/78 *Commission of the European Communities v. French Republic* [1979] ECR 2729 (*Commission v. France*) para. 9; Case C–5/94 *The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd.* [1996] ECR I–2553, para. 9; Case C–11/95 *Commission of the European Communities v. Kingdom of Belgium* [1996] ECR I–4115, paras 37–39.

461) Mathias Roth, 'Bilateral Disputes Between EU Member States and Russia' (2009) CEPS Working Document No. 319 <http://aei.pitt.edu/11434/1/1900.pdf > last accessed 14 October 2014.

462) Robin White and Alan Dashwood, 'Enforcement Actions under Articles 169 and 170 EEC' (1989) 14 EL Rev 388−413, 388.

463) ibid.

464) The Commission, however, enjoys discretion in its right to commence infringement procedures

State before the ECJ due to an alleged infringement of EU law. Article 259 TFEU is only exceptionally used.[465] This provision allows any Member State to initiate an infringement procedure against any other Member State which it considers to be in breach of its obligations under EU law. While Article 259 TFEU apparently provides for direct confrontation between Member States, the procedure requires the Commission's failure to act. A Member State alleging an infringement must first bring the matter to the Commission's attention, which will then deliver a reasoned opinion and can decide to bring the allegedly infringing state before the ECJ.[466] The procedural basis in such cases is Article 258 TFEU rather than Article 259 TFEU. It is only in the cases where the Commission does not react in accordance with Article 259, i.e. where it does not deliver a reasoned opinion within the required time[467] or delivers such an opinion but decides not to take further action where that would be appropriate according to its view, [468] that a Member State can bring another Member State before the ECJ. This could presumably occur for issues connected to the sensitive territorial or border disputes between Member States. An example is the dispute between Spain and the UK, brought before the ECJ under Article 259 TFEU (then Article 227 EC Treaty) and touching upon the interminable dispute between the two over the status of Gibraltar.[469] Spain claimed that the UK had infringed EU law with the arrangements it made to extend voting rights to Gibraltarian residents in European Parliament

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pursuant to that provision. If it finds that a Member State has not applied EU law and has accordingly failed to meet its obligations, it will not bring the Member State before the Court immediately. Proceedings under Article 258 TFEU comprise two stages: administrative and judicial. Under the first stage, the Commission will make various attempts to negotiate agreement with the Member State concerned informally and usually by exchange of correspondence, documents, data etc. If no agreement is achieved in the pre-infringement stage and the Commission decides to initiate an infringement procedure, it will send a formal notice to the Member State. The Member State is then given the opportunity to submit its observations. After the Member State's submission, the Commission decides whether to deliver a reasoned opinion explaining why it considers that the Member State has failed to fulfil its Treaty obligations. Once the Member State has replied to the Commission's reasoned opinion or the lack thereof, the Commission will refer the matter to the ECJ and thus start the judicial procedure. On proceedings under Article 258 TFEU, *see* in greater detail Stine Andersen, *The Enforcement of EU Law: The Role of the European Commission* (OUP, Oxford 2012) 44–58.

465) Only four actions brought under Article 259 TFEU have resulted in a final decision: Case 141/78 *French Republic v. United Kingdom of Great Britain and Northern Ireland* [1979] ECR 2923 (*France v. UK*); Case C–388/95 *Kingdom of Belgium v. Kingdom of Spain* [2000] ECR I–2923 (*Belgium v. Spain*); *Spain v. UK* (n 458); Case C–364/10 *Hungary v. Slovak Republic* (decision of 16 October 2012).

466) This was for instance the case in *Commission v. France* (n 460), which started as an action by Ireland against France and also in Case C–1/00 *Commission of the European Communities v. French Republic*, which started as an action by the UK against France [2001] ECR I–9989.

467) *Spain v. UK* (n 458); *Belgium v. Spain* (n 465).

468) *France v. UK* (n 465). Case C–364/10 *Hungary v. Slovak Republic* (n 465).

469) *See* III.3.2 bellow.

elections.[470] It first filed a complaint with the Commission in accordance to Article 259 TFEU.[471] However, the Commission distanced itself from the issue. In particular, it stated that 'given the sensitivity of the underlying bilateral issue', it 'refrains from adopting a reasoned opinion […] and invites the parties to find an amicable solution'.[472] On 18 March 2004, the Spanish side brought the issue before of the Court, which decided against Spain, upholding the UK's position.[473]

The Commission will also not take a case over if the issue falls outside the scope of the EU law and is governed by the rules of international law. This reaction is in accordance with the competencies of the Commission as a 'guardian of the Treaties'. In the more recent case of Hungary v. Slovak Republic,[474] the ECJ reconfirmed that disputes between Member States falling outside the scope of the EU law are decided under the rules of international law. This case provides an example of where neighbouring Member States' history of antagonism can provoke a dispute which is then brought to the EU level. In particular, in connection to the free movement of persons, Hungary claimed that Slovakia infringed Article 21(1) TFEU and Directive 2004/38 on free movement of citizens,[475] by not allowing the Hungarian President to enter its territory.[476] The Commission did not take over the case, finding that the disputed issue concerning the free movement of Heads of States of a Member State was not covered by the Treaties and secondary law.[477] It pointed out that the free movement of persons covered by EU law (fundamental right of individuals) applies only to people as 'private' citizens and not to Heads of State of a Member State or non-EU country, who are governed by international law.[478] The Commission was also explicit that 'the institutions do not have the power to modify the international law

470) The UK arrangements - *see* in details *Spain v. UK* (n 458) paras 20−30, followed a judgment of the ECtHR in *Matthews v. United Kingdom*, App. No. 24833/94 (ECtHR, 18 February 1999). With respect to the Spanish claims and the UK's observations, *see Spain v. UK* (n 458) paras 37−58.

471) *Spain v. UK* (n 458) para 31.

472) *Spain v. UK* (n 458) para 32.

473) *Spain v. UK* (n 458) paras 59−97.

474) *Hungary v. Slovak Republic* (n 465).

475) *Directive 2004/38/EC* (n 422).

476) The purpose of the President's visit was to participate in a ceremony inaugurating a statue of Saint Stephen, the founder and first King of the Hungary. The visit was to take place on a sensitive date for Slovakia – the 41st anniversary of the invasion of Czechoslovakia by Warsaw Pact troops, which also included Hungarian troops – *see Hungary v. Slovak Republic* (n 465) paras 5 and 6. After a few diplomatic exchanges between the embassies of the two Member States, the Slovak side informed the Hungarian Ambassador in Slovakia by a *note verbale* that the Hungarian President may not enter Slovak territory. Slovakia relied on Directive 2004/38 and on the national legal provisions to justify this prohibition. The Hungarian President refrained from entering Slovak territory after being informed about the note at the border – *see Hungary v. Slovak Republic* (n 465) paras 7 and 8.

477) Reasoned opinion – Article 259 TFEU – Hungary/Slovakia, Press Release IP/10/827 of 24 June 2010 (*Reasoned opinion*).

478) *Reasoned opinion* (n 477).

governing bilateral diplomatic relations between Member States'.[479] Consequently, Hungary brought the dispute before the ECJ, which adopted a similar line of reasoning to that expressed by the Commission. While confirming the rights of the Hungarian President as an EU citizen, the ECJ also clarified that 'EU law must be interpreted in the light of the relevant rules of international law, since international law is part of the European Union legal order and is binding on the institutions'.[480] The Court then went on to establish that on the particular date that the Hungarian President wanted to visit Slovakia, he was acting in the capacity of Head of a State and as such was distinguished from 'all other Union citizens, with the result that that person's access to the territory of another Member State is not governed by the same conditions as those applicable to other citizens'.[481] The Court concluded that in such circumstances, the right to free movement conferred by Article 21 TFEU is justifiably limited by the rules of international law.[482] In particular, 'on the basis of customary rules of general international law and those of multilateral agreements, the Head of State enjoys a particular status in international relations which entails, inter alia, privileges and immunities'.[483] Moreover, the ECJ rejected as unfounded the Hungarian claims that Slovakia relied on Directive 2004/38 to pursue political aims contrary to the objectives of the EU law. In particular, the Hungarian side argued that 'if such conduct were to be considered compatible with EU law, there would be nothing to prevent the other Member States from 'settling' their bilateral disputes in the future by invoking EU law, something which would be contrary to the objectives of that law'.[484] The Court recognised that Slovakia was wrong to refer to Directive 2004/38 in its note verbale, but noted that this fact is not sufficient to prove abuse of rights by Slovakia.[485] It went on to establish that the objective and the subjective element, i.e. the achievement of the purpose of the EU rules and not merely their formal observance, and the intention to gain an advantage from EU law by creating conditions that achieved this artificially, both required to evidence an abusive practice, did not apply to Slovakia.[486]

Exceptions aside, the low number of judgments under Article 259 TFEU not

479) *Reasoned opinion* (n 477).
480) *Hungary v. Slovak Republic* (n 465) para. 44.
481) *Hungary v. Slovak Republic* (n 465) paras 45−50.
482) *Hungary v. Slovak Republic* (n 465) para. 51.
483) *Hungary v. Slovak Republic* (n 465) paras 46. The ECJ pointed in particular to the limitations which follow from the UN 'Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents' (adopted 14 December 1973, came into force 20 February 1977) UN Doc A/Res/3166. In accordance with Article 1 of that Convention, whenever '[a] Head of State […] is in a foreign State, (s/he) is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household'.
484) *Hungary v. Slovak Republic* (n 465) para. 54.
485) *Hungary v. Slovak Republic* (n 465) para. 56−57.
486) *Hungary v. Slovak Republic* (n 465) paras 58−60.

only suggests the efficiency of the Commission in its safeguarding role, but also the reduced opportunities for direct confrontations and unfriendly actions between Member States.

3.2 Bilateral disputes falling outside EU law

Bilateral disputes falling outside the scope of the EU law are governed by the rules of international law. However, Article 273 TFEU provides a seemingly unique possibility for the settlement of such disputes among Member States at the EU level. Before discussing the conditions under which a dispute can be brought under Article 273 TFEU, it should be noted that, despite having been available since the EEC Treaty, this provision has never been invoked before the ECJ or interpreted in the context of other EU law, and scholarly debate of any substance is also lacking.[487] In these circumstances, it is difficult to envisage the Court's approach in a potential dispute under Article 273 TFEU or even to define the scope of the provision with a sufficient degree of precision.

The provision reads: '[t]he Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties'.[488] However improbably it may sound, the text of Article 273 TFEU leads to an important conclusion: it can cover 'any dispute', without exception, which is related to the 'subject matter' of the Treaties and which is submitted under a 'special agreement' between the parties.

It is clear from the text that the provision concerns disputes which fall outside the scope of the EU law and are merely connected to the 'subject matter' of the Treaties. This is primarily because all disputes falling under the scope of the EU law are covered by the exclusive jurisdiction of the ECJ under Article 344 TFEU. Agreeing with Peers, Article 273 TFEU goes beyond the Treaties to include measures which do not form part of EU law but which are connected to the 'subject matter' of

487) Of the few discussions available, worthy of mention are Steve Peers's helpful comments in his written evidence to the House of Commons European Scrutiny Committee regarding the jurisdiction of the ECJ in Article 8 of the Treaty on Stability, Coordination and Governance (signed 2 March 2012) in discussion of the 'Treaty on Stability, Coordination and Governance: Impact on the Eurozone and the Rule of Law', 62nd Report of Session 2010–12, vol 1: Report, together with formal minutes, oral and written evidence, <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/1817/1817.pdf> last accessed 14 October 2014. *See* along similar lines, Marise Cremona in Anna Kocharov (ed.), 'Another Legal Monster: A Debate on the Legal Fiscal Treaty' EUI Working Papers LAW, 2012/09, 9–10. cf Henry G Schermers and Denis F Waelbroeck, *Judicial Protection in the European Union* (6th edn Kluwer Law, The Hague 2001) 643, who assume that if the relevant provision is to add anything new to Article 259 TFEU, it may be particularly important for subjects which affect EU law only partly.

488) Article 273 TFEU (emphasis added).

the Treaties.[489] Moreover, unlike Article 258 TFEU and Article 259 TFEU, Article 273 TFEU does not envisage any role for the Commission. The reference to the required 'special agreement between the parties' implies clearly that the provision is designed to provide an opportunity for Member States to submit disputes jointly.

It is therefore clear that Article 273 TFEU is intended to cover disputes between Member States governed in principle by the rules of international law and related to the 'subject matter' of the Treaties. What remains unclear, however, is the strength of the relationship with the 'subject matter' of the Treaties required. Article 273 TFEU does not offer any explanation as to the meaning of the phrase 'relate[d] to the subject matter of the Treaties', leaving uncertain the extent to which the jurisdiction of the ECJ can stretch. This question is even more important given the current advanced stage of integration, where is difficult to imagine a dispute between the Member States which is not in some way connected to the 'subject matter' of the Treaties. Another question that necessarily arises is connected to the law which would be applied in such cases. EU law alone would obviously not suffice, since disputes under Article 273 TFEU fall outside its scope and the ECJ can also not take over the role of international courts outside its competencies.[490]

Previous ECJ practice points to a few answers to these questions. Firstly, considering the Court's general practice in expanding its own jurisdiction,[491] we could expect it to develop a broad conception of the relationship to the 'subject matter' with the Treaties required. This would necessarily affect many different aspects emanating from territorial or border disputes between Member States which, if not falling under the EU law, as in the case of Spain v. UK, might in some way be related to the 'subject matter' of the Treaties. Such interpretation would mean further strengthening the EU dispute settlement mechanism not only to prevent infringements of EU law stemming from territorial or border disputes (via Article 258 TFEU and 259 TFEU), but also to prevent disputes which are merely related to the Treaties and only potentially capable of infringing EU law. Accordingly, Article 273 can serve as a preventive tool for potential infringements of EU law by any dispute between the Member States governed by the rules of international law.

While disputes falling outside the scope of EU law are governed by rules of international law, the ECJ cannot extend its jurisdiction beyond EU law. In line with its obligations, it is expected that the Court interprets EU law in the light of the international obligations of the Member States involved in a dispute and also in accordance with the international legal principles and rules of international

489) *Peers* (n 487).

490) *See Fikfak* (n 329).

491) *E.g.* Maartje de Visser, 'A Cautionary Tale: Some Insights Regarding Judicial Activism From the National Experience' in Mark Dawson et al. (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar, Cheltenham 2013).

customary law. Most importantly, if a consistent approach by the Court is presumed, it should be concluded that the EU Treaties and in particular, the fundamental rights of the EU legal order would prevail over any conflicting matter. However, Article 273 TFEU does not regulate the effect of the judgements, but it is presumed that they will have binding effect as all the other judgements of the EU Courts.[492]

4. Conclusion to Chapter II

Arguments for the recognition of a federal nature to the Union can no longer be easily discounted.[493] The supranational modality embodied primarily in the concepts of direct effect, supremacy and pre-emption have distinguished the EU from all other international organisations. EU law, which has become the main framework for the relations between EU Member States, has developed as an autonomous legal system, separate from international law. However, EU law exists, in principle, in harmony with international law. The EU has used international legal principles and norms of customary law to delimiting its powers and the powers of its Member States, as rules of interpretation or as gap-fillers. Moreover, EU legal acts can be invalidated if they run contrary to the provisions of the international agreements which codify customary rules of general international law where the EU institutions have made manifest errors in the adoption procedure. Furthermore, the international agreements concluded by the EU form part of the EU law and are binding on the Union and on its Member States and can also, under certain conditions, become directly effective. Analogously, the implementation of the rights and duties of the Union and of the Member States stemming from the good neighbourliness principle will also depend on the nature and substance of the international legal acts in which they are embodied. The compliance of the Member States and of the Union with their international obligations in the light of the good neighbourliness principle presupposes their conformity with the EU Treaties and in particular with the fundamental rights of the EU legal order. This is due to the autonomous EU legal framework, which is now the primary modulator of interstate relations between Member States. Therefore, the new supranational context must be borne in mind when analysing good neighbourly relations between EU Member States.

The integration process changed the substance of the relations between the Member States. The new model of interstate relations is structured within a democratic framework, transcending the national interests of individual states and

492) *Peers* (n 487).

493) Koen Lenaerts and Kathleen Gutman, '"Federal common law" in the European Union' (2006) 54(1) AJCL 1–121, 4; *Schütze* (n 225) etc.

incorporating the interests of all.[494] The principles of loyal cooperation and solidarity are a touchstone of the developmental framework of good neighbourly relations between EU Member States, largely replacing the principle of territoriality with which the good neighbourliness principle in international law has been associated. The EU legal system has moved far beyond national borders – guarding against them while guarding them at the same time.[495] Borders between Member States have lost much of their significance in the light of the integration process – primarily through the internal market, EU citizenship and also through the incorporation of the Schengen acquis into EU law – while the security of the common borders has become a shared responsibility of all. The lessening of the significance of borders has not gone hand-in-hand with the resolution of border disputes between EU Member States. Instead, the democratic framework built through supranational cooperation and the EU dispute settlement mechanisms has operated effectively in preventing such conflicts from undermining the integration achievements and thus, from their further aggravation.[496] Where such disputes are brought in connection with the EU law, it would be for the EU dispute settlement mechanism to safeguard the compliance of the Member States involved.

The EU has developed advanced mechanisms for the settlement of disputes between Member States. The Commission plays a central role in preventing direct confrontation between Member States through the enforcement of both Article 258 TFEU and Article 259 TFEU. This is testified to by the extremely low number of cases in which Member States have confronted each other directly under Article 259 TFEU. In addition, EU law envisages the settlement of disputes between Member States falling outside EU law when these are connected to the 'subject matter' of the Treaties, thus providing a platform for the settlement of international disputes at the EU level to a certain extent.

494) *Allot* (n 208).
495) *Weiler* (n 214) 341.
496) *Williams* (n 218) 64.

CHAPTER III

Good neighbourliness in EU foreign relations

1. The connotation of good neighbourliness in EU foreign relation

The advanced EU model of interstate relations based on loyal cooperation and solidarity usually ends where foreign policy begins. Contrary to the example of friendly relations maintained through the abolition of borders, EU foreign policy is by its very nature dependent on the existence of borders, '[f]or borders imply foreign policy just as much as foreign policy implies borders'.[497] It is beyond the EU borders where a different pattern of relations with third countries takes place. That pattern closely resembles the maintenance of good neighbourly relations between states under the rules of traditional international law. In fact, Articles 3(5) TEU and 21 TEU permit the deduction of an obligation on the EU to promote the good neighbourliness principle as established in international law in its foreign relations and to further contribute to its development.[498] Moreover, the Lisbon Treaty introduced the notion of 'good neighbourliness' to refer to the EU's relations with neighbouring countries. Article 8(1) TEU stipulates that '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'.[499] To that end, Article 8(2) TEU allows the Union to conclude 'specific agreements' with neighbouring countries which can contain reciprocal rights and obligations and the possibility of joint activities.

The new article raises several doubts. First, the substance of the 'special relationship[s]' referred to in the first paragraph is not clear.[500] Similar wording can

497) Christopher Hill, 'The Geopolitical Implications of Enlargement', in Jan Zielonka (ed.), *Europe Unbound: Enlarging and Reshaping the Boundaries of the European Union* (Routledge, NY 2002) 95–116, 95.

498) *See* (n 255).

499) Article 8(1) TEU.

500) Article 8(1) refers to 'a special relationship', while other versions of the Treaty, for instance the German and the French version, use the plural form referring to 'besondere Beziehungen' and 'des relations privilégiées' respectively.

be found for the association agreements based on Article 217 TFEU, which are said to be 'creating special, privileged links' between the Union and non-member countries. The doubt arises as to the ambiguity of an association which can '[range] from little more than a free trade agreement to a level of integration that comes close to membership'.[501] Closely resembling Article 217 TFEU, agreements based on Article 8 TEU can cover all the EU's competences,[502] and a procedural basis can be found in Article 218 TFEU.[503] Another question is raised by the countries affected by Article 8 TEU. Pointing to the relations between the EU and its neighbours, the provision in question has been primarily associated with the ENP countries, which not only include immediate neighbours, but also states from the wider surroundings.[504] Some scholars go as far as to suggest that the new article codifies the ENP and confers a constitutional status to the relationship between the Union and its neighbours.[505] In any event, countries outside the ENP have not been explicitly excluded from the scope of application of Article 8 TEU. This leaves space for broader interpretation of this provision to also cover other nearby countries such as the European microstates, EEA states, Switzerland and Russia.[506] It has been suggested, however, that the European states with clear prospects of membership exclude such a general application of this provision.[507] This can be inferred from the purpose of the agreements concluded under Article 8(2) TEU, which merely aim to establish 'an area of prosperity and good neighbourliness', rather than to bring non-

501) Peter Van Elsuwege, *From Soviet Republics to EU Member States: A Legal and Political Assessment of the Baltic States' Accession to the EU* (Martinus Nijhoff, Leiden/Boston 2008) 131.

502) In Case 12/86 *Meryem Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719, para. 9, the ECJ held that Article 217 TFEU (then Article 238 EC Treaty), 'must necessarily empower the Community to guarantee commitments towards non-member countries in all the fields covered by the Treaty'.

503) Marise Cremona, 'The Two (or Three) Treaty Solution: The New Treaty Structure of the EU' in Andrea Biondi and Piet Eeckhout (eds), *EU Law after Lisbon* (OUP, Oxford 2012) 40−61, 46.

504) Armenia and Azerbaijan, for instance, participate in the ENP although not being immediate neighbours of the EU. *See* in this respect: European Commission, 'European Neighbourhood Policy Strategy Paper', COM (2004) 373 final, 10–11.

505) *E.g.* Robert Schütze, *European Constitutional Law* (CUP, Cambridge 2012) 190; Dominik Hanf, 'The European Neighbourhood Policy in the Light of the New "Neighbourhood Clause" (Article 8 TEU)' in Erwan Lannon (ed.) *The European Neighbourhood Policy's Challenges* (P.I.E. Peter Lang, Brussels 2012) 109–126.

506) Such an understanding is also implied by the Declaration on Article 8 TEU annexed to the Lisbon Treaty, which does not exclude non-ENP states but stipulates that 'the Union will take into account the particular situation of small-sized countries which maintain specific relations of proximity with it' (Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon OJ C 115/337).

507) Some scholars go even further, arguing that Article 8 TEU was introduced to distinguish between countries with accession prospects and states without them. *See* in this respect Peter Van Elsuwege and Roman Petrov, 'Article 8 TEU: Towards a New Generation of Agreements with the Neighbouring Countries of the European Union?' (2011) 36(5) EL Rev 688–703, 693, noting that the provision confirms the 'disconnection between ENP and enlargement' through its objectives. *See* also Paul P Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (5th edn OUP, Oxford 2011) 324.

EU states closer to membership.[508] Finally, Article 8 TEU itself does not resolve all doubts regarding the interpretation and the implementation of the good neighbourliness principle. The provision in question merely suggests that EU views good neighbourliness through the prism of its values, i.e. as being founded on:

> respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities [which] are common to the Member States in a society in which pluralism, non-discrimination, justice, solidarity and equality between women and men prevail.[509]

In general, EU values largely coincide with the fundamental values essential to international relations established by the United Nations Millennium Declaration.[510] Furthermore, the clarification of good neighbourly relations at the EU Treaty level does not differ much from the Union's assumptions with respect to conflict prevention in its relations with the wider world.[511] As agreed by the Member States during an open debate of the General Affairs Council, conflict prevention should be based on principles such as democracy, the rule of law, respect for human rights and human dignity, expressed in the fight against poverty in particular and in favour of

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508) *Van Elsuwege and Petrov,* ibid 693.

509) Article 2 TEU.

510) The fundamental values essential to international relations in the twenty-first century were highlighted in the United Nations Millennium Declaration, UNGA Res 55/2 (8 September 2000) A/Res/55L.2. These include: 'a) Freedom (meaning that) men and women have the right to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice. Democratic and participatory governance based on the will of the people best assures these rights; b) Equality (meaning that) no individual and no nation must be denied the opportunity to benefit from development. The equal rights and opportunities of women and men must be assured; c) Solidarity (meaning that) global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most; d) Tolerance (meaning that) human beings must respect one other, in all their diversity of belief, culture and language. Differences within and between societies should be neither feared nor repressed, but cherished as a precious asset of humanity. A culture of peace and dialogue among all civilizations should be actively promoted; e) Respect for nature (meaning that) prudence must be shown in the management of all living species and natural resources, in accordance with the precepts of sustainable development [...]; f) Shared responsibility (meaning that) responsibility for managing worldwide economic and social development, as well as threats to international peace and security, must be shared among the nations of the world and should be exercised multilaterally. As the most universal and most representative organization in the world, the United Nations must play the central role'.

511) European Commission, 'The EU and the issue of conflicts in Africa: peace-building, conflict prevention and beyond' (Communication) SEC (96) 332 final, 6 March 1996, understands 'conflict prevention' not only in its narrow sense *i.e.* only 'as easing a situation where an outbreak of violence is imminent [...] but also (in a wider sense) as preventing the occurrence of such a situation'.

economic development.[512] The EU Programme for prevention of violent conflicts endorsed by the Götenburg European Council further reaffirmed this stance, underlining the commitment of the Union to pursuing conflict prevention as one of the main objectives in its external relations, which should be given the highest political priority in line with the fundamental values of the EU.[513]

The interpretation and the implementation of the specific rights and duties of states in light of the good neighbourliness principle, based on such values, crystallises when particular aspects of EU foreign relations are analysed more closely. The process of recognition of new states in the wake of the breakup of the Soviet Union and Yugoslavia has provided for active involvement of the Union and a more comprehensive approach to the principle of good neighbourliness. The EU followed the same approach in the processes of stabilising CEE states and bringing them closer to the Union. This approach largely overlaps with the good neighbourliness referred to in Article 8(1) TEU. Put differently, the new Treaty provision on good neighbourliness does not introduce much of substance with respect to the EU approach to good neighbourliness, but rather codifies its foreign relations practice.

This chapter is divided into three parts. The first part discusses the EU's role in the process of the recognition of new states and its contribution to the advancement of the good neighbourliness principle. In particular, it focuses on good neighbourliness as an evident condition for the recognition of new states and also for building up relations between these states and the Union. Particular emphasis is placed on the process of recognising new states in the wake of the dissolution of Yugoslavia, which is probably the most illustrative example for the interpretation and application of the good neighbourliness principle as a precondition for the recognition of new states. Finally, the text points to certain inconsistencies in the process of implementing that condition.

The second part of this chapter then follows the development of the good neighbourliness principle in the Union's foreign relations. It focuses on the EU's role in promoting stability and strengthening good neighbourly relations in CEE through respect for the principles of the inviolability of frontiers and the protection of the rights of minorities. The text discusses the 'Pact on Stability in Europe' as a main EU initiative for establishing or re-establishing good neighbourly relations between CEE states. It also extensively analyses the bilateral treaties maintaining good neighbourly relations in general and good neighbourliness treaties included in the Pact on Stability in particular.

The third part of this chapter discusses the protection of minorities in interstate relations. It primarily focuses on the protection of the rights of minorities, which are constitutive to a neighbouring state as a group primarily intended to be safeguarded

512) Conclusions of the General Affairs Council of 22–23 January 2001 (5279/01 Presse 19).

513) European Council, 'Draft EU Programme for the Prevention of Violent Conflicts', attachment to Presidency Conclusions of the European Council of 15–16 June 2001.

by the bilateral treaties promoting good neighbourliness. The 'Report on the Preferential Treatment of National Minorities by Their Kin-State' of the European Commission for Democracy Though Law[514] and the Bolzano Recommendations[515] are discussed in this part as the main instruments clarifying the protection of the rights of minorities in interstate relations. Finally, this part analyses the assessment of the Independent International Fact-Finding Mission on the Conflict in Georgia[516] in respect to the compliance of states with the principle of good neighbourliness. It concludes that the failure of the Fact-Finding Mission to assess the duty of states to protect human rights in their territories, including the rights of minorities in the light of the good neighbourliness principle, could seriously undermine the value of such an assessment.

1.1 Good neighbourliness as a condition for the recognition of states

In general, the recognition of states is a state competency. However, consultation and coordination of Member States in this respect has become common practice at the EU level.[517] The first time Member States spoke with one voice with respect to the recognition of states was with reference to the proclamation of the independence of the Turkish Republic of Northern Cyprus (TRNC). On 16 November 1983, the ten Member States issued a statement under the auspices of the European Political Cooperation, jointly rejecting the declaration of independence of the TRNC and expressing 'their unconditional support for the independence, sovereignty, territorial integrity and unity of the Republic of Cyprus'.[518] The Member States further called upon all interested parties not to recognize the TRNC's independence, which has created 'a very serious situation in the area'.[519] The same day, the Commission issued a similar statement, expressing its 'regrets and reject[ing] the unilateral declaration of independence of the Turkish Cypriot community'.[520] While the first statement represented the common stance of all Member States, the second statement was even

514) The European Commission for Democracy Though Law, 'Report on the Preferential Treatment of National Minorities by Their Kin-State', adopted by the Venice Commission at its 48th Plenary Commission (19–20 October, 2001, Venice) (*Report of the Venice Commission*)

515) The 'Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations' (*Bolzano Recommendations*) of the OSCE High Commissioner on National Minorities (June, 2008), <http://www.osce. org/hcnm/33633?download=true> last accessed 14 October 2014.

516) *See* Council Decision 2008/901/CFSP concerning an independent international fact-finding mission on the conflict in Georgia OJ L 323/66 (*Council Decision 2008/901/CFSP*).

517) Frank Hoffmeister, 'The Contribution of EU Practice to International Law' in Marise Cremona, *Developments in EU External Relations Law* (OUP, NY 2008) 37–127, 71.

518) EC Bull 11–1983, point 2.4.1.

519) EC Bull 11–1983, point 2.4.1.

520) EC Bull 11–1983, point 2.2.34.

more extensive, representing the position of the European Economic Community.[521] The wider international community reacted along similar lines, condemning the proclamation of the establishment of the TRNC and considering the declaration legally invalid.[522] The need for respect for the sovereignty, independence, territorial integrity and unity of the Republic of Cyprus and for finding a legal solution to the problem was repeatedly stressed by actors in the international community.[523] Such an approach is at the heart of the good neighbourliness principle based on UN principles and maintained through the rights and duties of states as established in international law.

The next coordination of the positions of Member States was in the wake of the dissolutions of the Soviet Union and Yugoslavia. On 16 December 1991, the twelve Member States adopted, under the auspices of the Council of Ministers, a Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union'.[524] The Guidelines on the recognition of new states transposed the legal basis of the good neighbourliness principle and the rights and duties of states stemming from that principle into preconditions for the recognition of new states. In particular, the EC and its Member States confirmed their adherence to the principles of the Final Act of Helsinki (Helsinki Act)[525] and the Charter of Paris for a New Europe (Charter of Paris)[526] and adopted the following criteria for the formal recognition of new states:

- respect for the provisions of the: UN Charter; Helsinki Act; Charter of Paris, especially with regard to the rule of law, democracy and human rights;
- guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the Conference on Security and Cooperation in Europe;[527]

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521) *See e.g.* Jean Groux and Philippe Manin, *Die Europäischen Gemeinschaften in der Völkerrechtsordnung* (Amt für amtliche Veröffentlichungen der Europäischen Gemeinschaften, Luxemburg 1984) 27.

522) *See* in particular, the UN response in UNSC Res 541 (18 November 1983). *See* also the CoE Rec. 974 (1983).

523) *E.g.* point 10 and 11 of the CoE Rec. 974 (1983).

524) Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union', Brussels (16 December 1991) 31 ILM 1486 (*Guidelines on the recognition of new states*).

525) Conference on Security and Cooperation in Europe, Final Act, Helsinki (1 August 1975) 14 ILM 1292 (*Helsinki Act*). The Helsinki Act was intended to promote better relations amongst states and was signed by thirty-five states including USA, Canada and all European states apart from Albania and Andorra.

526) Charter of Paris for a New Europe, Paris (21 November 1990) 30 ILM 190 (1991) (*Charter of Paris*).

527) The Conference on Security and Cooperation in Europe (CSCE) was renamed on 1 January 1995

- respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement;
- acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability;
- commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes.[528]

It was also emphasised that no entity resulting from aggression would be recognised and that the EC and its Member States would consider the possible effects of a recognition on neighbouring states.[529] The recognition of a new state but also its relations with the EC and its Member States was thus directly linked to its possible impact on neighbouring countries.

In fact, the Guidelines on the recognition of new states aimed at 'elaborating an approach regarding relations with new states',[530] and the principles referred to above were meant to form the main basis for such relations. In other words, the Guidelines on the recognition of new states clarified the sort of policies that the new states were expected to follow in their future relations with the Community and its Member States. Declaring also their own adherence to the principles embodied in the major international documents, the EC and its Member States basically required the same commitment from new states to the rules of international law and accordingly to the legal basis of the good neighbourliness principle. By doing so, they not only employed the legal basis of the good neighbourliness principle as a condition to the recognition of new states but also as a precondition to the further cooperation with the new states.

As such, the Guidelines on the recognition of new states did contribute to the international practice on the recognition of states. Hoffmeister summarises the significance of the Guidelines on the recognition of new states in three main points – first, that document's departure from the established practice that recognition of states is only an affirmation that an entity satisfies the (Montevideo) criteria of statehood[531] and its contribution to the additional elements relating to the political system of states and the impact of neighbouring countries; second, the added value accorded to the

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(and will be further referred to in this work) Organisation for Security and Cooperation in Europe (OSCE).

528) *Guidelines on the recognition of new states* (n 524).

529) *Guidelines on the recognition of new states* (n 524).

530) *Guidelines on the recognition of new states* (n 524).

531) *See* also Roland Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union'

state commitments incorporated in the relevant OSCE documents referred to in the document; and third, the introduction of the condition of non-recognition, rather than the mere prohibition, of territorial acquisition resulting from aggression.[532]

While the Guidelines on the recognition of new states were not intended be legally binding, being embodied in a declaration, they have highlighted the need for respect of the rule of law, democracy and human rights, stressing particularly the necessity for respecting the inviolability of frontiers and guarantying the protection of national minorities as bases for interstate relations.

1.2 Principles for recognition of states

The application of the good neighbourliness principle as a condition for the recognition of new states is best evidenced by the criteria embodied in the Guidelines on the recognition of new states. As discussed in Chapter I in detail, the UN Charter sets out the legal basis for the good neighbourliness principle. The strengthened significance of the provisions of the UN Charter as a condition for the recognition of new states thus also elevates the position of the good neighbourliness principle. In other words, the Guidelines on the recognition of new states have somewhat transformed the role of the good neighbourliness principle from international regulator of interstate relations into a condition or assessment tool employed by the EC and its Member States for the recognition of new states and the establishment of interstate cooperation.

The Helsinki Act, enumerated explicitly in the Guidelines on the recognition of new states, replicates UN principles to a great extent and accordingly, the legal basis for the good neighbourliness principle as established in international law and many of the rights and duties of states stemming from that principle. Unlike the UN Charter, the Helsinki Act is politically significant but is not a legally binding document.[533] As with the Declaration on Friendly Relations, the legally binding effect of the principles embodied in the Helsinki Act stems from the force of the UN Charter. However, the reference to the Helsinki Act in the Guidelines on the

(1993) 4 EJIL 36–65, 36. cf, however, David Raič, *Statehood and the Law of Self-Determination* (Kluwer Law, The Hague 2002) 165–166, arguing that the conditions introduced did not reinforce the statehood criteria but reflected the common stance of the Member States towards the recognition of new states, rather than towards the recognition of entities as states. *See* also Said Mahmoudi 'Recognition of States: the Case of Former Yugoslav Republics' in Jerzy Sztucki, Ove Bring and Said Mahmoudi (eds), *Current International Law Issues: Nordic Perspectives: Essays in Honour of Jerzy Sztucki* (Martinus Nijhoff, Dordrecht 1994) 154.

532) *Hoffmeister* (n 517) 73. cf Danilo Türk, 'Recognition of States: A Comment' (1993) 4 EJIL 66–71, 68, arguing that, while containing many international legal obligations, the Guidelines on the recognition of new states disregarded the main criterion of effectiveness of government.

533) *See*, in particular, Jan Klabbers, *The Concept of Treaty in International Law* (Kluwer Law Int'l, The Hague 1996) 126–129. For the prevalence of this view amongst the scholars and government experts, *see* Jordan J Paust, 'Transnational Freedom of Speech: Legal Aspect of the Helsinki Final Act' (1982) 45(1) Law and Contemporary Problems 53–70, 55.

recognition of new states has accorded the states commitments 'an importance that may not have been foreseen when leaders put their signature to such political [declaration]'.[534] The document embodies ten principles, namely:

1. It reaffirms the importance of the sovereign equality of states and respect for states' rights inherent in sovereignty. States are expected to respect each other's sovereign equality and individuality and to also 'respect each other's right freely to choose and develop its political, social, economic and cultural systems as well as its right to determine its laws and regulations'.[535] Furthermore, states 'have the right to belong or not to belong to international organizations, to be or not to be a party to bilateral or multilateral treaties including the right to be or not to be a party to treaties of alliance; they also have the right to neutrality'.[536]

2. It reiterates the obligation of states to refrain from the threat or use of force in their international relations. States must refrain from the direct or indirect use of force against each other and 'from any manifestation of force for the purpose of inducing another participating State to renounce the full exercise of its sovereign rights'.[537] States must also refrain from using force as an act of retaliation or as a means for settling disputes or unresolved questions.

3. It formulates and enshrines the inviolability of frontiers in a multilateral international act for the first time as a separate principle in interstates relations.[538] The relevant principle provides that:

> [t]he participating states regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers. Accordingly, they will also refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State.[539]

The recognition of the inviolability of frontiers by the Helsinki Act as a separate principle denotes its importance to maintaining peace, security and cooperation in Europe.[540] In line with the principle of sovereign equality and respect for the rights inherent in the sovereignty of states enshrined in the Helsinki Act, the

534) *Hoffmeister* (n 517) 73.
535) *Helsinki Act* (n 525).
536) *Helsinki Act* (n 525).
537) *Helsinki Act* (n 525).
538) A Movchan, 'Problems of Boundaries and Security in the Helsinki Declaration' (1977) 1 Recueil des Cours de l'Academie de Droit International de la Haye 7.
539) Principle III, *Helsinki Act* (n 525).
540) *Movchan* (n 538) 18–19.

frontiers of states can be changed in accordance with international law only by peaceful means and by agreement. Formulated as such, the principle of inviolability of frontiers also ensures the exercise of the right of states to territorial integrity inherent in sovereignty, which might not be realised if the inviolability of frontiers is not respected.[541] Conversely, the principle of territorial integrity reflects the substance of the principle of inviolability of frontiers aiming inter alia at the protection of existing state borders.

4. States need to respect each other's territorial integrity and to refrain from actions constituting a threat or use of force, while occupation or acquisition by direct or indirect forceful measures will not be recognized as legal.

5. States must settle their disputes peacefully through negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means, including any settlement procedure agreed by the parties in advance.

6. States must refrain from intervening, either directly or indirectly, in the internal affairs of other states. They should refrain from acts 'of military, or political, economic or other coercion designed to subordinate to their own interest the exercise by another [state] of the rights inherent in its sovereignty and thus to secure advantages of any kind'.[542]

7. States recognise the importance of respecting human rights to promote peace, security and friendly relations. They will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief and also respect the rights of national minorities to equality before the law and the actual enjoyment of human rights and fundamental freedoms.[543]

8. States also recognise the significance of the equal rights of people and their right to self-determination to the development of friendly interstate relations and must respect these rights.

9. States must cooperate in accordance with the principles and purposes of the UN Charter and especially within the OSCE framework. In particular, '[t]hey will endeavour, in developing their co-operation as equals, to promote mutual understanding and confidence, friendly and good-neighbourly relations among themselves, international peace, security and justice'.[544]

541) ibid 24.

542) *Helsinki Act* (n 525).

543) Already in the Final Recommendations of the Helsinki Consultations (8 June 1973), there were two identical references to national minorities under Chapter III on 'Co-operation in humanitarian and other fields' – one in the field of culture (para. 50) and the other in the field of education (para. 52), stating that '[t]he committee/Sub-Committee while considering the role of States in cooperation in the field of culture (*i.e.* 'in the field of education') will bear in mind the contribution that national minorities or regional cultures could make to it within the framework of respect for [the principles of the Helsinki Act and of the Declaration on Friendly Relations]'.

544) *Helsinki Act* (n 525).

> 10. States should fulfil in good faith their obligations under international law, including those arising from generally recognised principles and rules of international law and those arising from treaties or other agreements in conformity with international law.

The Charter of Paris further reaffirmed the commitment of states to the principles embodied in the Helsinki Act as a basis of interstate relations aiming to strengthen friendship and to promote democracy, peace and unity in Europe.[545] It also reiterated the conviction of states 'that friendly relations among [their] peoples, as well as peace, justice, stability and democracy, require that the ethnic, cultural, linguistic and religious identity of national minorities be protected and conditions for the promotion of that identity be created'.[546] To that end, the Charter of Paris envisaged that states should redouble their efforts to protect the rights of national minorities. In addition, new states were required to guarantee the rights of national minorities in accordance with the commitments subscribed to in the OSCE framework, which comprised a large number of relevant documents at the time when the Guidelines on the recognition of new states were adopted.[547]

The Helsinki Act and the Charter of Paris, both of which have become important instruments in the process of the recognition of new states, reiterate the rights and duties of states in the light of the good neighbourliness principle. The Guidelines on the recognition of new states have become the main basis for the recognition of Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, the Kyrgyz Republic, Moldova,

545) The participating states affirm in the *Charter of Paris* (n 526) that every individual without discrimination has the right to freedom of thought, conscience and religion or belief; freedom of expression; freedom of association and peaceful assembly; and freedom of movement. They further affirm that no one will be subject to arbitrary arrest or detention; or torture or other cruel, inhuman or degrading treatment or punishment. Moreover, it has been affirmed that everyone also has the right to know and act upon his rights; to participate in free and fair elections; to fair and public trials if charged with an offence; to own property alone or in association and to exercise individual enterprise; and to enjoy his economic, social and cultural rights.

546) *Charter of Paris* (n 526).

547) In addition to the *Helsinki Act* (n 525) and the *Charter of Paris* (n 526) these include: The Concluding Document of the Madrid Meeting 1980 of Representatives of the Participating States of the Conference on Security and Cooperation in Europe, Hold on the Basis of the Provisions of the Final Act Relating to the Follow-Up to the Conference, Madrid (9 September 1983) 22 ILM 1398 (*Concluding Document of the Madrid Meeting of the OSCE*); The Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Cooperation in Europe, Hold on the Basis of the Provisions of the Final Act Relating to the Follow-Up to the Conference, Vienna (15 January 1989) 28 ILM 531 (*Concluding Document of the Vienna Meeting of the OSCE*); Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen (29 June 1990) 29 ILM 1305 (*Copenhagen Document of the OSCE*); Report of the CSCE Meeting of Experts on National Minorities, Geneva (19 July 1991) 30 ILM 1692 (*1991 Geneva Report*); Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow (3 October 1991)

Tajikistan, Turkmenistan, Ukraine and Uzbekistan.[548] They have further served as the main framework for the recognition of the states which emerged from Yugoslavia. Moreover, the EU has employed the principle of good neighbourliness as a condition for Palestinian statehood, thus extending its application to states outside the Soviet Union and Eastern Europe.[549]

However, while the Guidelines on the recognition of new states announced an enhanced position for the good neighbourliness principle, its implementation has often been led by the political considerations of the Member States rather than by their legal obligations.[550] The process of recognition of the new states emerging from Yugoslavia is one of these examples.

1.3 Implementation of the good neighbourliness condition

The process of dissolution of Yugoslavia triggered active coordination between the Member States with regard to the future of the federation and of the possibility for recognition of new states. A total of 45 joint statements were issued from 1991–1992

Meeting of the Conference on the Human Dimension of the CSCE, Moscow (3 October 1991) 30 ILM 1670 (*Moscow Document of the OSCE*). Other relevant documents adopted within the OSCE framework after the adoption of the Guidelines include: the CSCE Helsinki Document 1992: The Challenges of Change, Helsinki (10 July 1992) 31 ILM 1395 (*The Helsinki 1992 Document*); CSCE Budapest Document 1994: Towards a Genuine Partnership in a New Era, Budapest (6 December 1994) 34 ILM 764; Stability Pact for Europe (21 March 1995) EU Bull. No. 3 (1995) 112–116; Lisbon Document: 'Declaration on a Common and Comprehensive Security Model for Europe for the Twenty First Century', Lisbon (3 December 1996) 36 ILM (1997) 496; Charter for European Security, Istanbul (19 November 1999) 39 ILM 255; Istanbul Summit Declaration (19 November 1999) available at: <http://www.osce.org.mc/13017.html> last accessed 14 October 2014.

548) *Hoffmeister* (n 517) 73, 'The Contribution of EU Practice to International Law' in Marise Cremona, *Developments in EU External Relations Law* (OUP, NY 2008) 37–127, 74.

549) *See* in this respect Steven Blockmans, 'EU Global Peace Diplomacy: Shaping the Law on Statehood' in *Kochenov and Amtenbrink* (n 198) 130–168, 167 et seq. Blockmans points out that 'the good neighbourliness condition rests on Palestinian respect for the three principles adopted by (EU, USA, UN and Russia): commitment to non-violence; recognition of Israel; and acceptance of previous agreements and obligations, in particular the Oslo Accords' (at 163). That author further notes that unlike Palestine, Israel was not required to comply with the same principles as a condition to negotiations and that if it had been, it would not have satisfied the requirements on it to take into account the Palestinian right to self-determination, as well as its continued violation of international human rights law and international humanitarian law in the Palestinian territories (at 163).

550) *See* in general *Türk* (n 532). It has been also noted in the 'Report of the Independent International Fact-Finding Mission on the Conflict in Georgia' vol 2 (2009) (*Report of the Fact-Finding Mission*) 128, that it is not whether the international obligations in the field of human rights and minority rights envisaged in the Guidelines on the recognition of new states 'were applied as legal conditions or as a matter of political discretion [but in] either case, these normative considerations can work in the same direction as the principle of effectiveness and underscore an entity's claim to statehood'. It further added that '[i]t is very possible that an entity short of statehood is recognised as a state by another state or states for particular political motives'.

under the EPC despite certain differences between the Member States.[551] While primarily convinced that 'a united and democratic Yugoslavia stands the best chance to integrate itself in the new Europe',[552] the Member States shifted their position after the worsening of the situation in Croatia and Slovenia.[553] A joint statement of 5 July 1991 recognised the new realities on the ground. The Community and the Member States:

> call[ed] for a dialogue without preconditions between all parties on the future of Yugoslavia, which should be based on the principles enshrined in the Helsinki Final Act and the Paris Charter for a New Europe, in particular respect for human rights, including rights of minorities and the right of peoples to self-determination in conformity with the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States [Charter of Paris].[554]

As early as 27 August 1991, at the same time as convening a peace conference on Yugoslavia, the EC and its Member States created an Arbitration Commission[555] that was tasked with examining which of the Yugoslavian states satisfied the conditions for formal recognition as independent states. In the Declaration on Yugoslavia, adopted at the extraordinary EPC Ministerial meeting on 16 December 1991, the EC and its Member States invited all Yugoslav republics to state whether they wanted to be recognized as independent states; they agreed to the commitments in the Guidelines on recognition of new states; they accepted the provisions of the Draft Convention from 4 November 1991, especially those on human rights and national or ethnic groups;[556] and they supported the UN's efforts and the continuation of the EC

551) *Blockmans* (n 549) 140.

552) *See e.g.* EC Bull 3–1991, point 1.4.6 (joint statement of 26 March 1991).

553) *See* in more detail Marc Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86(3) AJIL 569–607. *See* also *Türk* (n 532).

554) EC Bull 10–1991, point 1.4.7.

555) The Arbitration Commission (Badinter Commission), assembled at the Brussels Extraordinary Meeting of the Foreign Ministers (27 August 1991) and was chaired by Robert Badinter, President of the French Constitutional Council. It further comprised of the Presidents of the German and Italian Constitutional Court, the Belgian Court of Arbitration and the Spanish Constitutional Tribunal.

556) The Draft Convention followed the points presented by Lord Carrington on 25 October, UN Doc S/23169 (1991), Annex VI: sovereign and independent republics with international personality for those that wanted it; free association of the republics; arrangements for the protection of human rights and special status for certain groups and areas; European involvement where appropriate; and recognition of states wanting that in the framework of general settlement. *See* Article 2 of the Draft Convention from 4 November 1991, for details on the protection of human rights and rights of members of national or ethnic groups.

conference on Yugoslavia.[557] Another requirement explicitly stipulated in the Declaration on Yugoslavia was related to the impact of the recognition of the new states on neighbouring countries. In particular, the Community and its Member States required:

> a Yugoslav Republic to commit itself, prior to recognition, to adopt constitutional and political guarantees ensuring that it has no territorial claims towards a neighbouring Community State and that it will conduct no hostile propaganda activities versus a neighbouring Community State, including the use of a denomination which implies territorial claims.[558]

This condition was introduced at the insistence of Greece, which suspected that the use of the name 'Macedonia' may imply territorial claims by the new country over a part of the Greek territory bearing the same name.[559] The neighbouring factor, however, certainly did not affect only the recognition of Macedonia, but was an important question in the whole process of recognition of new states. As summarized by Weller, the situation in Yugoslavia was viewed by many delegations as purely internal in all aspects other than those relating to the security of neighbouring states.[560] In other words, the threat to peace was 'not necessarily to be found in the suffering of individuals, groups or peoples within Yugoslavia but, rather, in the danger to neighboring territories'.[561] The possible spreading of violence could affect the security of both neighbouring Yugoslav states and Member States.

1.4 The work of the Badinter Commission and the recognition of states

The Badinter Commission issued fifteen opinions which dealt with questions of international law such as the sovereignty of states, recognition, self-determination and succession.[562] Four of these opinions addressed the situation of individual states which declared their willingness to be recognised as independent states. In particular, the Badinter Commission assessed whether Bosnia and Herzegovina, Croatia, Macedonia and Slovenia fulfilled the conditions for recognition in the light of the

557) 'Declaration on Yugoslavia', Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991.

558) *Declaration on Yugoslavia* (n 557).

559) The Northern part of Greece was officially renamed 'Macedonia' in August 1988 – *see e.g.* John Shea *Macedonia and Greece: The Struggle to Define a New Balkan Nation* (McFarland, Jefferson, NC 1997) 104. With regard to the problem over the name and the consequences on recognition, *see Weller* (n 553) 588. cf Evangelos Kofos, 'Greek Policy Considerations over FYROM Independence and Recognition' in James Pettifer (ed.), *The New Macedonian Question* (Pelgrave, NY 1999) 226−263.

560) *Weller*, ibid 580.

561) ibid.

562) Christine Bell, *Peace Agreements and Human Rights* (OUP, Oxford 2000) 98.

Guidelines on the recognition of new states and the Declaration on Yugoslavia.[563] The Badinter Commission concluded that Macedonia and Slovenia did.[564] In the case of Macedonia, the Badinter Commission added that the country has:

> renounced all territorial claims of any kind in unambiguous statements binding in international law; that the use of the name 'Macedonia' cannot therefore imply any territorial claim against another State; and (…) that the Republic of Macedonia has given a formal undertaking in accordance with international law to refrain, both in general and pursuant to Article 49 of its Constitution in particular, from any hostile propaganda against any other State.[565]

The Badinter Commission had certain reservations about Bosnia and Herzegovina and Croatia. In particular, in the case of Bosnia and Herzegovina, the Badinter Commission insisted on a referendum to reflect the will of all the citizens in that country.[566] In the case of Croatia, the Badinter Commission highlighted the need for full incorporation of the provisions of the Draft Convention from 4 November 1991, related to the special status of autonomy of the national minorities where these formed a majority of the population.[567]

The assessment of the Badinter Commission itself has been viewed as legally correct and freed from political considerations.[568] Nevertheless, the implementation of the recommendations of the Badinter Commission has hardly been consistent. For instance, Germany recognised both Croatia and Slovenia on 23 December, i.e. even before the Badinter Commission brought its recommendations, though it only announced the establishment of relations with these two countries on 15 January 1992.[569] Once President Tuđman had presented a written statement promising that the provisions relating to the special status of minorities would be implemented, Member States and other countries proceeded with recognition of both Croatia and Slovenia.[570] In other words, Croatia was recognised prior to implementing the

563) *See* Opinions of the Badinter Commission No. 4–7.

564) *See* Opinion No. 6 on the Recognition of the Socialist Republic of Macedonia by the European Community and its Member States (11 January 1992) 31 ILM 1507 (*Opinion No. 6*) and Opinion No. 7 on International Recognition of the Republic of Slovenia by the European Community and its Member States (11 January 1992) 31 ILM 1512 (*Opinion No. 7*).

565) *Opinion No. 6* (n 564) para. 5.

566) Opinion No. 4 on International Recognition of the Socialist Republic of Bosnia-Herzegovina by the European Community and its Member States (11 January 1992) 31 ILM 1501, para. 4.

567) Opinion No. 5 on the Recognition of the Republic of Croatia by the European Community and its Member States (11 January 1992) 31 ILM 1503, para. 3.

568) *E.g. Türk* (n 532) 70.

569) *E.g.* Colin Warbric, 'Recognition of States' (1992) 41(2) ICLQ 473–482, 478.

570) John Dugard and David Raič, 'The Role of Recognition in the Law and Practice of Secession' in

conditions for its recognition as recommended by the Badinter Commission. In contrast, Bosnia was recognised on 6 April 1992, in the midst of a conflict on its territory and only after a referendum regarding its independence was held, but notwithstanding the fact that the country did not satisfy the basic requirement for effectiveness of its government as a necessary condition to statehood.[571] The case of the recognition of Macedonia revealed most clearly the prevalence of political considerations over the commitments undertaken by the Member States. Macedonia, which fulfilled all necessary conditions according to the Badinter Commission, remained unrecognized for a longer period. The introduction of the required constitutional amendments promising that the country did not have any territorial pretensions towards its neighbours[572] and that it would not interfere in the sovereign rights and internal affairs of other countries,[573] which were positively assessed by the Badinter Commission, did not solve the problem between Macedonia and Greece.

Unlike the Badinter Commission, which considered that the name of a state cannot imply territorial claims against another country and decided in favour of the recognition of Macedonia, Greece considered the commitments undertaken by its Northern neighbour as inadequate and insisted that the country should change its constitutional name.[574] Showing solidarity with Greece, but departing from the opinion of the Badinter Commission and from the Declaration on Yugoslavia, the Member States declared their readiness to recognise Macedonia as an independent and sovereign state 'under a name which could be acceptable to all interested parties (i.e. to Greece and Macedonia)'.[575] During the Lisbon European Council, the Member States further shifted their position by declaring that they would recognise the country's independence under a name which did not include the denomination 'Macedonia'.[576] The 'mutually acceptable' solution thus became a solution acceptable only to the one of the parties involved. As a Member State, Greece gained support from its allies, which 'substantially delayed [the recognition of Macedonia] because of the Greek objections'.[577] Accordingly, the situation amounted to the elevation of a bilateral issue to the multilateral level and its transformation into a precondition

Marcelo G Kohen (ed.), *Secession: International Law Perspectives* (CUP, Cambridge 2006) 94–137, 127. *See* also Jan Klabbers et al. (eds), *State Practice Regarding State Succession and Issues of Recognition* (Kluwer Law Int'l, The Hague 1999) 68.

571) *See Türk* (n 532) 69.

572) Article 3 of the Constitution of the Republic of Macedonia, Official Gazette No. 52/91, as amended.

573) Article 49 of the Constitution of the Republic of Macedonia, Official Gazette No. 52/91, as amended.

574) *E.g.* Roy H Ginsberg, *The European Union in International Politics: Baptism by Fire* (Rowman Littlefield, Lanham 2001) 81.

575) Informal meeting of Ministers for foreign affairs at Guimaraes (1, 2 May 1992).

576) Annex II of the Lisbon European Council (26, 27 June 1992).

577) Michael Ioannidis, 'Naming a State – Disputing over Symbols of Statehood at the Example of "Macedonia"' (2010) 14 Max Planck YB UN L 507–561, 522.

for the international recognition of Macedonia. It further meant granting Greece a veto over the name of its neighbour,[578] which has certainly elevated its position in the bilateral dispute. Such an advanced position for one of the parties in the dispute, which although bilateral in substance, was demonstrated to have had important multilateral effects, could hardly have contributed to finding a 'mutually acceptable' solution and to the development of good neighbourly relations based on equality between states.

On 7 April 1993, Macedonia was admitted to the UN under the provisional name 'former Yugoslav Republic of Macedonia' as a temporary solution until the dispute was resolved and with an obligation to change its national flag, which was also problematic for the relations between Greece and Macedonia.[579] The UN Security Council justified its decision with the need of 'maintaining peace and good neighbourhood relations in the region'.[580] Such an interpretation, suggesting that good neighbourly relations are maintained through the 'right' denomination of a state, was at least exceptional if not completely contrary to the international principle of self-determination (including the right of self-representation) which the UN itself has defined as being the founding basis of the good neighbourliness principle. By the end of 1993, all EU Member States apart from Greece recognised the country under the denomination 'fYROM', following the UN terminology, although that reference was meant to serve initial UN purposes rather than the international recognition of the country.[581] Greece recognised the country under the UN reference in 1995, when an Interim Accord was signed between the two countries which eased their strained relationship and paved the way for their future cooperation.[582]

It can be concluded from the above that despite the added value of the Guidelines on the recognition of new states with respect to the good neighbourliness principle, the actual process of recognition was rather directed by the political considerations of Member States. Nonetheless, the enhanced position of the good neighbourliness principle as a condition for the recognition of states can have hardly any significance in circumstances where the legal obligations of states are overshadowed by politics. In such circumstances, the good neighbourliness principle can be applied as a tool to serve individual state interests rather than as a means serving legal purposes.

578) ibid.

579) In respect to the legal nature and the compatibility or otherwise of the two additional conditions attached to the Macedonian accession to the UN (*i.e.* the provisional reference for the UN purposes and the obligation to negotiate over the name of the country with Greece) *see* Igor Janev, 'Legal Aspects of the Use of a Provisional Name for Macedonia in the United nations System' (1999) 93 AJIL 155–160.

580) UNSC Res 817 (7 April 1993) UN Doc S/RES/817.

581) *See* Daniel L Bethlehem and Marc Weller (eds), *The 'Yugoslav' Crisis in International Law: General Issues, Part 1* (CUP, Cambridge 1997) lii.

582) UN Interim Accord Between the Hellenic Republic and the FYROM UN Doc 95−27866 of 13 September 1995 (*Interim Accord*).

2. The EU's role in strengthening good neighbourly relations in CEE

The processes of stabilizing and bringing states from CEE closer to the EU provided a rare opportunity for the Union to strengthen its approach to the good neighbourliness principle. The EU used this opportunity not only to reinforce its approach in the relations with the European states in question, but also to play the role of chief promoter of good neighbourly relations between these states. This was initially done with the launch of the 'Pact on Stability in Europe',[583] which was intended 'to stabilize and democratize Europe – before any EU enlargement took place'.[584] Although implemented under the auspices of the OSCE, the Pact on Stability was initiated,[585] moderated[586] and financed by the EU itself.[587] Its main aim of guaranteeing stability and strengthening good neighbourly relations in CEE was promoted through respect for the inviolability of frontiers and for the protection of minority rights.

583) The Pact on Stability in Europe (*Pact on Stability*) was adopted at a conference held in Paris (20, 21 March 1995) by representatives of 52 Member States of the OSCE which became responsible for its implementation. It was initially proposed in March 1992 by Edouard Balladur, the then French Prime Minister, and was to guarantee 'good neighbourliness' and hence security in CEE. In view of the dramatic events in the former Yugoslavia, it was agreed at the Copenhagen European Council (21, 22 June 1993) Presidency Conclusions, that action with respect to borders and minority protection should be 'timely and appropriate'. The Council adopted a decision under the CFSP, 93/728/CFSP: Council Decision of 20 December 1993, [1993] OJ L 339. After reporting to the Brussels European Council (10, 11 December 1993), the Council adopted a decision on the continuation of the joint action, 94/367/CFSP: Council Decision of 14 June 1994, [1994] OJ L 165 (*Council Decision 94/367/CFSP*).

584) Petra Roter, 'Managing the 'Minority Problem' in Post-Cold War Europe within the Framework of a Multilayered Regime for the Protection of National Minorities' (2001/2) 1 Eur. YB Minority Issues 85–130, 121.

585) *See* (n 583).

586) In line with para. 2.4 of Annex 1 of *Council Decision 94/367/CFSP* (n 583), the EU expressed 'its readiness to play the role of moderator in the bilateral talks at the request of the interested parties' and has already contributed 'to the economic restructuring and the strengthening of democratic institutions in the region and is also prepared to put at the disposal of the countries concerned, in the framework of the existing Europe Agreements, other agreements and programmes, the appropriate support to facilitate the achievement of the objectives of the Pact'. In para. 5.1 of Annex 1 of the *Brussels European Council* (n 583) Presidency Conclusions, the Union undertook to actively accompany the process of drawing up the Pact on Stability.

587) Also, acting as a sponsor of the Pact, in Article 3 *Council Decision 94/367/CFSP* (n 583), the Council requested the Commission 'to direct its activity towards attainment of the objectives of the joint action by means of appropriate economic measures, in the framework of the implementation of Community programmes'. *See* along same lines, Gabriel von Toggenburg, 'A Rough Orientation Through a Delicate Relationship: The European Union's Endeavours for (its) Minorities' (2000) 4(16) EIoP No. 16, pointing to Poland and Hungary: Assistance for Restructuring their Economies (PHARE) and Technical Assistance to the Commonwealth of Independent States (TACIS) Programmes for Democracy and also to the Regulation No. 2760/98 of 18 December 1998, [1998] OJ L 345, p.49, providing funds for cross-border cooperation including 'cultural exchanges' and 'the development or establishment between border regions, including support for cross-border radio, television, newspaper and other media'.

2.1 Good neighbourliness in the Pact on Stability

While being mainly addressed to the CEE countries with clear EU prospects,[588] the Pact on Stability was officially conducted outside the EU enlargement framework. It aimed to contribute to regional stability through the promotion of good neighbourly relations.[589] The participating states declared that:

> [t]he objectives of stability will be achieved through the promotion of good neighbourly relations, including questions related to frontiers and minorities, as well as regional cooperation and the strengthening of democratic institutions through cooperation arrangements to be established in the different fields that can contribute to the objective.[590]

Clearly, states not only confirmed the link between stability and the need to ensure good neighbourly relations, but also clarified what the promotion of good neighbourly relations would include. According to the initial purpose of the Union, the conclusion of the Pact on Stability was 'intended to promote good neighbourly relations and to encourage countries to consolidate their borders and to resolve the problems of national minorities that [have arisen]'.[591] Questions related to frontiers were not only connected to the need to strengthen security according to UN principles, but also resulted from the commitments of states to stability of borders, most notably reiterated by the Helsinki Act.[592] Good neighbourly relations were interpreted broadly to cover questions related to minorities.[593] The participants at the conference further stated the most important principles for the promotion of good neighbourliness, agreeing that:

> [t]he reference principles of the Pact on stability, concerning good neighbourly relations, will be the existing principles and commitments established by the UN, the CSCE and the Council of Europe, in particular those principles contained in the Helsinki Final Act, in the Charter of Paris for a New Europe, in the Copenhagen document, in the Helsinki 1992 Document and the 1993 Vienna Declaration of the Council of Europe Summit, referring respectively, to inviolability of frontiers, territorial integrity and respect of existing borders, and to national minorities.[594]

588) *See* Annex 1 of the *Brussels European Council* (n 583).

589) Annex 1 of the *Brussels European Council* (n 583).

590) *See* the 'Concluding document of the inaugural conference for a Pact on Stability in Europe' annexed to the *Council Decision 94/367/CFSP* (n 583).

591) Annex 1 *Brussels European Council* (n 583).

592) Conference on Security and Cooperation in Europe, Final Act, Helsinki (1 August 1975) 14 ILM 1292.

593) cf Dimitar Bechev, 'Carrots, Sticks and Norms' (2006) 8 (1) J. South East Europe and the Balkans 27–43, 31.

594) Annex 1, para. 1.6, *Council Decision 94/367/CFSP* (n 583).

The Pact on Stability thus closely resembled the EU's approach to the recognition of new states, merely updating the requirements embodied in the Guidelines on the recognition of new states. In addition to the Helsinki Act and the Charter of Paris, the Pact on Stability explicitly referred to the Copenhagen Document, the Helsinki 1992 Document and the 1993 Vienna Declaration of the Council of Europe Summit.

The first of the three instruments – the Copenhagen Document, placed minority protection under a separate section, stipulating that 'questions relating to national minorities can be only satisfactorily resolved in a democratic political framework based on the rule of law, with a functioning independent judiciary'.[595] It further reaffirmed that 'respect for the rights of persons belonging to national minorities as part of universally recognised human rights is an essential factor to peace, justice, stability and democracy in the participating States'.[596] Additionally, the Copenhagen document confirmed that the existence of minorities does not depend on states, by recognizing that belonging to a minority is a personal individuals choice.[597] More importantly, the Copenhagen Document firmly established the commitments of states to positive actions to ensure full equality to persons belonging to national minorities.[598]

The second instrument, the Helsinki 1992 Document, embodies important provisions for establishing a High Commissioner on National Minorities (HCNM) for strengthening capabilities in the field of 'early warning' and 'early action', as appropriate, at the earliest possible stage regarding minority issues capable of developing into conflicts affecting peace, stability or relations between participating states within the OSCE area.[599]

Finally, the CoE 1993 Vienna Declaration reaffirmed the determination of the participating states to implement fully the commitments regarding the protection of national minorities undertaken with the OSCE documents and considered that the CoE,

595) Para. 30, *Copenhagen Document of the OSCE* (n 547).

596) Para. 30, *Copenhagen Document of the OSCE* (n 547).

597) Para. 32, *Copenhagen Document of the OSCE* (n 547).

598) Para. 31 *Copenhagen Document of the CSCE* (n 547), which is reaffirmed in the Charter for a New Europe, provides that participating states will adopt 'special measures' where necessary to ensure full equality of persons belonging to national minorities with other citizens in the exercise and enjoyment of their human rights and fundamental freedoms. In para. 33, *Copenhagen Document of the OSCE* (n 547), the participating states undertook to create the conditions for the promotion 'of the ethnic, cultural, linguistic and religious identity of national minorities' and to 'take the necessary measures to that effect after due consultations, including contacts with organisations or associations of such minorities, in accordance with the decision-making procedures of each state'. The Copenhagen Document was the first time where states approved positive measures to ensure effective equality at the OSCE level. As Florence Benoît-Rohmer, *The Minority Question in Europe: Towards a Coherent System of Protection of National Minorities* (CoE, Strasbourg 1996) 24–25, observes when analysing para.33 Copenhagen Document, '[f]or the first time, the states explicitly allow the possibility that positive measures, intended to restore the real and effective equality with the majority, may be taken with respect to minorities without these measures being considered as discrimination against the majority'.

599) Part II, paras 1–3, *Helsinki 1992 Document* (n 547).

which was particularly well placed to contribute to the settlement of issues of national minorities, should transform such political commitments into legal obligations.[600] It has further stressed the importance of bilateral agreements between states aimed at assuring the protection of national minorities and their important role in assuring peace and stability in Europe.[601] More importantly, the CoE 1993 Vienna Declaration instructed the Committee of Ministers of the CoE to assist, upon request, in the negotiation and implementation of such agreements as well as in agreements on trans-frontier cooperation.[602]

The Pact on Stability envisaged the conclusion of bilateral treaties between neighbouring states as the main tool for resolving frontier and minority issues in establishing or re-establishing good neighbourly relations among states. The EU encouraged countries to conclude 'cooperation and good neighbourliness agreements and arrangements, including minority and border issues […] through a process of bilateral negotiation and regional tables'.[603] As a result, the Pact on Stability consisted of a declaration urging the strengthening of good neighbourly relations among participating states and 130 good neighbourliness and cooperation agreements and arrangements, most of which were concluded before the signing of the agreement.[604] However, the conclusion of bilateral agreements among neighbouring or geographically proximate states of this type was hardly likely to introduce any novelty to the previous state practice.

2.2 Roots of the treaties on good neighbourliness

Bilateral agreements treating good neighbourly relations between states can be found under various designations, such as 'Basic Treaty' or 'Treaty on the basis of relations' as used in the German Language (Grundlagenverdräge),[605] or 'Treaty on Friendship' or 'Treaty on Friendship, Good Neighbourliness and Cooperation' etc. Similar bilateral agreements between states have already been used in previous centuries as a way to protect borders and minorities.[606] The idea of bilateral treaties reappeared in the aftermath of the Second World War when the connection between the principle of good neighbourliness and the questions of borders and minorities became more comprehensive.

600) Appendix II: National Minorities, CoE Summit (1993) Vienna Declaration, 8–9 October, Vienna, Europe Documents No. 1855 (15 October 1993) (*CoE 1993 Vienna Declaration*).
601) Appendix II: National Minorities, *CoE 1993 Vienna Declaration* (n 600).
602) Appendix II: National Minorities, *CoE 1993 Vienna Declaration* (n 600).
603) Annex 1, para. 1.7, *Council Decision 94/367/CFSP* (n 583).
604) *Toggenburg* (n 587).
605) *See* also Kinga Gal, 'Bilateral Agreements in Central and Eastern Europe: A New Inter-States Framework for Minority Protection?' (1999) ECMI Working Paper No. 4, 7.
606) *See* Emma Lantschner and Roberta Medda, 'Bilateral Approach to the Protection of Kin-Minorities' in *The Protection of National Minorities by their Kin-State* (CoE, Strasbourg 2002) 107–134, 107. Also, as noted by Elizabeth G Ferris, *The Politics of Protection: The Limits of Humanitarian Action* (Brookings Institution, Washington DC 2011) 42, the minority rights regime

For instance, the so-called 'Gruber–De Gasperi Agreement',[607] agreed between the Austrian and Italian Governments in 1946, provided for complete equality of the:

> German-speaking inhabitants of the Bolzano Province and of the neighbouring bilingual townships of the Trento Province […] with the Italian-speaking inhabitants, within the framework of special provisions to safeguard the ethnical character and the cultural and economic development of the German-speaking element.[608]

In consultation with the Austrian Government, the Italian Government pledged itself to the aim of establishing 'good neighbourhood relations' to 'revise in a spirit of equity and broadmindedness' the citizenship decisions which resulted from the 1939 Hitler–Mussolini agreements;[609] to agree on mutual recognition of certain degrees and University diplomas; to draw up a convention for the free transit of passengers and goods between northern and eastern Tyrol; and to reach special agreements to enlarge the frontier and local exchange of goods between Italy and Austria.[610] Other examples include the 'Additional Protocol to the Treaty of Friendship and Mutual Aid between the Republic of Poland and the Czechoslovak Republic', which in the name of a firm friendship between the two states provided for settlement of the outstanding territorial questions on the basis of mutual agreement and to guarantee the Poles in Czechoslovakia and the Czechs and Slovaks in Poland the possibility of national, political, cultural and economic development within the limits of law and on the basis of reciprocity;[611] the early Agreement between the Greek and

of the League of Nations was necessarily based on bilateral treaties. Nevertheless, as analysed by *Gal*, ibid 3, although most of these were incorporated into various peace treaties, the only bilateral treaty which has survived the League of Nations period is the 'Agreement between Finland and Sweden, Relating to Guarantees in the Law of 7 May 1920 on the Autonomy of the Åland Islands', League of Nations OJ, supp.5, Resolutions Adopted by the Council of the League of Nations at its Thirteenth Session (1921), 24 – the text of the Treaty can be found in Hurst Hannum (ed.), *Documents on Autonomy and Minority Rights* (Martinus Nijhoff, Dordrecht 1993) 141–143.

607) Annex IV of the Treaty of Peace with Italy, Provisions Agreed upon by the Austrian and Italian Government (signed 5 September, 1946) 49 UNTS 184 (*Gruber-De Gasperi Agreement*).

608) *Gruber-De Gasperi Agreement* (n 607) 220.

609) With the Hitler–Mussolini agreement of 21 October 1939, South Tyroleans were given the option of either choosing German citizenship and resettling in Nazi Germany (Option für Deutschland) or retaining their Italian citizenship and accepting assimilation. *See* in more detail, Elizabeth F Defeis, 'Minority Protections and Bilateral Agreements: An Effective Mechanism' (1998) 22 Hastings Int'l and Comp.L.Rev. 291–321, 298. *See* more generally, Rolf Steininger, *South Tyrol: A Minority Conflict of the Twentieth Century* (Transaction Publishers, New Brunswick, NJ 2003).

610) *Gruber–De Gasperi Agreement* (n 607) 220.

611) *See* 'Treaty of friendship, co-operation and mutual assistance between the Polish People's Republic and the Czechoslovak Socialist Republic' (signed 1 March 1967) 632 UNTS I–9027 and particularly the 'Additional Protocol to the Treaty of Friendship and Mutual Aid between the Republic of Poland and the Czechoslovak Republic' (signed 10 March 1947) 25 UNTS No. 365, 240–246.

the Turkish Governments for the promotion of 'friendly interchange and cooperation', undertaking to ensure the persistence of the cultures of the two countries;[612] and the Bonn–Copenhagen Declaration intended to secure friendly relations between Denmark and Germany through respect for the rights of minorities, etc.[613] In a later treaty on mutual relations between the Czechoslovak Socialist Republic and the Federal Republic of Germany, the contracting parties were even more explicit:

> purposing to create lasting foundations for the development of good-neighbourly relations […] in accordance with the] purposes and principles of the Charter of the United Nations [...] affirm[ing] the inviolability of their common frontier […] and mutually pledge to each other unqualified respect for their territorial integrity. [States have also declared] that they have no territorial claims of any kind against each other and that they will not raise any such claims in the future.[614]

There are numerous other early examples indicative of state practice in the conclusion of good neighbourly agreements based inter alia on the principles of inviolability of frontiers and the protection of the rights of minorities.[615] Such treaties

612) Cultural Agreement between Greece and Turkey (signed 20 April 1951) 178 UNTS No 2333, 19–27.

613) Bonn–Copenhagen Declaration (adopted 19 April 1955). In particular, the Danish Government issued a declaration regarding persons belonging to the German minority in South Jutland: '[d]esiring to promote peaceful relations between the population on both sides of the Danish-German border and thus also the development of friendly relations between the Kingdom of Denmark and the Federal Republic of Germany and referring to Article 14 of the European Convention on human rights, pursuant to which the rights and freedoms set forth in this Convention shall be secured without discrimination in respect of association with a national minority the Royal Danish Government issues the following declaration confirming the legal principles already applicable to this minority'. The other contracting side included almost the Basic Law of the state itself. The text of the Bonn–Copenhagen Declaration is available from the identical statement regarding the Danish minority in the Federal Republic of Germany, determining also that the members of minority shall enjoy rights guaranteed under the declaration, *see*: <http://www.ecmi.de/about/history/german-danish-border-region/bonn-copenhagen-declarations> last accessed 14 October 2014.

614) 'Treaty on Mutual Relations between the Federal Republic of Germany and the Czechoslovak Socialist Republic' (signed 11 December 1973) 951 UNTS 355.

615) Some of the treaties from the earlier period include the 'Treaty on Cultural and Intellectual Relations between the Netherlands and Belgium' (signed 16 May 1946) 266 UNTS 23; the 'Memorandum of Understanding between the Republic of Italy and the Federal Socialist Republic of Yugoslavia' (signed on 5 October 1954), the text is available in Udina Manlio, *Gli Accordi di Osimo: lineamenti introduttivi e testi annotati* (Lint, Trieste 1979) 137; the 'Cultural Protocol between Greece and Turkey (signed 20 December 1968), published partially in Bjӧrn Arp, *International Norms and Standards for the Protection of National Minorities: Bilateral and Multilateral Texts with Commentary* (Martinus Nijhoff, Leiden 2008) 243–244; the 'Treaty between the Italian Republic and the Socialist Federal Republic of Yugoslavia' (signed 10 November 1975) 1466 UNTS 2; 'Agreement between the United Kingdom and Northern Ireland and the Republic of Ireland' (signed 15 November 1985), available at: <http://cain.ulst.ac.uk/hmso/aia.htm> last accessed 14 October 2014; 'The Declaration on Friendship, Good-Neighbourly Relations and Co-

were concluded not only between immediate neighbours but among states all across Europe and beyond,[616] regulating a wide range of fields, selected on the basis of their relevance to the bilateral relations between the states.[617] The same applies to the good neighbourliness treaties included in the Pact on Stability. Although frontiers and the treatment of minorities have been particularly emphasised in the whole process of stabilisation of the European states, such treaties can also regulate different aspects of the cooperation between states that contributes to their good neighbourly relations. As clearly put by the HCNM:

> [s]uch treaties play a crucial role in establishing the basis of good neighborliness and friendly relations especially between geographically contiguous States which simply need a broad framework to regulate the full range of their common interests, including border controls, use of water resources, economic and justice affairs, and so on. Importantly, if such treaties also contain clauses concerning the protection of persons belonging to national minorities they can put to rest any concerns that neighbors may have about the treatment of a kin-minority. They may also ease suspicions about the use of minority issues as a pretext for external interference, and create mechanisms both to facilitate cultural exchanges of mutual interest and benefit, and also respond to points of dispute which may arise.[618]

In most cases, good neighbourliness treaties refer either implicitly or explicitly to the aims and principles of the UN Charter, the Helsinki Act, the OSCE documents and to the generally accepted international norms of human rights, while

operation between the Popular Republic of Bulgaria and the Republic of Greece' (signed 11 September 1986) published in Bulgarian in 'Работническо дело' of 13 September 1986 (*Declaration on Friendship between Bulgaria and Greece*) etc.

616) *See* for instance, the 'Treaty of Friendship, Cooperation and Mutual Assistance between the Russian Federation and the Republic of Tajikistan' (signed 25 May 1993) in Arie Bloed and Pieter van Dijk (eds), *Protection of Minority Rights Through Bilateral Treaties: The Case of Central and Eastern Europe* (Kluwer Law, The Hague 1999) 282–285; the 'Agreement on Cooperation for the Purpose of Ensuring the Rights of the Russian Minority in Turkmenistan and the Turkmenian in the Russian Federation between the Russian Federation and the Turkmenistan (signed 18 May 1995), published in 'Собрание законодательства Российской Федерации' N. 32, 6407–6410, of 11 August 1997, English translation available in *Arp*, ibid 359–362; 'Agreement on Friendship and Cooperation between Latvia and Uzbekistan' (6 June 1995), 1928 UNTS 210 etc.

617) Jan F Triska and Robert M Slusser, *The Theory, Law and Policy of Soviet Treaties* (Stanford UP, Stanford 1962) 288, observe for instance, that Soviet Treaties on Friendship provided, among other things, for future cooperation 'in a spirit of friendship, for the purposes of further development and consolidation of the economic (and cultural) ties' among participating states.

618) Address given by Max van der Stoel to an international seminar on 'Legal Aspects of Minority Rights: Participation in Decision-Making Processes and Bilateral Agreements on Minority Rights' (4 December 2000, Zagreb). The text is available at: <http://legislationline.org/documents /action/popup/id/8488> last accessed 14 October 2014.

consideration has been given to the 'further development and strengthening of friendly relations, good-neighbourliness and mutually beneficial co-operation [which] answers the fundamental national interests of the peoples […] and serves the aims of peace and security'.[619] Similar assertions followed in a number of bilateral declarations,[620] some of which have explicitly linked the interpretation of the principle of good neighbourliness to the relevant international instruments and to their constitutions.

2.3 Strengths and weaknesses of good neighbourliness treaties

The Pact on Stability is a political document, lacking any legal force.[621] The importance of the Pact on Stability rather 'lies in the provisions that establish a system of guarantees for the bilateral norms by including the OSCE in the implementation mechanism of the treaties incorporated in the document'.[622] However, the Pact on Stability aside, the incentive for the conclusion of good neighbourliness treaties is also evident from some multilateral international instruments such as the UN Declaration on Minorities and the Framework Convention for the Protection of National Minorities of the CoE.[623]

619) 'Treaty between the Russian Soviet Federative Socialist Republic and the Belorussian Soviet Socialist Republic' (signed 18 December 1990) – for an English version of the text, *see Bloed and van Dijk* (n 616), 257–258; *see* in Fernard de Varennes, *Language, Minorities and Human Rights* (Martinus Nijhoff, The Hague/Boston/London 1996) 353 *et seq*., along similar lines: 'Treaty on the Foundations of the Relations between the USSR and the Republic of Ukraine' (signed 19 November 1990); Treaty between Ukraine and the Republic of Belarus (29 December 1990); 'Treaty on the Principles for the Interstate Relations between the USSR and the Republic of Estonia' (signed 12 January1991); 'Treaty on the Foundations of Interstate Relations between the USSR and the Republic of Lithuania' (signed on 29 July 1991); *see* also in Carmen Schmidt, *Der Minderheitenschutz in den baltischen Staaten – Dokumentation und Analysen – Estland, Lettland Litauen* (Kulturstiftung der Deutschen Vertriebenen, Bonn 1993) 90–91, a German version of the 'Treaty on the Foundations of the States Relations between the Russian Soviet Federative Republic and the Republic of Latvia' (signed 13 January 1991). Other similar examples include the 'Treaty on Good Neighbourliness, Partnership and Cooperation between the Federal Republic of Germany and the Union of Soviet Socialist Republics' (signed 9 November 1990) 1707 UNTS 387; 'Treaty on Good-Neighbourly Relations and friendly Cooperation between the Federal Republic of Germany and the Republic of Poland' (signed on 17 June 1991) 1708 UNTS 463; Treaty between the Czech and Slovak federal Republic and the Republic of Poland on good neighbourly relations, solidarity and friendly cooperation' (signed 6 October 1991) 632 UNTS I–9027. For many other examples *see Arp* (n 615) 277 *et seq.*

620) Examples include the 'Deklaracija o Odnosih Slovenie z Italijo in Evropsko unijo' Ur.l. RS, št. 71/1994, providing for effective protection of the autochthonous minorities (the Slovenian in Italy and the Italian in Slovenia) in accordance with all international treaties, from the peace Treaty with Italy to the Treaty of Osimo.

621) *Gal* (n 605) 4.

622) ibid.

623) Framework Convention for the Protection of National Minorities (adopted on 1 February 1995, entered into force 1 February 1998) (FCNM). With respect to other relevant international instruments, *see* Maria Amor Martín Estébanez, 'Minority Protection and the Organisation for Security

The FCNM, which is the first legally binding multilateral instrument devoted to the protection of national minorities, provides a conventional basis for both the protection of minorities in the light of the good neighbourliness principle and for the conclusion of bilateral and multilateral agreements in this respect. In particular, the FCNM provisions 'shall be applied […] in conformity with the principles of good neighbourliness, friendly relations and co-operation between States'.[624] In order to ensure the protection of national minorities, parties should 'endeavour to conclude, where necessary, bilateral and multilateral agreements with other States, in particular neighbouring States'.[625] Similarly, the European Charter for Regional or Minority Languages (ECRML) provides that parties should:

> apply existing bilateral and multilateral agreements which bind them with the States in which the same language is used in identical or similar form, or if necessary to seek to conclude such agreements, in such a way as to foster contacts between the users of the same language in the States concerned.[626]

However, a number of ratifying states have expressed reservations to these international instruments, while other EU/CoE Member States have not ratified them in the first place.[627] This certainly weakens the prospects for consistent interpretation and successful implementation of the rights and duties of states stemming from the good neighbourliness principle as embodied in these international instruments.

While lacking legal force, the Pact on Stability enforced through the bilateral treaties on good neighbourliness has certainly contributed to the strengthening of the position of the good neighbourliness principle in interstate relations. In particular, such treaties are a clear continuation to the state practices regulating inter alia the inviolability of frontiers and the treatment of minorities in the light of the good neighbourliness principle, and their persistence over time demonstrates the existence of a customary norm. Furthermore, the political commitments of states established with the international instruments become legally relevant when referred to in the bilateral treaties on good neighbourliness, while non-binding international instruments gain binding force either because of state practices or because of the explicit will of the contracting parties.[628] Moreover, considering that EU law is interpreted in the light

and Co-operation in Europe' in Peter Cumper and Steven Charles Vheatley (eds), *Minority Rights in the 'New' Europe* (Kluwer Law Int'l, The Hague 1999) 33.

624) Article 2 FCNM.

625) Article 18(1) FCNM.

626) Article 14(a) European Charter for Regional or Minority Languages ETS No.148 (adopted 22 June 1992, entered into force 1 March 1998).

627) The following states have not signed and/or ratified the FCNM: Andorra, Belgium, France, Greece, Iceland, Luxembourg, Monaco and Turkey. The ECRML has not been signed and/or ratified by Albania, Andorra, Azerbaijan, Belgium, Bulgaria, Estonia, France, Georgia, Greece, Iceland, Ireland, Italy, Latvia, Lithuania, Malta, Moldova, Macedonia, Monaco, Portugal, Russia, San Marino and Turkey.

628) For instance, para. 1.1, of the *Declaration on Friendship between Bulgaria and Greece* (n 615)

of the international obligations of Member States (as long as these are consistent with primary EU law), bilateral treaties on good neighbourliness can, at least theoretically, contribute to an enhanced protection of the rights of minorities at the EU level. This is particularly because, in line with Article 8 TEU, good neighbourliness is founded on the values of the Union, including the rights of persons belonging to minorities. Finally, the EU has to observe the law on good neighbourly relations as far as it codifies customary rules of general international law.[629] This is indeed the case with the principles of the inviolability of frontiers and the protection of the rights of minorities, which shape the main framework of the good neighbourliness principle in the bilateral treaties included in the Pact on Stability.

Potential and positive effects aside, good neighbourliness treaties have hardly contributed to a significant change in the interstate relations of the states involved. From a legal perspective, the implementation of good neighbourliness treaties faces a lack of effective mechanisms, despite the several existing implementation and monitoring procedures.[630] The EU did not apply strict conditionality to secure the implementation of these agreements under the OSCE framework. States merely needed 'to promise to implement certain initiatives to comply with international standards'.[631] For the good neighbourliness agreements and arrangements included in the Pact on Stability, the OSCE relies on its instruments and procedures, including

reads: 'both parties officially confirm that their mutual relations will also in the future be governed by the consequent compliment of the principles of the UN Charter, the Final Act of the OSCE, the international treaties in force and the general norms of international Law'. An excellent example is the 'Treaty on Friendship and Cooperation between Slovenia and Hungary' (signed on 1 December 1992), published in Hungary in 'Magyar Kozlony' (1995) 2044. According to Article 16 of that Treaty, the signatories 'come to an agreement on the fact that the standards established in the documents of the OSCE Conference on the Human Dimension held in Copenhagen, on 29 June 1990 and those of the other OSCE documents worked out for the protection of the ethnic minorities into obligatory effect' and also the signatories 'take steps in an international scope for the acceptance of the OSCE obligations worked out for the protection and promotion of the ethnic minorities as legal norms of universal validity'. *See* along similar lines Articles 10–13 of the 'Treaty on Friendship and Cooperation between the Republic of Lithuania and the Republic of Belarus' (signed on 6 February 1995), for English translation of the text *see Bloed and van Dijk* (n 616) 404–406; Article 16 of the Treaty on friendship and Cooperation between the Republic of Hungary and the Republic of Moldova (signed on 19 April 1995), *see* the English version of the text in *Bloed and van Dijk* (n 616), 358–359; and Article 13 of the Treaty of Friendship, Cooperation and Good Neighbourliness and Security between the Republic of Albania and the Greek Republic (signed on 21 March 1996), available in the 'Second Report submitted by Albania pursuant to Article 25, para.1 of the Framework Convention for the Protection of National Minorities', ACFC/SR/II (2007)004 of 18 May 2007, 127–128 etc.

629) *See* (n 260).

630) As most of these treaties were incorporated in the Pact on Stability the implementation mechanisms are primarily established with the Declaration of the Pact on Stability in Europe. The implementation of the agreements has been entrusted to the OSCE, which was to act as the repository for these agreements – *see* Annex to *Council Decision 94/367/CFSP* (n 583), para. 5.2.

631) Patrice C McMahon, *Taming Ethnic Hatred: Ethnic Cooperation and Transnational Networks in Eastern Europe* (Syracuse UP, NY 2007) 78.

those concerning conflict prevention, peaceful settlement of disputes and the human dimension. In this respect and as far as the protection of minorities is concerned, states can consult the HCNM if a problem regarding an implementation of a good neighbourliness treaty appears.[632] Another possibility for states under the auspices of the OSCE is to refer the possible dispute concerning the interpretation or implementation of good neighbourliness agreements to the International Conciliation and Arbitration Court, which was established by the OSCE Convention on Conciliation and Arbitration.[633] Until now, however, none of these two possibilities has been used.[634]

Another option for the successful implementation of good neighbourliness agreements is the possibility to use domestic court proceedings as a monitoring instrument, although this would largely depend on the effect that these treaties would have in the constitutional systems of the parties and also of the provisions contained in the particular treaty.[635] A successful invocation of a right would be likely in cases where a constitutional system allows for the direct application of a treaty and where the provisions of the treaty contain self-executing rights i.e. concrete rights providing for a clear obligation on the states involved.[636]

There might be also a possibility of referring disputes arising from good neighbourliness treaties to the ICJ, although none of the treaties make reference to that court. The obligation of states to submit a dispute to the ICJ can be deduced

632) The HCNM was primarily created as an instrument of conflict prevention concerned with early warning, rather than the protection of the rights of minorities as provided in good neighbourliness treaties. Nevertheless, the role of the HCNM in the implementation of minority standards was enhanced in the bilateral treaties. This, according to Arie Bloed, 'Helsinki–II: The Challenges of Change' 3(3) Helsinki Monitor (1992) 37–50, 48, has resulted from the HCNM's efforts to prevent critical minority issues from escalating into conflict and violence. To that end, in line with the *Helsinki 1992 Document* (n 525), the HCNM was mandated to draft recommendations acceptable to all sides and also to communicate and cooperate where there is a 'minority problem' to all parties in individual cases. The HCNM may receive information regarding minorities from all sources apart from organizations connected with terrorism (Part II, paras 23–25). Based on this information the HCNM decides whether to involve itself in a given situation, and this decision is not subject to approval of the states concerned (Part II, para. 27).

633) The 'Convention on Conciliation and Arbitration within the CSCE' (15 December 1992) 32 ILM 557, followed the 'Principles for Dispute Settlement and Provisions for a CSCE Procedure for Peaceful Settlement of Dispute' (text available in 30 ILM 382), adopted by OSCE states in Valletta in 1991, which were then modified in 1992 at the Stockholm meeting (text available in 32 ILM 55), where the Convention on Conciliation and Arbitration was opened for signature to complement the principles.

634) Section B of the *Report of the Venice Commission* (n 514).

635) Section B of the *Report of the Venice Commission* (n 514).

636) Good neighbourliness treaties do not often contain self-executing rights. This is particularly the case with the provisions concerning the respect for common borders and is even less likely with the provisions concerning respect of minorities. For instance, Article 14 of the 'Convention on providing special rights for the Slovenian minority living in the Republic of Hungary and for the Hungarian minority living in the Republic of Slovenia' (signed 6 November 1992) (*Hungarian-*

from the European Convention for the Peaceful Settlement of Disputes if a dispute concerns:

a) the interpretation of a treaty;
b) any question of international law;
c) the existence of any fact which, if established, would constitute a breach of an international obligation;
d) the nature or extent of the reparation to be made for the breach of an international obligation.[637]

However, the ECPSD has been ratified only by fourteen states so far.[638] Another unfortunate circumstance is that the provisions of the ECPSD do not apply to disputes relating to facts or situations which preceded its conclusion.[639]

Some of the treaties also foresee joint intergovernmental mechanisms for cooperation – such as joint committees – for the conduct of negotiations and to help reach agreement over the implementation of the treaty, but also to monitor the progress of implementation, to report to contracting governments and to suggest amendments to the treaties if necessary.[640] One of the dominating examples is

Slovenian Convention), available in English in *Arp* (n 615) 312–315, provides that 'no provision of the [Convention] shall be interpreted in a way that it harms the territorial integrity of each Contracting Parties'. Even more specific is Article 15 of the 'Convention between the Republic of Hungary and the Republic of Croatia on the protection of the Hungarian minority in the Republic of Croatia and the Croatian Minority in the Republic of Hungary' (signed 5 April 1995) (*Hungarian-Croatian Convention*), 2043 UNTS No. I–35340, which provides that 'no provision of the [Convention] shall be interpreted or implemented in a way which would threat or violate the territorial integrity of each Contracting Party'. *See* along similar lines: Article 4 of the 'Treaty on Friendship, Cooperation and Good Neighbourliness between the Republic of Hungary and Romania' (signed 16 September 1996), English version available in 36 ILM 340–353; Article 3 of the 'Treaty on Friendship and Cooperation between the Republic of Hungary and the Republic of Slovakia' (signed 19 March 1995) (Hungarian-Slovak Treaty) in 'Magyar Kozlony' (1997) 3485.

637) Article 1 of the 'European Convention for the Peaceful Settlement of Disputes', CETS No.023 (adopted 29 April 1957, entered into force 30 April 1958) (ECPSD).

638) These are: Austria, Belgium, Denmark, Germany, Italy, Liechtenstein, Luxembourg, Malta, The Netherlands, Norway, Slovakia, Sweden, Switzerland and the United Kingdom.

639) Article 27(a) *ECPSD* (n 637). Only Austria and Italy have voted for a system which explicitly allows disputes concerning minority issues to be referred to the ICJ. The two neighbouring countries adopted a bilateral treaty in which they modified Article 27(a) *ECPSD* (n 637) and allowed for retroactive application of Chapter I of the ECSDP. 'Vertrag betreffend die Abänderung des Artikel 27 lit. a des Europäischen Übereinkommens zur friedlichen Beilegung von Streitigkeiten im Verhältnis zwischen Österreich und Italien' (10 June 1992) StF: BGB1. Nr. 395/1992. *See* in this respect Frank Selbmann, 'The International Court of Justice' in *Mechanisms for the Implementation of Minority Rights* (CoE, Strasbourg 2004) 74–75.

640) The creation of joint committees is not a new phenomenon. For earlier examples *see* Article 2 (1 and 2) of the 'Treaty on Cultural and Intellectual Relations between the Netherlands and Belgium' (n 615) from 1946, which envisaged the creation of a joint committee to settle questions arising from the application of the agreement. *See* also Articles 16 and 18 (1 and 2) of the *Cultural Agreement between Greece and Turkey* (n 612), from 1951, which envisaged the creation of a 'Perma-

Hungary which, along with various surrounding states, foresaw the creation of such joint committees in a number of treaties.[641] Nonetheless, although joint committees can have positive results in bridging the interests of the contracting parties through discussions and negotiations and can also contribute by suggesting modifications to the existing treaties if necessary, these bodies do not possess any legislative or sanctioning powers to force the contracting parties to comply with the treaty provisions or to adopt the necessary alterations.

3. Protection of minorities in interstate relations

Bilateral treaties concerning inter alia the treatment of minorities are primarily intended to safeguard the rights of minorities constitutive to a neighbouring state, rather than protecting other minority groups.[642] The Report of the Venice

nent Mixed Commission' to draw up proposals for the application of the Agreement and Para. 8 of the 'Memorandum of Understanding between the Republic of Italy and the Federal Socialist Republic of Yugoslavia' (n 615), which envisaged the establishment of Italian-Yugoslav Mixed Commissions to assist and consult on the problems relating to the Yugoslav ethnic group in the zone under Italian administration and the Italians under the zone of Yugoslav administration, and also with the further aim of examining the claims and questions raised by individuals belonging to the respective ethnic groups on the implementation of the Memorandum.

641) *E.g.* Article 15 of the *Hungarian-Slovenian Convention* (n 636), 312–315, provides for 'a special inter-governmental minority Commission for monitoring the implementation of the provisions of the (relevant) Convention', which has been assigned to discuss the issues of the relevant minorities; evaluate the implementation of the Convention; and prepare and adopt recommendations for the contracting governments concerning the implementation, and where necessity for amendment, of the Convention. Along similar lines, Hungary and Ukraine expressed their readiness in para. 16 of the 'Declaration on the Principles of Cooperation between the Republic of Hungary and the Ukrainian Soviet Socialist Republic for the Protection of the Rights of National Minorities' along with its Protocol (adopted 31 May 1991), Press Release of the Ministry for Foreign Affairs, No.12, 1991, to set up a Joint Committee which was to monitor the implementation of the principles laid down in the document. Along similar lines, joint committees with similar tasks were also envisaged between neighbouring Hungary and Slovakia in Article 15(6) of the *Hungarian-Slovak Treaty* (n 636); between Hungary and Croatia in Article 16 of the *Hungarian-Croatian Convention* (n 636). Article 16 of the 'Treaty on Cooperation in Matters related to Persons of German origin who reside in Ukraine between the Federal Republic of Germany and the Republic of Ukraine' (signed 3 September 1996), English translation of the Treaty is available in 'Comparative Summary of Bilateral Agreements for the Protection of National Minorities', CoE Doc. SP/BA(2003) 002, 363–367. More recent examples include Article 20 of the 'Treaty on the Cooperation in the Fields of Culture, Education and Sciences between the Republic of Austria and the Republic of Slovenia' (signed 30 April 2002) available in BGB1. III 90/2002; Article 11 of the 'Treaty on Cooperation in the Field of National Minority Protection between the Federal Government of the Federal Republic of Yugoslavia and the Government of Romania' (signed 4 November 2002) available in English in (2002/3) 2 Eur. YB Minority Issues 592–596 etc.

642) The Venice Commission defines bilateral and multilateral agreements as the main tool at the disposal of kin-States for the protection of their kin-minorities in other home-States - Section A of the *Venice Commission* (n 514). *See* also *Arp* (n 615) 73.

Commission[643] and the Bolzano Recommendations[644] provide a fairly clear explanation as to the treatment of national minorities[645] in interstate relations in general and in the light of the principle of good neighbourliness in particular. The Independent International Fact-Finding Mission on the Conflict in Georgia further analysed the compliance of one of the states involved in the Russia–Georgia conflict with the good neighbourliness principle, basing its conclusions partly on the findings of the Venice Commission. The Fact-Finding Mission did not, however, assess the compliance of states with their obligation to protect the human rights of their residents in light of the good neighbourliness principle.

3.1 The Report of the Venice Commission and the Bolzano Recommendations

The Report of the Venice Commission resulted from the requests of the Romanian and Hungarian governments related to the implementation of the 'Act LXII of 2001 on Hungarians Living in Neighbouring Countries: Status Law' which provided a number of benefits to persons of Hungarian origin living in neighbouring countries and holding foreign nationality.[646] It clarified certain important aspects regarding the status of kin

643) *Report of the Venice Commission* (n 514).

644) *Bolzano Recommendations* (n 515).

645) The *Bolzano Recommendations* (n 515) use the term 'national minorities' to include 'religious, linguistic and cultural as well as ethnic minorities, regardless of whether these groups are recognized as such by the States where they reside and irrespective of the denomination under which they are recognized'.

646) Act LXII of 2001 on Hungarians Living in Neighbouring Countries: Status Law (adopted on 19 June 2001, entered into force on 1 January 2002) 40 ILM 1242 (*Status Law*). For more detail on the Status Law, *see* Sergiu Constantin, 'The Hungarian "Status Law" on Hungarians Living in Neighboring Countries' (2001) 1(2) Eur.YB Minority Issues 593–622. As summarized by Marten Breuer, 'The Act on Hungarians Living in Neighbouring Countries Challenging Hungary's Obligations under Public International Law and European Community Law' (2002) 2 Zeitschrift für Europarechtliche Studien 255–297, 262, the Status Law enacted by the Hungarian Parliament provided for benefits in six major areas: culture and science; education; social security provisions and health services; travelling; employment; and public media and assistance to organisations operating abroad. In line with Article 1(1–2), the Status Law applied to: (1) persons declaring themselves to be of Hungarian nationality who are not Hungarian citizens and who have their residence in the Republic of Croatia, the Federal Republic of Yugoslavia, the Republic of Slovenia, the Slovak Republic or the Ukraine, and who a) have lost their Hungarian citizenship for reasons other than voluntary renunciation and b) are not in possession of a permit for permanent stay in Hungary; (2) the spouse living together with the person identified in paragraph (1) and to the children of minor age being raised in their common household even if these persons are not of Hungarian nationality. On 21 June 2001, Romania's Prime Minister, Adrian Natase, required the Venice Commission to examine the compatibility of the Status Law with the 'European standards and the norms and principles of contemporary public international law' – *see* the *Report of the Venice Commission* (n 514). Soon after, the Hungarian government requested the Venice Commission to carry out a comparative study with respect to the ongoing European legislative trends concerning the preferential treatment of national minorities living outside the borders of their countries of citizenship. The aim of the study was to establish whether such treatment is compatible with the CoE standards and with the principles of international law.

minorities[647] in interstate relations, which were then restated in the Bolzano Recommendations and closely followed by the EU. The Bolzano Recommendations were largely based on and reflected in the findings of the Venice Commission, aiming to:

> provide representatives of States, national minorities and international organizations with guidance on how to address the questions concerning national minorities that arise in the context of inter-State relations in a way that protects and promotes the rights of persons belonging to national minorities, prevents conflict, maintains interethnic harmony and strengthens good neighbourly relations.[648]

The Venice Commission made it unambiguously clear that the respect for and the protection of the rights of minorities is primarily a function of the home state.[649] As also clearly outlined in a statement of the OSCE HCNM:

> [p]rotection of minority rights is the obligation of the State where the minority resides. History shows that when States take unilateral steps on the basis of national kinship to protect national minorities living outside of the jurisdiction of the State, this sometimes leads to tensions and frictions, even violent conflict.[650]

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647) The concept 'kin' is a contested one and lacks scientific or legal definition, as clearly noted by the OSCE HCNM in the introductory part of the *Bolzano Recommendations* (n 515). As pointed out by Francesco Palermo, 'National Minorities in Inter-State Relations: Filling the Legal Vacuum?' in Francesco Palermo and Natalie Sabanadze (eds), *National Minorities in Inter-State Relations* (Martinus Nijhoff, Leiden 2011) 3–27, 5, it remains uncertain whether a common history, culture or language are sufficient elements for 'kinship' where the ethnic link is missing, highlighting that some states define kinship 'in terms of blood ties and common ancestry, other in terms of a common culture, language or history or former citizenship'. Notwithstanding this, it is widely accepted that the term 'kin state' is used for a state which has a national minority living in another country (home-state), while a person belonging to a 'kin-minority' refers to a citizen of the home state with the ethnic origin of a kin-state: *see* in this respect the *Report of the Venice Commission* (n 514).

648) *Report of the Venice Commission* (n 514).

649) Section A, para.2 of the Report of the Venice Commission (n 514) notes that 'the pertinent international agreements entrust home-States with the task of securing to everybody within their jurisdiction the enjoyment of fundamental human rights, including minority rights', concluding firmly at the end (section E, para.1) that '[r]esponsibility for minority protection lies primarily with the home-States'. The same acknowledgments are found in the OSCE HCNM Statement and amongst the general principles summarised in the Bolzano Recommendations (n 515) which assert that the obligation for protection of minorities results from sovereignty of states.

650) Rolf Ekéus, OSCE HCNM, 'Sovereignty, Responsibility, and National Minorities: Statement by OSCE Minorities Commissioner' (26 October 2001, The Hague). The statement is available at: <http://www.osce.org/ hcnm/53936> last accessed 14 October 2014.

In the view of the Venice Commission, the adoption of unilateral measures by states granting benefits to kin minorities which 'does not have sufficient diuturnitas to have become international custom'[651] is legitimate if a number of principles are respected: the principle of the territorial sovereignty of states, pacta sunt servanda, friendly interstate relations and respect for human rights and in particular the prohibition of discrimination.[652] National state legislation must be based on the above four principles.

With respect to the principle of the territorial sovereignty of states, the Venice Commission first pronounced its opinion on the question whether 'the mere adoption of legislation with extraterritorial effects, per se, [can] be seen as an interference with the internal affairs of the other State or States concerned and therefore an infringement of the principle of territorial sovereignty of states'.[653] In its response, the Venice Commission distinguished between the effects of the state's legislative acts on foreign citizens. It concluded that the adoption of legislation which addresses foreign citizens does not necessarily infringe the principle of territorial sovereignty. This is particularly true when 'the effects of these laws or regulations are to take place within its borders only'.[654] In contrast, the legitimacy of a state's measures that are capable of impacting on foreign citizens in other countries was viewed by the Venice Commission as less straightforward.

Namely, as clearly emphasised in the Bolzano Recommendations, sovereignty implies obligation on states to ensure the protection of human rights and fundamental freedoms, including minority rights, to all persons within their territories and jurisdictions.[655] Such protection of rights is also a matter for legitimate concern for the international community, which supervises state obligations under international law.[656] In this vein, the involvement of individual states in the protection of human rights, and particularly of the rights of persons belonging to minorities outside their territories and jurisdictions, can be regarded as an interference in the internal affairs of a state and accordingly an infringement of the principle of the territorial sovereignty of that state. In other words, while a state may have an interest or even a constitutional responsibility to support national minorities living in other states on the basis of an ethnic, cultural, linguistic, religious, historical or other tie, this does not imply under international law a right to exercise jurisdiction over these persons in the territory of another state.[657] Therefore, in the view of the Venice Commission,

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651) Section E *Report of the Venice Commission* (n 514).
652) Section E *Report of the Venice Commission* (n 514).
653) Section D(a) *Report of the Venice Commission* (n 514).
654) Section D(a)(i) *Report of the Venice Commission* (n 514).
655) Section I *Bolzano Recommendations* (n 515).
656) Section I *Bolzano Recommendations* (n 515) and section A, para.2 *Report of the Venice Commission* (n 514).
657) Section I *Bolzano Recommendations* (n 515). In its comparative study, the Venice Commission

in cases where the legislation adopted can have effects in other states, '[i]t is not conceivable, in fact, that the home-State of the individuals concerned should not have a word to say on the matter'.[658] Exceptionally, a state may legitimately exercise jurisdiction over such persons in another state if it gets consent for its actions from the home country or if its actions are in fields where an international custom exists, such as education and culture, in which case the consent of the home country is presumed.[659]

States should be guided by the rules and principles established in international instruments on human rights protection when dealing with issues concerning the protection of national minorities. In particular, states are encouraged to cooperate and to conclude bilateral agreements which would further enhance the protection of national minorities.[660] In this context, the Venice Commission referred to the pacta sunt servanda principle and the obligation of states to perform in good faith their duties for protection of the rights of minorities stemming from the treaties to which they are parties. Areas which have been demonstrably pre-empted by bilateral treaties should not be touched upon by the unilateral measures on preferential treatment of kin-minorities 'without the express consent or the implicit but unambiguous acceptance of the home-State'.[661] If disputes arise regarding the interpretation or implementation of these agreements, unilateral measures can be only taken by the kin-state after all existing procedures which have been applied in good faith have

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summarised the constitutional provisions of seven European states which provide certain kinds of support for their kin-minorities in neighbouring and/or other states. The study however does not portray the whole picture since it does not include the constitutional provisions containing limitations regarding the protection of kin-minorities by their kin-sates. For instance, in its Section A, para.6, the *Report of the Venice Commission* (n 514), quotes Article 49 of the Constitution of the Republic of Macedonia from 22 November 1991, Official Gazette 52/91, as follows: 'The Republic cares for the status and rights of those persons belonging to the Macedonian people in neighbouring countries [...], assists their cultural development and promotes links with them'. However, the continuation of the provision which has been introduced with the second amendment of the 'Amendments I and II of the Constitution of the Republic of Macedonia', Official Gazette of Republic of Macedonia 1/92, of 10 January 1992, reads: 'At the same time, the Republic shall not interfere with sovereign rights of other states and with their internal affairs' (autochthon translation). Obviously, the second part of the provision significantly alters the context in which the first provision is quoted as it indicates a legitimate route for the protection of kin-minorities in neighbouring states. Similar omission is repeated by some scholars, *e.g. Palermo* (n 647) 7, quoting the constitutional provisions of European states which stipulate duties for kin-states to care for their kin-minorities abroad. Therefore, the provisions quoted by the Venice Commission cannot be used to establish infringement of the good neighbourliness principle, which would be the case if unjustified interference existed: *see* in this context Jennifer Jackson Preece, 'Diversity and Co-existence in International Society' in the same volume, 29–43, 39, noting that kin-states' role has proved pivotal in supporting or subverting' the principle of good neighbourliness.

658) Section D(a)(i) *Report of the Venice Commission* (n 514).

659) Section D(a)(i) *Report of the Venice Commission* (n 514).

660) Section IV and para.18 *Bolzano Recommendations* (n 515) in particular.

661) Section E *Report of the Venice Commission* (n 514).

proved ineffective.[662] The refusal of states to participate in bilateral talks over the implementation of a treaty, would not only amount to a breach of the above principle but also of the good neighbourliness principle, which must guide the actions of states at the international level, particularly in a local and regional context.[663]

In addition to the pacta sunt servanda principle, the Venice Commission explicitly analysed the principle of good neighbourly relations or as entitled in its report, friendly neighbourly relations. It acknowledged that 'the framework of bilateral treaties connecting Central and Eastern European States draws from the principle of good neighbourliness and holds it as the main purpose of the treaties themselves'[664] and also that the obligation of states to work towards the achievement of good neighbourliness derives from Article 2 of the FCNM. In this sense, the Venice Commission highlighted once again that states need to abstain from taking unilateral measures which can compromise cooperative interstate relations. Moreover, in the view of the Venice Commission, kin-states should consult with home states over the issuance of documents able to create a political bond with their kin minorities. In particular, the Bolzano Recommendations consider the practice of conferring citizenship en masse contrary to the principle of good neighbourliness, even where the state of residence allows for dual citizenship.[665] Such practice 'could fuel separatist tendencies and have a weakening or fragmenting effect in the States where the foreigners reside, violates the principles of sovereignty and friendly relations between states'.[666] Therefore, while recognising the fact that the conferral of citizenship falls generally under the domestic jurisdiction of individual states and that the same can be based on linguistic competences, cultural, historical or family ties, the Bolzano Recommendations emphasise that this issue can be highly sensitive when it involves persons residing abroad. Referring to the ICJ ruling in the Nottebohm Case,[667] the Bolzano Recommendations concluded that states should 'refrain from granting citizenship without the existence of a genuine link between the State and the individual upon whom it is conferred'.[668] Moreover, the conferral of citizenship cannot discriminate against citizens on the grounds of, inter alia, national or ethnic origin in line with Article 5 of the UN Convention on the Elimination of All Forms of Racial Discrimination[669] and Article 5 of the European

662) Section E *Report of the Venice Commission* (n 514).
663) Section E *Report of the Venice Commission* (n 514). *See* also the European Commission for Democracy through Law (26–27 September 1997, Santorini) Law and Foreign Policy, 'Science and Technique of Democracy' No. 24, 14 and Article 2 of the FCNM.
664) Section D(c) *Report of the Venice Commission* (n 514).
665) Recommendation 11 *Bolzano Recommendations* (n 515).
666) Explanation to Recommendation 10 *Bolzano Recommendations* (n 515).
667) *Nottebohm Case (Liechtenstein v. Guatemala)* [1955] ICJ Rep 4.
668) Explanation to Recommendation 11 of *Bolzano Recommendations* (n 515).
669) International Convention on the Elimination of All Forms of Racial Discrimination, UNGA Res 2106 (XX) (21 December 1965).

Convention on Nationality.[670] In this respect it has been highlighted that:

> [e]ven though States have the right to freely determine who their citizens are, they should not abuse this right by violating the principles of sovereignty and friendly, including good neighbourly, relations. Full consideration should be given to the consequences of bestowing citizenship on the mere basis of ethnic, national, linguistic, cultural or religious ties, especially if conferred on residents of a neighbouring State. It could for example lead to differential treatment for these individuals as compared with other residents of the "kin-State" who may be denied access to citizenship.[671]

The Venice Commission further emphasised that states are bound to respect human rights and fundamental freedoms in general, and the principle of non-discrimination in particular, as embodied in the international agreements to which they are parties. In particular, in accordance with the ECHR, states need to secure non-discriminatory enjoyment of the protected rights to everyone on their territory and are also accountable for their acts with extraterritorial effect.[672] Different treatment of persons in similar situations is always prohibited under the principles of international law, except where it is reasonably justified and the measures taken are proportionate to a legitimate aim.[673] In that context, the Venice Commission distinguished between benefits related to education and culture and other benefits granted by the kin-state. It has established that the differential treatment engendered by benefits in the field of education and culture can be justified by the legitimate aim of fostering cultural links between the kin minority and the kin state, in which case the benefits granted must be genuinely linked to the culture of the state and to be proportionate to the legitimate aim pursued.[674] In other areas, where it can be shown that the preferential treatment is genuinely aimed to maintaining links between kin minorities and the kin state and that this is proportionate to the aim, preferential treatment can only exceptionally be allowed.[675]

The EU followed the conclusions of the Venice Commission closely in its approach to the protection of kin minorities in view of the good neighbourliness principle.[676] In its assessment of the compatibility of the Status Law with the acquis

670) European Convention on Nationality, CETS No. 166 (6 November 1997) (ECN).
671) Explanation to Recommendation 11 of *Bolzano Recommendations* (n 515).
671) Section D(d) *Report of the Venice Commission* (n 514).
673) Section D(d) *Report of the Venice Commission* (n 514).
674) Section D(d) *Report of the Venice Commission* (n 514).
675) Section D(d) *Report of the Venice Commission* (n 514).
676) The EU published its opinion on the Status Law because its relations with Hungary at that time

and with the spirit of good neighbourly relations, the European Commission concluded that the contested Act ran contrary to the principle of non-discrimination embodied in the EU Treaties.[677] The European Commission relied on the findings of the Venice Commission in clarifying its position, recalling that unilateral measures of kin states aimed at protection of their kin minorities can be only legitimate if the principles of territorial sovereignty of states, pacta sunt servanda, friendly interstate relations and the respect for human rights, in particular the prohibition of discrimination, are observed. Subsequently, the Status Law was amended in line with the conclusions of the Venice Commission and of the Union shortly after its enactment.[678] However, the implementation of the amended Status Law did not

were governed by the 'Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part', 31 December 1993, [1993] OJ L 347, p. 2. After the adoption of the Status Law and in the course of the accession negotiations with Hungary, the European Parliament called upon the European Commission to evaluate its compatibility with the *acquis* and with the 'spirit of good neighbourhood and cooperation amongst states' – *see* European Parliament Resolution on Hungary's application for membership of the European Union and the state of negotiations, COM (2000) 705 – C5–0605/2000 – 1997/2175 (COS).

677) Commission of the European Communities, '2001 Regular Report on Hungary's Progress Towards Accession', SEC (2001)1748 (Brussels, 13 November 2001) 91. The Commission has neither explained which provisions of the Status Law should have been aligned with the *acquis*, nor has it distinguished between the different fields in which the benefits were granted. This approach by the Commission has been criticised by a number of authors. For instance, *Breuer* (n 646) 272 et seq., maintains that most of the Status Law conforms with EU law. Balázs Vizi, 'The Evaluation of the "Status Law" in the European Union' in Osamu Leda (ed.), *Beyond Sovereignty: From Status Law to Transnational Citizenship?* (Hokkaido UP, Sapporo 2006) 89–107, 102, asserts that while the discriminatory effect of the Status Law in certain areas, such as those concerning the access to the labour market, may be relevant, the Union's statement was 'bold' and 'hardly justifiable'. cf Nigel Swain, 'The Innocence of Article Eighteen, Paragraph Two, Subsection E' in the same volume, 225–241, with regard to rural development policy and more particularly to the possibility of Hungary intervening on behalf of its kin minorities resulting in intervention in the economic affairs of neighbouring countries.

678) Hungary negotiated modifications of the Status Law with Romania and later on with Slovakia. With Romania, it signed a 'Memorandum of Understanding between the Government of the Republic of Hungary and the Government of Romania Concerning the Law on Hungarians Living in Neighbouring Countries and Issues of Bilateral Co-operation' (signed 22 December 2001), which was later substituted by the 'Agreement between the Government of Romania and the Government of the Republic of Hungary on Implementation of the Amended Benefit Law in Romania' (signed 23 September 2003). For a number of changes regarding the implementation of the Status Law, *see e.g.* Myra A Waterbury, *Between State and Nation: Diaspora Politics and Kin-state Nationalism in Hungary* (Palgrave Macmillan, NY 2010) 113–114. On 12 December 2003, an 'Agreement between the Government of the Republic of Hungary and the Government of the Slovak Republic on the Mutual Educational and Cultural Support of the National Minorities' was signed, which helped in the easing of the strained relations between Hungary and Slovakia to a certain extent and for the implementation of the amended Status Law – *see e.g.* Dagmar Kusá, 'The Slovak Questions and the Slovak Answer: Citizenship During the Quest for National Self-Determination and After' in Rainer Bauböck et al. (eds), *Citizenship Policies in the New Europe: Expanded and Updated Edition* (Amsterdam UP, Amsterdam 2009) 276–304, 290. Accord-

resolve all the issues between neighbouring states.[679] As observed by Kusá regarding the relations between Hungary and Slovakia, the main problem was not in the law itself, but in Slovak suspicion at Hungary's 'attempts to recreate the Hungary of the

ing to some authors, *e.g.* Gwendolyn Sasse, 'National Minorities and EU Enlargement: External or Domestic Incentives for Accommodation' in John McGarry and Michael Keating (eds), *European Integration and the Nationalities Questions* (Routledge, Oxon 2006) 64–84,78, the amendments introduced by the Romanian-Hungarian Agreement of 2003 and with the Slovak-Hungarian Agreement of 2003, introduced significant changes, 'effectively reduc[ing] the original law to a mutual declaration of support for cultural and linguistic activities for the Hungarians in Romania and Slovakia and the Romanians and Slovaks in Hungary'.

679) The Status Law did not resolve the main concern with regard to the acceptance of the Schengen requirements, which impinged upon and threatened to sever the ties between the Hungarian minorities and their homeland. The problem was particularly acute for Hungarian minorities living in non-EU countries or countries which were not as near to EU accession. As described by *Waterbury* (n 678) 96, '[i]n the diaspora communities a "Schengen panic" arose, bringing fears of a "different kind of Iron Curtain" that would cut off ethnic Hungarians in Romania, former Yugoslavia, and the Ukraine from the homeland' (footnotes omitted). As a result, a discussion has started in Hungary about the possibility of granting a dual Hungarian citizenship to ethnic Hungarians living in neighbouring countries. This initiative, however, failed to pass at a referendum held on 5 December 2004, due to the low voter turnout (37.5 %) – *see* in this respect *Kusá* (n 678) 302. On 26 May 2010, changes to the Hungarian Citizenship Law were adopted, which allowed for ethnic Hungarians living in other states to gain Hungarian citizenship – for more details *see* Judit Tóth, 'Changes to the Hungarian Citizenship Law July 2010', available at: <http://eudo-citizenship.eu/docs/CountryReports/recentChanges/Hungary.pdf> last accessed 14 October 2014. *See* also Andras Bozoki, 'Access to Electoral Rights: Hungary', <http://eudo-citizenship.eu/admin/?p=fileappl=countryProfiles f=1319-Hungary-FRACIT.pdf> last accessed 14 October 2014. According to some official figures, approximately 270,000 naturalisation procedures were completed by October 2012 and 50,000 were in progress at that time – *see* Daniel Hegedüs, 'The Contradictions of Constitutional Engineering: An Analysis of the New Hungarian Parliamentary Election laws and their Role in the Power System of the Orbán-Regime' Working Paper, FG 1, 2013/03, 12, available at: <http://www.swp-berlin.org/fileadmin/contents/products/ arbeitspapiere/Contradictions_of_Constitutional_Engineering.pdf> last accessed 14 October 2014. On the basis of these figures, Hegedüs estimates that around 400,000–500,000 new citizens will have been created by 2014. In response to the Hungarian law on dual citizenship, Slovakia amended its citizenship law to remove the option of dual citizenship possibility for Slovak citizens who voluntarily acquire citizenship from another country – *see* Citizenship Act 1993, No. 40/1993 as amended, available in English at: <http://eudo-citizenship.eu/admin/?p=file appl=currentCitizenshipLawsf=SLK%20Act%2040_1993_ENGLISH_CONSOLIDATED%20VERSION_as%20last%20amended%20by%20Act%20250_2010.pdf> last accessed 14 October 2014. Slovak citizens who could show a 'real link' to another country, such as permanent residence or family ties, were later exempted from these rules – *see* 'New rules lead few to seek dual citizenship' *The Slovak Spectator* (27 June 2011), <http://spectator.sme.sk/articles/view/43104/2/new_rules_lead_few_to_seek_dual_citizenship.html> last accessed 14 October 2014. More recently, in *István Fehér and Erzsébet Dolník v. Slovakia*, App. Nos 14927/12 and 30415/12 (ECtHR, 21 May 2013), the ECtHR found that the Slovak law providing for loss of Slovak citizenship upon acquiring a citizenship from another country does not amount to a violation of human rights *ipso facto*. The effects of the Slovak law, however, which was, first and foremost, introduced in response to the Hungarian law on dual citizenship, has affected Hungarian minorities in Slovakia much less than other citizens. Reportedly, from 17 July 2010, when the amended Slovak law be-

times of the Hungarian kingdom on a psychological level, and of lurking historic revisionism among the Hungarian minorities themselves'.[680]

3.2 Findings of the Independent International Fact-Finding Mission

Another situation where the compliance of a state with the good neighbourliness principle has been questioned is related to the issuance of passports by Russia to a large number of residents of Abkhazia and South Ossetia and much more is to come with regards to the more recent Crimean status referendum[681] and Russia's annexation of Crimea[682] as well as with the current developments in Eastern Ukraine.[683]

The assessment of the compliance of Russia with the good neighbourliness principle was conducted by the Independent International Fact-Finding Mission on

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came effective, until April 2012, a total of 258 people lost their Slovak citizenship by acquiring citizenship from another country: Czech (129); Austrian (33); German (28) and Hungarian (25) – *see* 'Slováci sa stávajú Čechmi aj Maďarmi. Smer to chce zmeniť, Hnonline.sk, <http://hn.hnonline.sk/slovensko-119/slovaci-sa-stavaju-cechmi-aj-madarmi-smer-to-chcezmenit-496907> last accessed 14 October 2014. The Slovak law has been further challenged before of the Slovak Constitutional Court as unconstitutional on the basis of 'strip[ping] people of their citizenship against their will' – *see* 'ECHR rejects challenges to Slovakia's citizenship law' *The Slovak Spectator* (17 June 2013), <http://spectator.sme.sk/ articles/view/50404> last accessed 14 October 2014. Having declared the motion admissible on 4 July 2012, the Slovak Constitutional Court is expected to rule on the constitutionality of the contested Act.

680) *Kusá* (n 678).

681) The Crimean status referendum was held on 16 March 2014, by the legislature of Autonomous Republic of Crimea and by the local government of Sevastopol and offering to citizens of Crimea two options – to join Russia as a federal subject or to restore the 1992 Crimean constitution and Crimea's status as a part of Ukraine. The official result of the referendum was 96.77% for reuniting with Russia with an 83.1% voter turnout – *see* <http://voiceofrussia.com/2014_03_17/With-100-of-ballots-counted-96-77-of-Crimeans-who-came-to-polls-on-Sunday-voted-to-reunited-with-Russia-Crimean-election-chief-1708/> last 11 May 2014.

682) Following the Crimean status referendum, the Crimean parliament declared independence and formally applied to join Russia on 17 March 2014. Only one day later the Russian and Crimean leaders signed an agreement to join the region to Russia and on 21 March 2014, Russia's President, Vladimir Putin, signed a law completing the annexation of Crimea. The EU has condemned Russia's annexation of Crimea, supporting territorial integrity of Ukraine and imposing sanctions on Russia. However, any meaningful economic sanctions can hardly be imposed on Russia, given that the country is the third largest trading partner with the EU. For a rather critical view on the Russian approaches to the international law after Crimean annexation to Russia, *see* Lauri Mälksoo, 'Crimea and (the Lack of) Continuity in Russian Approaches to International Law', available at: <http://www.ejiltalk.org/crimea-and-the-lack-of-continuity-in-russian-approaches-to-international-law/> last accessed 14 October 2014.

683) Tensions of different intensity have been reported in a number of Ukrainian cities with high density of ethnic Russians. These include: Artemivsk, Dobropillya, Donetsk, Druzhkivka, Horlivka, Ilovaysk, Kharkiv, Khartsyzk, Kostiantynivka, Kramatorsk, Luhansk, Makiyivka, Sloviansk, Snizhne, Yenakiyevo and Zaporizhya. More details available at: <http://www.bbc.co.uk/news/world-europe-27012612> last accessed 14 October 2014.

the Conflict in, Georgia which was supported and financed by the EU.[684] The Fact-Finding Mission aimed 'to investigate the origins and the course of the conflict in Georgia, including with regard to international law, humanitarian law and human rights, and the accusations made in that context'.[685] However, not all the legal aspects have been analysed with the same level scrutiny in light of the good neighbourliness principle, the alleged breach of which could definitely lead to destabilization of the relations between the states involved.

In particular, the Fact-Finding Mission asserted in its report that '[t]he mass conferral of Russian nationality on persons living in neighbouring states risks violating the international legal principle of good neighbourly relations'[686] as established in the UN Charter in the Declaration on Friendly Relations and in the UN Resolutions. It has based its findings on the fact that 'the conferral of Russian nationality [to citizens of Abkhazia and South Ossetia] constitutes interference in the internal affairs of Georgia, because Georgia does not allow dual citizenship'.[687] In support of Georgia, the Fact-Finding Mission further explained that the country 'can not be compelled to admit dual citizenship and to revise its legislation, because states are free in that regard',[688] concluding that 'the Russian "passportisation" policy interferes with Georgia's internal affairs'.[689] According to the Bolzano Recommendations, the situation would not have been any different even if Georgia permitted dual citizenship.[690]

The Fact-Finding Mission followed the approach of the Venice Commission in supporting its findings, explaining 'that the creation of a "political bond" without the consent of the home state of the persons runs against the "principle of friendly neighbourly relations" [and that this] reasoning applies a fortiori to large-scale conferrals of nationality'[691] concluding therefore that the Russian '"passportisation" policy runs counter to the principle of good neighbourliness'.[692] Such an interpretation of the approach of the Venice Commission in a field falling under an exclusive state competence and which is even considered 'a key element of [s]tate sovereignty'[693] is somewhat contradictory to the nature of the good neighbourliness principle as established in international law. Namely, it is a basic principle that states determine under their own laws who their nationals are and this remains essentially

684) *See Council Decision 2008/901/CFSP* (n 516).
685) Article 1(2) of *Council Decision 2008/901/CFSP* (n 516) (footnotes omitted).
686) *Report of the Fact-Finding Mission* (n 550) 174.
687) *Report of the Fact-Finding Mission* (n 550) 173.
688) *Report of the Fact-Finding Mission* (n 550) 174.
689) *Report of the Fact-Finding Mission* (n 550) 174.
690) Recommendation 11, *Bolzano Recommendations* (n 515).
691) *Report of the Fact-Finding Mission* (n 550) 174.
692) *Report of the Fact-Finding Mission* (n 550) 174.
693) *Kochenov* (n 412) 178.

a right of their domestic jurisdictions.[694] Nevertheless, it is also true that 'there are no matters which, by their very nature, are solely within the domestic jurisdiction of a state',[695] to which the good neighbourliness principle testifies. As discussed throughout this work, the good neighbourliness principle imposes a duty on states to respect each other's territorial sovereignty in their international relations and to refrain from exercising their powers in the territories of other states in the absence of a permissive rule to the contrary.

The right of states to determine who their nationals are is thus limited under international law in general and under the good neighbourliness principle in particular by the rights of other states. In that sense, states are obliged to inform, consult and negotiate with neighbouring countries[696] on activities and events in their own territories which can clearly affect their neighbours. The conferral of nationalities on a large scale to residents of a neighbouring country can be certainly considered as one such activity. However, the duty to inform, consult and negotiate in the light of the good neighbourliness principle cannot be extrapolated into an obligation for states to obtain consent or permission from neighbouring countries to perform their domestic policies. The requirement of a 'consent' in such cases would necessarily endow states with cartes blanches to interfere in each other's internal affairs, contrary to the good neighbourliness principle. The Fact-Finding Commission overlooked the duty to inform, consult and negotiate in the light of the good neighbourliness principle, concluding rather that Russia violated the good

694) In PCIJ, *Nationality Decrees issued in Tunis and Morocco* (Advisory Opinion) [1923] PCIJ Rep Series B No 4, para. 40, it has been confirmed that '[t]he question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations' and that at that time 'in the […] state of international law, questions of nationality [were], in the opinion of the Court, in principle within this reserved domain'. In *Nottebohm case* (n 667), the ICJ recalled that 'it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation'. However, referring to Article 1 'Convention on Certain Questions Relating to the Conflict of Nationality Law' (adopted 13 April 1930, entered into force 1 July 1937) 179 LNTS 89, the ICJ restated that '[t]his law shall be recognised by other [s]tates in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality'. Hence, states are not obliged to recognise the nationality conferred to an individual by another state. Almost identically, Article 3 *ECN* (n 670) stipulates that: '[e]ach State shall determine under its own law who are its nationals' and that '[t]his law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality'. Such an approach is quite problematic, allowing as it does for the international ineffectiveness of the nationality and rights of citizens attached to it. When deciding whether full international effect was to be attributed to the nationality invoked in *Nottebohm* (n 667), the ICJ accepted a rather restrictive approach, noting that 'nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties' (p 23).

695) *Kelsen* (n 40) 197 (citation omitted).

696) *See* I.2.2(c) above.

neighbourliness principle by issuing nationalities to residents of Abkhazia and South Ossetia without obtaining consent from Georgia. Such a conclusion seems somewhat rushed and presumptuous, as it does not take into account anything else but the territorial integrity of one of the states involved in establishing the infringement of the good neighbourliness principle.

Another important limitation under international law follows from human rights considerations.[697] This has also been recognised by the Fact-Finding Mission, which noted that 'international law sets up limits on the naturalisation in order to protect two sets of interests: the interests of the affected persons and the interests of the former state of nationality'.[689] Obviously, the Fact-Finding Mission based its findings on the latter limitation, concluding that '[t]he conferral of Russian nationality on a large scale is apt to deprive Georgia of its jurisdiction over persons, forecloses Georgian diplomatic protection for those persons, and may be a basis (or rather a pretext) for military intervention'.[699] Such a conclusion is rather theoretical and does not take the factual context into account in the assessment of the possible violation of the good neighbourliness principle. In particular, although recognising that 'it could be argued that Georgian jurisdiction over the disputed territories is not effective anyway, so that Georgia is not able to protect its citizens there'[700] the Fact-Finding Mission concluded that 'such an argument would be based on the [illegal] fait accompli [and therefore] [t]hat fact can not be held in law against Georgia's sovereign right to protect its nationals, however virtual that right is in the territories'.[701] Nonetheless, the protection of human rights is not only a right but also a duty of states and as noted by the Fact-Finding Mission itself, 'a traditional prerogative of sovereignty'.[702] The failure or refusal of Georgia to grant citizenships to residents of Abkhazia and South Ossetia[703] or to allow the issuance of UN travel documents[704] for these residents should have been assessed in the light of the good

697) *E.g.* Kay Hailbronner, 'Nationality in Public International Law and European law' in Rainer Bauböck et al. (eds), *Acquisition and Loss of Nationality: Comparative Analyses: Policies and Trends in 15 European Countries* (Amsterdam UP, 2006 Amsterdam) 35–104.

698) *Report of the Fact-Finding Mission* (n 550) 150.

699) *Report of the Fact-Finding Mission* (n 550) 172.

700) *Report of the Fact-Finding Mission* (n 550) 172.

701) *Report of the Fact-Finding Mission* (n 550) 172.

702) *Report of the Fact-Finding Mission* (n 550) 171.

703) The Fact-Finding Mission analysed the status of the residents of Abkhazia and South Ossetia under the Georgian Law on nationality from 1993. It concluded that 'residents of Abkhazia and South Ossetia who had not refused Georgian citizenship in a written form before 24 December 1993 became Georgian citizens for purposes of Georgian and international law' recognising that the circumstances on the ground did not allow these residents to either receive the documents confirming their Georgian citizenship or to refuse such citizenship within the required period – *Report of the Fact-Finding Mission* (n 550) 154.

704) *E.g.* Nicu Popescu, '"Outsourcing" *de facto* Statehood Russia and the Secessionist Entities in Georgia and Moldova' (2006) CEPS Policy Brief, No. 109, 5, <http://aei.pitt.edu/11718/> last accessed 14 October 2014.

neighbourliness principle with at least the same scrutiny.

Regrettably, the Fact-Finding Mission has not analysed whether Georgia complied with the requirement to protect of human rights and whether it actually aimed to protect the rights of residents of Abkhazia and South Ossetia.[705] Most importantly, the Fact-Finding Commission did not discuss whether the non-compliance of Georgia in that respect also contributed to the violation of the good neighbourliness principle. In particular and without any further analysis, the Fact-Finding Mission wrongly concluded that 'no concrete positive obligations can be derived from the principle of good neighbourliness [and that] it arguably requires states to refrain from abusive activity towards their neighbouring states'.[706]

As analysed in detail in the first Chapter of this work, the good neighbourliness principle not only imposes obligations on states to refrain from abusive activities towards neighbouring states as viewed by the Fact-Finding Mission, but also requires active engagement from states where the need arises. This is inter alia the case where the good neighbourliness principle applies in the field of human rights. The Venice Commission's report, which was directly invoked by the Fact-Finding Commission, clearly addresses the duty of states to protect human rights and fundamental freedoms and to secure non-discriminatory enjoyment of the protected rights to everyone on their territory.[707] Furthermore, the human rights dimension has not been taken sufficiently into consideration, despite the aim of the Fact-Finding Mission to investigate the circumstances in Georgia with regard to international law, including the Helsinki Final Act, which highlights the importance of respecting human rights in promoting peace, security and friendly relations. Both the protection of human rights and the territorial integrity of states are equally important elements of the good neighbourliness principle and should not be viewed in isolation from each other.

Cherishing the report of the Fact-Finding Mission, the EU also ignored the human rights aspect of the good neighbourliness principle. It expressed its hopes

705) Nicolai N Petro, 'The Legal Case for Russian Intervention in Georgia' (2008/09) 32 Fordham Int'l L.J. 1524–1549, 1535, notes for instance, that residents of Abkhazia and South Ossetia have sought for Russian help only because being denied travel documents by Georgia, which prevented them from travelling abroad and enjoying their social and other rights for years. According to Zygmunt Dzieciolowski 'Abkhazia: Wedded to Independence' (21 August 2008), <http://www.opendemocracy.net/russia/article/akhazia-wedded-to-independen ce> last accessed 14 October 2014. This situation persisted in 1998 when Abkhazia's Prime Minister, Sergei Bagapsh tried to solve the 'passport crisis' with Georgian authorities, but faced strong opposition by Georgia's President, Eduard Shevarnadze, who 'angrily refused to issue [Abkhazians] with Georgian passport and suggested that [they] should make do with UN travel documents'. Nevertheless, Georgia did not allow the granting of UN travel documents which made the situation for the residents of Abkhazia and South Ossetia even more difficult. The response of the Abkhazia's Prime Minister to Georgia's President, according to *Dzieciolowski* was '[w]e will ask Russia to help – and in five years most of our citizens will have Russians passports'.

706) *Report of the Fact-Finding Mission* (n 550) 174.

707) Section D(d) *Report of the Venice Commission*.

that the findings of the report 'can contribute towards a better understanding of the origins and the course of [the] conflict and, in a broader perspective, serve as an input to future international efforts in the field of preventive diplomacy'.[708] It 'also recall[ed] that a peaceful and lasting solution to the conflicts in Georgia must be based on full respect for the principles of independence, sovereignty and territorial integrity as recognised by international law'.[709] Regrettably, no reference has been made to the need to protect human rights and the rights of minorities in the same context.

4. Conclusions to Chapter III

In accordance with its Treaty obligations, the EU has contributed to the promotion and further development of the principle of good neighbourliness in its foreign relations. It has interpreted good neighbourly relations as established in international law and has further enhanced the position of that principle by employing it as a condition for the recognition of new states. The Guidelines on the recognition of new states evidently reiterated the rights and duties of states in the light of the good neighbourliness principle. However, as usual, the process of recognition of new states has been highly political and as such has subsumed the legal possibilities. To quote Khaliq's remark in the context of EU ethical foreign policy, 'policy statements and legal obligations are one thing, implementation quite another'.[710] The Member States have not consistently followed the opinions of the Badinter Commission, which offered a rather legal assessment of the preparedness of states for recognition in the light of the Guidelines on the recognition of new states and of the Declaration on Yugoslavia.

The EU also played the role of chief promoter of good neighbourly relations between CEE states. It has initiated, moderated and financed the Pact on Stability as a way of stabilizing the region. The commitments of states stemming from the Pact on Stability closely resemble the EU's approach to the recognition of new states and the values of the Union upon which good neighbourliness at EU Treaty level is based. The particular emphasis on the principles of inviolability of frontiers and the respect for and the protection of the rights of minorities – both inherent to the good neighbourliness principle, reflect the EU's approach to conflict prevention. The large number of good neighbourliness treaties included in the Pact on Stability admittedly

708) EU@UN, Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, available at: <http://www.eu-un.europa.eu/articles/en/article_9045_en.htm> last accessed 14 October 2014.

709) ibid.

710) Urfan Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (CUP, Cambridge 2008) 2.

contributed to the strengthening of the position of the good neighbourliness principle in EU foreign affairs law. However, good neighbourliness treaties do not provide strong implementing mechanisms. The implementation of the treaties largely depends on the political will of the states involved. The lack of effective implementation instruments for these treaties enabling the successful implementation of the rights and duties of states in light of the good neighbourliness principle remains the weakness of the process.

Protection of human rights including the rights of minorities is a key factor for avoiding interstate conflicts and an important element of the good neighbourliness principle. In that context, bilateral treaties on good neighbourliness provide states with a solid platform to protect their kin minorities in neighbouring countries. The Report of the Venice Commission and the Bolzano Recommendations have clarified that the protection of human rights and the rights of minorities is primarily a function of the home state. Unilateral measures by states granting benefits to kin minorities can only be legitimate if the principles of the territorial sovereignty of states, pacta sunt servanda, friendly interstate relations and the respect for human rights, and in particular the prohibition of discrimination, are respected. However, the modification of the Status Law in line with the conclusions of the Venice Commission and of the Union did not contribute much to the strengthening of the relations between Hungary and Slovakia, to which the subsequent changes of the citizenship rules in the two neighbouring countries testify.[711] The conferral of citizenship to individuals abroad is yet another problematic issue for which no simple answer exists. According to the Venice Commission, states should, before issuing documents capable of creating a political bond with individuals residing abroad, consult with the home state of these persons. The Bolzano Recommendations are even more explicit in this respect, requiring states to ensure that the 'such a conferral of citizenship respects the principles of friendly, including good neighbourly, relations and territorial sovereignty'.[712] However, the good neighbourliness principle does not only presuppose the inviolability of the territorial sovereignty of states but also requires the protection of human rights as a prerogative of such sovereignty. The disregarding of this important element of the good neighbourliness principle could lead to incomplete or even wrong analysis, as might be true of Fact-Finding Mission's assessment of the relations between Georgia and Russia.

711) *See* (n 679).
712) Recommendation 11, *Bolzano Recommendations* (n 515).

CHAPTER IV

Good neighbourliness in relation to enlargement of the EU

1. Good neighbourliness as a condition for EU membership

In the words of President of the European Commission, Barroso, 'enlargement has always been a potent tool for spreading peace, democracy and prosperity to all corners of [the European] continent'.[713] The European Council defined enlargement as 'a political necessity and a historic opportunity for Europe [that] will ensure the stability and security of the continent and will thus offer both the applicant States and the current members of the Union new prospects for economic growth and general well-being'.[714] Viewed from the perspective of many European states, the membership to the Union has shown to be a strong incentive. As Hill puts it:

> [w]here decisions are taken to exclude states from membership [even if not permanently], their relations with the Union remain by definition at the level of foreign policy. Their very desire to enter is premised on the view that being inside involves a qualitatively different kind of relationship than is implied even by close friendship from the outside. Moreover, changing membership transforms relationships between those admitted and their neighbours left outside, previously shaped at least in part by the common status of exclusion.[715]

It is not wrong to assert that relations between states differ depending on whether they have been included or excluded. As discussed extensively in Chapter 2 of this work, good neighbourly relations between Member States are largely shaped through

713) Speech by José Manuel DurãoBarroso at a Conference on Enlargement 'EU Enlargement – 5 Years After' Prague, 2 March 2009, SPEECH/09/83.
714) Madrid European Council (15, 16 December 1995) Presidency Conclusions, para.III (A).
715) *Hill* (n 497) 95.

the supranational framework of the Union and build upon the principles of solidarity and sincere cooperation. Contrary to this, good neighbourly relations in the Union's current enlargement policy are effected through the principle of conditionality.

The application of strict conditionality strengthens the position of the Union and its Member States vis-à-vis candidate countries. This can have further negative consequences on the implementation of the good neighbourliness requirement in the enlargement process. In explaining the pattern used for Slovenian accession, Šabič describes the problem by using Katzenstein's definition of norms as 'collective expectations for proper behaviour of actors with a given identity' and their function to either constitute identities or regulate behaviour or to do both.[716] The dual impact of norms describes the relationship between the candidate country and the accession. More precisely, the regulative effects of the norms are expressed through the fulfilment of the Copenhagen criteria,[717] but as this may not be sufficient, the candidate country might have to prove its 'Europeanness' to please individual Member States. To that end, Member States can employ their membership to solve their bilateral issues with candidate countries. Should a Member State be able to render 'what is essentially a bilateral problem into a "European issue" at the multilateral level of accession negotiations',[718] its chances of achieving an advantageous outcome to the bilateral issue can improve substantially.[719]

Good neighbourliness has become an important accession condition in EU enlargement policy. It formalises the possibility of the Union and its Member States to require candidate countries to settle their bilateral disputes at a multilateral (EU) level. The progress of candidate countries has been linked to the results of the settlements in such disputes. However, where the parties involved have unbalanced powers, the use of conditionality might not be the most appropriate tool for settlement of bilateral issues.

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716) Zlatko Šabič, 'Slovenia and the European Union: A Different Kind of Two-Level Game' in Ronald H Linden (ed.), *Norms and Nannies: The Impact of International Organizations on the Central and Eastern European States* (Rowman Littlefield, Oxford 2002) 91–127, 93. Katzenstein considers norms to have in some instances constitutive effects specifying 'what actions will cause relevant others to recognize a particular identity', while in others, to have regulative effects that 'operate as standards that specify the proper enactment of an already defined identity': *see* for further clarification Peter J Katzenstein (ed.), *The Culture of National Security: Norms and Identity in World Politics* (Columbia UP, NY 1996) 5.

717) The Copenhagen European Council (21, 22 June 1993) Presidency Conclusions formulated three groups of criteria: political criteria – requiring that the candidate country has achieved stability of its institutions guaranteeing democracy, the rule of law, and respect for and protection of minorities; economic criteria – requiring that the candidate country have a functioning market economy and capacity to cope with the competitive pressure and market forces within the Union; and implementation of the *acquis communautaire* – meaning that candidate countries must be able to take on the obligations of the membership.

718) *Šabič* (n 716).

719) ibid.

Rodin employs the asymmetric relations between states to differentiate between two general groups of bilateral disputes involving states with different status.[720] According to his classification, vertical disputes involve a Member State and a candidate country, while horizontal issues involve only candidate countries.[721] In vertical disputes, Member States can either act on their own behalf with respect to their bilateral disputes with candidate countries or on the behalf of the Union regarding 'EU-wide issues'.[722] Horizontal issues can be decided outside or within the framework, depending on their nature, but can be also reflected at the EU level if they concern an EU interest.[723]

Rodin's classification is extremely useful for distinguishing the ongoing enlargement of the Union with the Western Balkan countries, and the pre-Balkan enlargement rounds. Whereas certain countries which joined the Union in the fifth and sixth enlargement rounds[724] were involved mostly in disputes with each other or with third countries, the bilateral disputes of Western Balkan countries and also of Turkey, often involve Member States or have the potential to involve Member States in the future. In other words, while in the case of the earlier two enlargement rounds, the good neighbourliness condition was tested to some extent on horizontal disputes,

720) Siniša Rodin, 'The European Union and the Western Balkans: Does the Lisbon Treaty Matter?' in FederigaBindi and Irina Angelescu (eds), *The Foreign Policy of the European Union: Assessing the Europe's Role in the World* (2nd edn Brookings Institution Press, Washington 2012) 153–171, 156.

721) ibid. In the case of the application of the good neighbourliness condition in the enlargement process, however, a more appropriate classification seems to be that between Member States and non-member countries, since the requirement can also affect states which are not candidates.

722) *Rodin* (n 720).

723) ibid.

724) The enlargement numbering as used in this work draws inspiration from Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law Intl, Alphen aan den Rijn 2008) 8, who distinguishes between the ten countries which joined the Union on 1 May 2004, i.e. in the fifth enlargement round: Cyprus; Czech Republic; Estonia; Hungary; Latvia; Lithuania; Malta; Poland; Slovakia; Slovenia; and the two countries which joined the Union on 1 January 2007, i.e. in the sixth enlargement round: Bulgaria and Romania. This enlargement numbering, as opposed to the European Commission's, which considers the fifth enlargement round including the accession of all new Member States from 2004 and 2007 (*see* European Commission, 'Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania' (Communication) COM (2006) 214 final, follows according to *Kochenov*, from the fact that the enlargements of the Union in 2004 and 2007 were governed by different Treaties of Accession, occurred at different dates and involved different transitional measures. In addition, the Treaty of Accession of the Republic of Bulgaria and Romania, Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union, Articles 36−39, [2005] OJ L 157/3, envisaged post-accession measures for these two countries – in particular, monitoring by the Commission of these states' compliance in the areas of justice and home affairs, the internal market and economic policy and sanctions for the non-compliance thereof for a period of three years after accession.

in the case of the Western Balkan countries and Turkey, it is effectively applied to vertical disputes between states. These two are essentially different situations given the important role of the Member States in the enlargement process.

Vertical bilateral disputes can be more problematic than horizontal ones in terms of causing delays or even deadlock at different stages of the enlargement process, as can the invocation of good neighbourliness through the principle of conditionality. Enlargement practice has shown that the conditionality principle has been more strictly applied to the Western Balkan countries than to other candidate countries.[725] The problem that appears with such application of the conditionality principle is not only that of the inconsistent application of the good neighbourliness condition. Far more problematic is the application of the good neighbourliness condition to the settlement of vertical bilateral disputes which involve states which are not equal before the law. In such circumstances, conditionality is not used to ensure the compliance of Member States with international law and with the good neighbourliness principle; quite the contrary, because instead of being used as an instrument to contribute to the settlement of international disputes 'in a spirit of good neighbourliness and bearing in mind the overall EU interests',[726] the conditionality principle in such cases serves the national interests and political considerations of individual Member States. This amounts to the politicization of the good neighbourliness condition and its legal substance.

This chapter discusses the development and implementation of the good neighbourliness condition in EU enlargement policy. It consists of three parts. The first part analyses EU accession conditions and the place of good neighbourliness among them. It further discusses the compatibility between the condition of good neighbourliness and the conditionality principle in the Union's enlargement policy, shedding light on the possible difficulties of applying good neighbourliness through conditionality.

The second and third parts discuss the development and application of the good neighbourliness condition in the enlargement context. The second part is largely confined to the pre-Western Balkans accessions, but also discusses the application

725) *See* Milada Anna Vachudova, 'EU Leverage and National Interests in the Balkans: The Puzzles of Enlargement Ten Years On' (2014) 52(1) JCMS, 122–138, 123.

726) European Commission, 'Enlargement Strategy and Main Challenges 2009–2010' (Communication) COM (2009) 533 final (*Enlargement Strategy 2009*). The Commission used similar wording in its enlargement strategies of the following years: European Commission, 'Enlargement Strategy and Main Challenges 2010–2011' (Communication) COM (2010) 660 (*Enlargement Strategy 2010*); European Commission, 'Enlargement Strategy and Main Challenges 2011–2012' (Communication) COM (2011) 666 final (*Enlargement Strategy 2011*); European Commission, 'Enlargement Strategy and Main Challenges 2012–2013' (Communication) COM (2012) 600 final (*Enlargement Strategy 2012*) and European Commission, 'Enlargement Strategy and Main Challenges 2013–2014' (Communication) COM (2013) 700 final (*Enlargement Strategy 2013*).

of the condition in the case of Turkey in view of its earlier membership application. It analyses the roots of the good neighbourliness condition associated to the Greek accession and its further implications on the prospective membership of Turkey. The text then examines the development and crystallization of the condition in the light of the fifth and sixth enlargement rounds. It focuses on its application to Cyprus' accession as an example of where the EU has insisted on a settlement of a bilateral issue in the enlargement process.

The third part analyses the development and application of the good neighbourliness condition in the ongoing enlargement with the Western Balkan countries. It first discusses the most important initiatives and instruments for bringing the Western Balkan countries closer to the Union and for strengthening the good neighbourly relations between all countries in the region. It then analyses the application of the good neighbourliness condition to the bilateral disputes of Croatia and Macedonia. Both countries have been involved in vertical bilateral disputes that were dealt with at an EU level.

1.1 Accession conditions

All international organizations set membership conditions with which states wishing to join must comply. Such conditions usually reflect and intend to safeguard the values and the achievements of the organization.[727] Thus, Article 49(1) TEU, which is the main Treaty provision regulating EU enlargement, stipulates that '[a]ny European State which respects the values referred to in Article 2 [TEU] and is committed to promoting them may apply to become a member of the Union'.[728] Nonetheless, it is important to note that the main enlargement provision does not promise membership to applicant countries but merely provides the possibility for states which satisfy the above conditions to apply to become members of the Union. In other words, states only enjoy a right to apply for membership rather than the right to join the Union.[729] The question of whether an applicant state will be admitted to the Union 'lies within the discretion of the Union and its Member States [and is] thus somewhat removed from the legal sphere'.[730] This speaks of 'the predominantly

727) Karen E Smith, 'The Evolution and Application of EU Membership Conditionality' in Marise Cremona (ed.), *The Enlargement of the European Union* (OUP, Oxford 2003) 105–140, 106.

728) Similar wording can be found in the enlargement articles of all three Communities: while Article 98 ECSC Treaty provided that '[a]ny European state may apply to accede [the] Treaty', Article 237 EEC Treaty and Article 205 Euratom Treaty stipulated identically that: '[a]ny European State may apply to become a member of the Community'. The three provisions were later replaced by a single Article 'O', introduced by the Treaty on European Union, [1992] OJ C 191/1, adapted to the newly emerging Union, but restating once more that '[a]ny European State may apply to become a Member of the Union'.

729) *See Kochenov* (n 724) 15.

730) ibid (footnotes omitted).

political nature of enlargement regulation'[731] which as such cannot be challenged by applicant countries before the ECJ.[732]

The reference to the founding values of the Union was first introduced with the Amsterdam amendments of the EU Treaty. The Amsterdam text of Article 49(1) referred to the principles set out in the former Article 6(1) of the EU Treaty, which was renumbered Article 2(1) TEU by the most recent Lisbon revision of the Treaties. This reference reflected the Union's long-standing enlargement practice rather than heralding any substantial novelty.[733] In comparison with its predecessor, Article 2(1) TEU explicitly refers to the rights of persons belonging to minorities as a value upon which the Union is based. The inclusion of such a reference in the text of the Treaty was obviously underpinned by the Union's enlargement practice.[734]

The lack of any coherent internal minority policy did not prevent the Union from requesting protection for and promotion of minority rights in its enlargement policy.[735] Put differently, some of the accession conditions, such as minority protection, have evolved over time to grow into demands which go beyond the Union's achievements.[736] However, with the references to Article 6(1) TEU and to Article 2(1) TEU, the EU started to bridge the gap 'between the way the enlargement process was described in the Treaties and the way enlargements were conducted in practice'.[737] However, a number of important elements of EU enlargement law are

731) ibid. *See* also Milada Anna Vachudova, *Historical Institutionalism and the EU's Eastward Enlargement* (OUP, Oxford 2007) 105−122 and Christophe Hillion, 'The Creeping Nationalisation of the EU Enlargement Policy' (2010) 6 SIEPS.

732) In Case 93/78 *Lothar Mattheus v Doego Fruchtimport und Tiefkühlkost eG* [1978] ECR 2203, ECJ concluded that 'the legal conditions for […] accession remain to be defined in the context of [the then, Article 237(3) EEC Treaty] procedure without it being possible to determine the content judicially in advance'. *See* in this context Christophe Hillion, 'EU Enlargement' in Paul P Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn OUP, Oxford 2011) 187–216, 205; Henry G Schermers, *Article 177 EEC: Experiences and Problems* (T.M.C. Asser Institute, The Hague 1987) 388, Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff, The Hague 1986) 486.

733) *Kochenov* (n 724) 21.

734) *See e.g. Hillion* (n 732) 196–197.

735) *See* Christophe Hillion, 'Enlargement of the European Union – the Discrepancy Between Membership Obligations and Accession Conditions as Regards the Protection of Minorities' (2004) 27 Fordham Int'l L.J. 715–740. *See* also Dimitry Kochenov, 'European Union's Troublesome Minority Protection: A Bird's-Eye View' in Will Kymlicka and Jane Boulden (eds), *International Approaches to Ethnic Minority Protection* (OUP, Oxford 2014); Gwendolyn Sasse, 'Minority Rights and EU Enlargement: Normative Overstratch or Effective Conditionality' in Gabriel von Toggenburg (ed.), *Minority Protection and The Enlarged European Union: The Way Forward* (OSI/LGI Books, Budapest 2004) 59–83 and Gwendolyn Sasse, 'The Politics of EU Conditionality: The Norm of Minority Protection During and Beyond EU accession' (2008) 15(6) J. Eur. Public Policy 842–860.

736) *See* in more detail Gabriel von Toggenburg, 'A Rough Orientation Through a Delicate Relationship: The European Union's Endeavours for (its) Minorities' (2000) 4 EIoP No.16. *See* in general *von Toggenburg*, ibid.

737) *Kochenov* (n 724) 13 (footnote omitted). *See* also *Hillion* (n 732) 196–197.

still excluded from the Treaties, including 'the main principles of the enlargement process, some of the criteria that the applicant States have to satisfy in order to have reasonable aspirations to join the Union and even the real sequence of enlargement events'.[738] These elements, as suggested by Kochenov, developed through EU enlargement practice, forming a part of the unwritten or customary enlargement law of the Union, which is gradually being transferred into written law.[739] One such element, which is neither explicitly mentioned nor referred to by Article 49(1), is the good neighbourliness condition. This is notwithstanding the fact that the EU values defined in Article 2(1) TEU in practice overlap with the good neighbourliness condition as interpreted in the EU enlargement policy or Article 8 TEU, which is a first step towards clarifying 'good neighbourliness' at Treaty level.

In fact, good neighbourliness had started to develop as an EU accession condition well before that notion was incorporated into the Treaties, as will be explained later in this Chapter. However, Article 8 TEU is most commonly associated with ENP countries and regarded as a means of distinguishing between these countries and countries with membership prospects.[740] However, the exclusion of the states with membership prospects from the scope of application of Article 8 TEU does not mean that good neighbourliness as defined in that provision is not relevant to the enlargement process. Article 8 TEU sets out a more general approach to good neighbourliness, founded on the values of the Union. This can be confirmed for instance by the fact that the application for EU membership is conditional on the respect of the EU values on which good neighbourliness is said to be based. Albeit to a different extent, good neighbourliness has been applied through the principle of conditionality ever since the crystallization of its corollary condition in the Union's enlargement policy.

1.2 Conditionality in the context of EU enlargement

The Copenhagen criteria establish conditionality as a new approach to assessing the progress of candidate countries. The criteria themselves were formulated in response to the increased interest of many post-communist countries in becoming members of the Union in the nineties. The large number of interested countries in EU membership required a different approach in EU's enlargement policy.[741] The new applicants were weak in terms of economy, democracy and human rights, which threatened to seriously undermine the achievements of the Union were they admitted

738) *Kochenov*, ibid 14 (footnotes omitted).
739) ibid 62.
740) *See* the introductory part of Chapter 3.
741) These include the states from the fifth and the sixth enlargement rounds (n 724). Turkey applied for full membership on 14 April 1987, but has not yet completed its negotiations with the Union. On Turkey's accession prospects *see* part 2.2 of this Chapter.

without undergoing much-needed reforms.[742]

Unlike in the previous period, when candidate countries were trusted to fulfil the membership conditions on their own, the success of new applicants in implementing the necessary reforms was to be checked.[743] However, the accession criteria did not provide any detail of the assessment of the progress of candidate countries and Article 49 TEU was silent in this respect. Moreover, the Copenhagen European Council did not appoint institutions to lead the assessment of the progress of candidate countries towards the fulfilment of the criteria it laid down. It only stated that it 'will continue to follow closely the progress in each associated country towards fulfilling the conditions of accession to the Union and draw the appropriate conclusions'.[744]

The major step forward was made only with the Madrid European Council in 1995, which asked the Commission to ensure the preparation of Opinions on the Application for Membership to be forwarded to the Council, and to start preparing a 'Composite Paper' on enlargement.[745] The Commission made use of all possible relevant sources in drawing up the Opinions, including answers to questionnaires from the authorities in the candidate countries, information received during bilateral meetings, reports from Member State embassies and the Commission's delegations in candidate countries, assessments by international organisations and Non-Governmental Organisation reports.[746] The Amsterdam European Council in 1997 did not mention the 'Composite Papers' but referred to a 'Comprehensive Communication' which was to be presented by the Commission.[747] It explained that that instrument was to contain 'the main conclusions and recommendation from the Opinions and give its views on the launching of accession process including proposals on reinforcing pre-accession strategy and further developing pre-accession assistance'.[748] The first Communication of that kind was released on 15 July 1997

742) As viewed by the European Commission, 'Europe and the Challenge of Enlargement', EC Bull Supp 3/92, 14, '[n]on-members apply to join because the [Union] is attractive [and it] is attractive because it is seen to be effective [and therefore] to proceed to enlargement in a way which reduces its effectiveness would [have been] an error'.

743) *E.g.* Dimitry Kochenov, 'Overestimating Conditionality' in Inge Govaere et al. (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Martinus Nijhoff, Leiden 2013) 541–556, 549. *See* also Marc Maresceau, 'Pre-accession' in Marise Cremona (ed.), *The Enlargement of the European Union* (OUP, Oxford 2003) 9–42; Andreas Bieler, 'The Struggle Over EU Enlargement: A Historical Materialist Analysis of European Integration' in Frank Schimmelfennig and Ulrich Sedelmeier (eds), *The Politics of European Union Enlargement: Theoretical Approaches* (Routledge, Oxon/NY 2005) 75–96 etc.

744) *Copenhagen European Council* (n 717).

745) *Madrid European Council* (n 714).

746) *See* in more detail *Maresceau* (n 743) 25. *See* also Dimitry Kochenov, 'Behind the Copenhagen Façade: The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law' (2004) 8 EIoP No.10.

747) Amsterdam European Council (16, 17 June 1997) Presidency Conclusions.

748) *Amsterdam European Council* (n 747).

and was entitled 'Agenda 2000'.[749]

The innovations related to the pre-accession assessment were necessarily connected to the conditionality principle, were issued the same year and were defined in the Presidency Conclusions of the Luxemburg European Council.[750] Two of these are of great importance: the introduction of Regular Reports prepared by the Commission in the pre-accession stage and the introduction of the Accession Partnerships (APs). The Commission's task was to submit Regular Reports, assessing the preparedness of the candidate countries to the Council.[751] Since late 1998, the Commission has presented a complete set of Regular Reports annually. They followed the methodology of Agenda 2000 and drew on similar sources as the Opinions.[752] Every round of Regular Reports is accompanied by a Commission Paper which was meant to synthesize the analysis of the separate reports and to provide a series of recommendations, but also to determine the conditions of negotiations and the reinforcement of the pre-accession strategy.[753] The APs were the main legal instruments 'of the enhanced pre-accession strategy [expected to] mobilise all forms of assistance to the applicant countries of Central and Eastern Europe within a single framework'.[754] The APs were tailor-made instruments intended to address the priority steps required of each individual candidate country and to set out the financial means available to implement these priorities. The progress of candidate countries towards the priorities set out in each individual AP was to serve as the basis of the Regular Reports prepared by the Commission.[755] The benefits which applicant countries could receive from the Union, including financial and other assistance and eventually EU membership, was strictly dependant on their reforms and compliance with the Copenhagen criteria, which were made enforceable through the APs.[756] The application of the conditionality principle has thus strengthened further the already superior position of the Union and its Member States vis-à-vis candidate countries in the enlargement process. It is in this context of asymmetric relations[757] that the

749) European Commission 'Agenda 2000: for a stronger and wider Union' (Communication) COM (1997) 2000 final (*Agenda 2000*).

750) Luxemburg European Council (12, 13 December 1997) Presidency Conclusions.

751) *Luxemburg European Council* (n 750) para. 29.

752) *E.g.* Commission, Composite Paper, Reports on progress towards accession by each of the candidate countries of 1998, point. 1 (*Composite Paper 1998*).

753) *Composite Paper 1998* (n 752) point 1. Two of these papers were entitled 'Composite Papers' in accordance with the Presidency Conclusions of the Madrid European Council and all the others were entitled 'Strategy Papers', thus obeying the Commission's recommendation.

754) *Luxemburg European Council* (n 750) para. 14.

755) *Luxemburg European Council* (n 750) para. 29.

756) *See* Article 4 of Council Regulation No 622/98 of 16 March 1998 on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships, [1998] OJ L 85/1. On EU's pre-accession strategy *see* (n 746).

757) *See e.g.* Andrew Moravcsik and Milada Anna Vachudova, 'National Interests, State Power, and

application of good neighbourliness in the enlargement policy of the Union has been framed.[758] Asymmetric relations between states can have negative consequences on the application of the good neighbourliness condition in law.

1.3 Applying good neighbourliness through conditionality

The intention of the Union to give effect to good neighbourliness in its enlargement policy through the settlement of bilateral disputes is not inconsistent with the same principle as established in international law. Indeed, in aiming to prevent the importation of external conflicts,[759] good neighbourliness is a legitimate condition in EU's enlargement policy. After all, the principle of good neighbourliness is founded upon the requirement for peaceful settlement of international disputes in accordance with the UN Charter and with the Declaration on Friendly Relations.[760] Taking the argument further, the Union is even obliged by virtue of Article 3(5) TEU and Article 21(1) TEU to promote the principle of good neighbourliness in its enlargement policy and thus to make the membership of applicant countries conditional on the peaceful settlement of disputes.[761]

Nevertheless, the implementation of the good neighbourliness condition should not be flexible and arbitrary but consistent and in accordance with international law. In addition to applying equally to all candidate countries in terms of consistency, this inevitably means that the settlement of bilateral disputes in the light of the good neighbourliness condition requires parallel advancement of the equality of all the states involved.[762] However, the position of Member States and candidate countries in the enlargement process is far from equal.

Given the unanimity requirement in the Council upon the application of other countries, Member States could employ their powers to delay the enlargement process ever since the first enlargement round.[763] Such state-centrism enables Member States to insert their 'crude domestic interests'[764] into the enlargement process. Unlike in the past, when Member States employed their membership powers

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EU Enlargement' (2003) 17(1) East European Politics and Societies 42–57, 44.

758) *E.g.* Harun Arıkan, 'Good Neighbourliness Condition for EU Membership: The EU Policy Towards the Cyprus Conflict and its Security Implications', available at: <http://dergiler.ankara.edu.tr/dergiler/42/463/ 5275.pdf> last accessed 14 October 2014.

759) *Agenda 2000* (n 749) 51.

760) *See* I.2.2(e) above.

761) *See* the introductory part of Chapter 3.

762) *See* I.1.2 above.

763) Article 98 ECSC Treaty left all the stages in the control of the Council without clarifying the voting procedure. Article 237 EEC Treaty and 205 Euratom Treaty made the accession of new Member States conditional upon 'agreement between the Member States and the applicant State'.

764) *Hillion* (n 732) 191.

to block the accession of candidate countries for various reasons on a rather exceptional basis,[765] this has become a regular practice at the current stage of integration. The process has been described by Hillion as a 'creeping nationalisation' of EU enlargement policy.[766]

The introduction of the good neighbourliness condition, applying first and foremost to the settlement of bilateral disputes, creates a further risk for the misuse of the advantageous position of Member States. This would be particularly the case in vertical disputes i.e. where a Member State negotiating and assessing the fulfilment of the good neighbourliness condition by a candidate country is a directly affected party. The opportunities for Member States to exert pressure in the enlargement process are thereby increased and can vary 'from withholding consent to the opening of negotiating chapters, to objecting to the graduation of a country to a new phase (candidate membership, opening of negotiations, membership)'.[767] Indeed, Member States have a crucial role in the enlargement process. As put by Kochenov,

> [i]t is notable that the [EU] Institutions, although taking part in the process of enlargement preparation, do not sign the Treaties of Accession. Clearly, enlargement of the EU is not about the Union enlarging but about the Member States enlarging the Union with the help of Institutions.[768]

This can certainly lead to politicisation of the good neighbourliness condition, contrary to its basis and its specific components in international law. Although only recently introduced in enlargement policy, the condition has already been used to gain political rather than legally significant aims.

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765) This was for instance the case with the two French vetoes of UK's attempt to accede to the Communities. For more details *see Hillion* (n 732) 191. *See* also Simon Sweeney, *Europe, The State and Globalisation* (Pearson, Essex 2005) 94–95; in more detail *see* Stephen Wall, *The Official History of Britain and the European Community: From Rejection to Referendum, 1963–1975,* vol 2 (Routledge, NY 2013) and regarding the British reactions surrounding the decisions by Charles de Gaulle *see* Richard Davis, 'The "Problem of de Gaulle": British Reactions to General de Gaulle's Veto of the UK Application to Join the Common Market' in (1997) 32(4) J. Contemporary History 453–464.

766) *Hillion* (n 732) 187–216.

767) Arjan Uilenreef, 'Bilateral Barriers or Good Neighbourliness? The Role of Bilateral Disputes in the EU Enlargement Process', Clingendael European Papers, Netherlands Institute for International Relations, Clingendael, The Hague, June 2010, 15–22, 28 <http://www.clingendael.nl/sites/default/files/20100600_cesp _paper_uilenreef.pdf > last accessed 14 October 2014.

768) *Kochenov* (n 724) 312 (footnote omitted).

2. Development and the application of the good neighbourliness condition: pre-Western Balkans

The good neighbourliness condition started to crystallise in Union enlargement policy only after the establishment of the Copenhagen criteria. It was introduced in response to EU security considerations with respect to the unresolved issues of the applicant countries, which included border issues and questions related to the protection of minorities.[769] Its roots in Union enlargement policy, however, can be traced back to the Greek accession, although back then, the condition appeared in a gentler form, i.e. 'less [as] a condition and more [as] an assertion of good intent'.[770]

The complex relations between Greece and Turkey gave rise to what later developed into a good neighbourliness condition in Union enlargement policy. In particular, Turkey raised its concerns related to the Greek application for membership at the EU level.[771] The Council noted that Greek membership should not negatively impact on the relations between the Community and Turkey,[772] to which Greece agreed.[773] In its opinion on the Greek application for membership, the Commission maintained that '[t]he prospect of Greek membership raises the problem of the disagreements between Greece and Turkey, an Associate country whose agreement with the Community also has full membership as its stated final objective'.[774] However, the Commission refrained from interfering in the much troubled relations between the two neighbouring countries and clearly separated the decision over the Greek membership application from the need to solve the existing issues between the two states. It maintained that:

769) *Agenda 2000* (n 749) 51.

770) *Smith* (n 727) 110. *See* also Christophe Hillion, 'The Copenhagen Criteria and their Progeny' in Christophe Hillion (ed.), *EU Enlargement: A Legal Approach* (Hart, Oxford 2004) 17 and Stéphanie Laulhé Shaelou, *The EU and Cyprus: Principles and Strategies of Full Integration* (Martinus Nijhoff, Leiden 2010) 60.

771) Turkey stressed the question of the procedure to be followed for the implementation of Article 56 of the Additional Protocol to the Agreement Establishing an Association Between the European Economic Community and Turkey [1977] OJ L 361/22, stipulating that '[i]n the event of a third State acceding to the Community, appropriate consultations shall take place in the Council of Association so as to ensure that account can be taken of the mutual interests of the Community and Turkey stated in the Agreement of Association'.

772) The Council agreed to emphasise the interest of the Community in maintaining very close relations with Turkey in its declaration of 24 June 1975, EC Bull 6–1975, noting that the examination of the membership application submitted by Greece would not affect the relations between the Community and Turkey (para. 1209).

773) *Smith* (n 727) 110.

774) Opinion on Greek application for membership, EC Bull Supp 2/76, para. 6.

> [t]he European Community is not and should not become a party to the disputes between Greece and Turkey. The Commission is consequently of the opinion that the European Community should urge upon Greece and Turkey the need for them to reach just and lasting solutions to the differences which separate them. The Community should consider what part it could play, in parallel with the preparatory work for Greek accession, to facilitate this process. It [was] evident that the success of these initiatives does not depend on the Community alone, and it would therefore be inappropriate for the decision on Greek membership to be dependent on it.[775]

By taking this view, the Commission has practically distanced itself from the bilateral disputes between the two neighbouring countries and more importantly, it detached these issues from the enlargement process. It did however recognise that until then, 'the balance in the Community relations with Greece and Turkey has found its expression in their identical status as Associates both of them with the possibility of full membership as the final objective, albeit with different timetables',[776] and that the 'prospect of Greek membership of the Community introduce[d] a new element in this balance'.[777] To that end and in accordance with the Council's declaration, the Commission indicated that specific steps should have been taken to ensure that the examination of the membership application of Greece would not affect relations between Turkey and the Community or the rights guaranteed by the Association Agreement between the two parties.[778] This is not exactly what happened.

2.1 Turkey's membership application and prospective accession

Turkey's application for full membership[779] brought the troubled relations of that country with Greece into the focus again.[780] Existing Aegean disputes[781] and the Cyprus question remained unsettled, standing in the way of completely friendly

775) *Opinion on Greek application for membership* (n 774) para. 6.
776) *Opinion on Greek application for membership* (n 774) para. 7.
777) *Opinion on Greek application for membership* (n 774) para. 7.
778) *Opinion on Greek application for membership* (n 774) para. 7.
779) *See* (n 741).
780) On Turkey's path to accession *see* in general Edel Hughes, *Turkey's Accession to the European Union: The Politics of Exclusion?* (Routledge, London/NY 2011); *See* also David A Kanarek, 'Case Law: Turkey and the European Union: The Path to Accession' (2003) 9 CJEL 457–474; Nergis Canefe and Mehmet Ugur (eds), *Turkey and European Integration: Accession Prospects and Issues* (Routledge, London/NY 2004); Constantine Arvanitopoulos (ed.), *Turkey's Accession to the European Union: An Unusual Candidacy* (Springer-Verlag, Berlin/Heidelberg 2009).
781) For detailed legal analysis of the Aegean disputes between the two neighboring states *see* Haralambos Athanasopulos, *Greece, Turkey and the Aegean Sea: A Case Study in International Law* (McFarland, Jefferson, NC 2001); cf Deniz Bölükbaşi, *Turkey and Greece: The Aegean Disputes: a Unique Case in International Law* (Cavendish, London 2004).

relations between the two neighbouring countries. Past efforts by the Commission and the Council to prevent the impediment of the relations between the Community and Turkey after Greek accession were unsuccessful. Quite to the contrary, the rhetoric of these two institutions significantly changed and good neighbourliness started to acquire an explicit requirement for the settlement of bilateral disputes as a condition for further progress towards EU membership. The reasons the Commission offered for responding negatively to Turkey's application included:

> [e]xamination of the political aspects of the accession of Turkey would be incomplete if it did not consider the negative effects of the dispute between Turkey and one Member State of the Community, and also the situation in Cyprus, on which the European Council has just expressed its concern once again. At issue are the unity, independence, sovereignty and territorial integrity of Cyprus, in accordance with the relevant resolutions of the United Nations.[782]

Six months later, the Dublin European Council expressed its concerns regarding Cyprus' question, reaffirming 'its support for the unity, independence, sovereignty and territorial integrity of Cyprus in accordance with the relevant UN resolutions'.[783] It reiterated that 'the Cyprus problem affects EC–Turkey relations'[784] and stressed the need for quick elimination of the obstacles preventing 'the pursuit of effective intercommunal talks aimed at finding a just and viable solution to the question of Cyprus'.[785]

The standpoints of the Commission and of the European Council regarding the status of Cyprus did not introduce any novelty to the scene. They reflected the earlier approach of the Commission and its Member States, both of which strongly disapproved of the declaration of independence of the TRNC, supporting the unity, independence, sovereignty and territorial integrity of the Republic of Cyprus.[786] What was new at that point was the linking of this question to Turkey's progress towards EU membership.

Evidently, Greece's accession brought the bilateral disputes from which the Commission had previously distanced itself to a multilateral level.[787] Hoffmeister notes in this respect that the 'carefully drafted statement [of the Commission]

782) European Commission, 'Commission's Opinion on Turkey's Request for Accession to the Community' SEC(89) 22/90 final/2, 20 December 1989.

783) Annex VIII, Dublin European Council (25, 26 June 1990) Presidency Conclusions.

784) *Annex VIII, Dublin European Council* (n 783).

785) *Annex VIII, Dublin European Council* (n 783).

786) *See* III.1.1 above.

787) *See* e.g. Guy Dundas, 'Cyprus from 1960 to EU Accession: the Case for Non-Territorial Autonomy' (2004) 50(1) AJPH 86–94, 90, who argues that the approach of Greece, Turkey and the Re-

coincides with the political analysis that Greece under Prime Minister Papandreou would [have] any way block[ed] Turkey's accession if there was no prior Cyprus settlement'.[788] Grigoriadis explains these and the circumstances in the following years with the Greek decision 'to exploit Turkey's interest in improving its relations with the European Union by conditioning its consent to the improvement of Turkey–EU relations on the modification of Turkey's policies on their bilateral disputes'.[789] That author further argues that Turkey's unwillingness to change its policies resulted in 'Turkey–EU relations suffer[ing] a stalemate as any decisions that could improve [these] relations were blocked by Greece's veto'.[790]

EU expectations for the settlement of the Cyprus issue persisted into the later stages, i.e. after Turkey was granted candidate status. The EU Accession Partnership with Turkey enumerated among its short-term priorities and objectives the need for Turkey to 'strongly support the UN Secretary General's efforts to bring to a successful conclusion the process of finding a comprehensive settlement of the

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public of Cyprus to achieving a solution of Cyprus' question 'is increasingly determined by their interests in the European context, and not just by their immediate concerns with respect to Cyprus'. Nathalie Tocci, 'Cyprus and the European Union Accession Process: Inspiration for Peace or Incentive for Crisis' (2002) 3(2) Turkish Studies 104–138, 107, argues that EU expected that Turkey's candidate status 'would induce Turkey to adopt a more accommodating stance towards Cyprus'. In particular, as further discussed by that author, EU officials believed that Turkey valued its relations with the Union more than those with Cyprus, But most importantly, 'EU believed [that] Ankara would work towards a settlement of the Cyprus issue […] because expected accession of the [Republic of Cyprus] in the near future' (p. 108). Tocci argues that '[w]ith the effective participation of Turkish Cypriots in EU structures and policies, Turkish would become an official EU language' and 'Turkey's EU candidature would gain the full support of a fully recognized community' (p. 110).

788) Frank Hoffmeister, *Specials Legal Aspects of the Cyprus Problem: Annan Plan and EU Accession* (Martinus Nijhoff, Leiden 2006) 86 (footnote omitted).

789) *See* in this respect Ioannis N Grigoriadis, 'The Changing Role of the EU Factor in Greek-Turkish Relations', London School of Economics and Political Science Hellenic Observatory, Symposium Paper, <http://grammatikhilfe.com/europeanInstitute/research/hellenicObservatory/pdf/1st_Symposium/GrigoriadisIoannis.pdf> last accessed 14 October 2014; for rather critical analysis *see* Bahar Rumelili, 'Transforming the Greek-Turkish conflicts: the EU and "what we make of it"!' in Thomas Diez, Stephan Stetter and Mathias Albert (eds), *The European Union and Border Conflicts: The Power of Integration and Association* (CUP, Cambridge 2008) 94–128.

790) *Grigoriadis* (n 789). *See* also Panayotis J Tsakonas, 'How Can the European Union Transform the Greek-Turkish Conflict' in *Arvanitopoulos* (n 780) 107–120, 110; Geoff Berridge, 'The UN and the world diplomatic system: lessons from the Cyprus and US-North Korea talks' in Dimitris Bourantonis and Marios L Evriviades (eds), *A United Nations for the Twenty-First Century: Peace, Security, and Development* (Kluwer Law Intl, The Hague 1996) 105–126, 113; Tozun Bahcheli, 'Turning a New Page in Turkey's Relations with Greece? The Challenge of Reconciling Vital Interests' in Mustafa Aydin and Kostas Ifantis (eds), *Turkish-Greek Relations: The Security Dilemma in the Aegean* (Routledge, London/NY 2004) 95–122, 114; Armağan Emre Çakir, 'Political Dimension: Always in the List of "Also-rans": Turkey's Rivals in EU–Turkey Relations' in Armağan Emre Çakir (ed.), *Fifty Years of EU–Turkey Relations: A Sisyphean Story* (Routledge, London/NY 2010) 10–46, 36; Christopher Preston, *The Enlargement and Integration of the European Union: Issues and Strategies* (Routledge, London/NY 1997) 218.

Cyprus problem'.[791] Furthermore and after Turkey secured the opening of accession negotiations with the Union, the good neighbourliness condition was specifically enumerated among the principles guiding its negotiating framework in addition to the Copenhagen criteria. The negotiation framework for Turkey clearly stipulates that the progress of that country toward its integration will be measured against the good neighbourliness requirement and that country's relations with its neighbouring states, including a settlement of the Cyprus' issue.[792] In particular, according to the Council, the Union will assess:

> Turkey's unequivocal commitment to good neighbourly relations and its undertaking to resolve any outstanding border disputes in conformity with the principle of peaceful settlement of disputes in accordance with the United Nations Charter, including if necessary jurisdiction of the International Court of Justice; […] Turkey's continued support for efforts to achieve a comprehensive settlement of the Cyprus problem within the UN framework and in line with the principles on which the Union is founded, including steps to contribute to a favourable climate for a comprehensive settlement, and progress in the normalisation of bilateral relations between Turkey and all EU Member States, including the Republic of Cyprus.[793]

The explicit inclusion of the good neighbourliness condition to cover the settlement of the Cyprus issue corresponded to the profound development of that condition in the enlargement practice of the Union – initially towards CEEc and later on, towards Western Balkan countries.[794]

2.2 Crystallization of the good neighbourliness condition

The 1994 Essen European Council emphasised the need for enhancing the intraregional cooperation between the associated states and their immediate neighbours for the purpose of good neighbourly relations.[795] The formal

791) Council of Ministers, 'Council Decision on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Republic of Turkey', [2001] OJ L 85/13, para. 4.1.

792) Council of European Union, 'Enlargement: Accession negotiations with Turkey: General EU Position' 12823/1/05 REV 1 (Annex II), 12 October 2005.

793) *Enlargement: Accession negotiations with Turkey: General EU Position* (n 792).

794) *See*, for instance, *Laulhé Shaelou* (n 770) 60, noting that after Cyprus' accession to the Union, the aim of recognition of the Republic of Cyprus by Turkey and the normalisation of the relations between Cyprus and Turkey was to be achieved by exerting political pressure, and through the 'technical requirements deriving from binding instruments of [EU] law'.

795) Essen European Council (9, 10 December 1994) Presidency Conclusions.

establishment of the good neighbourliness condition has therefore often been associated with the Essen Summit.[796] One year after the Summit, the French Minister of European affairs, Alain Lamassoure, declared that admission to the EU 'is only possible for countries that maintain good relations with their neighbours'[797] and further clarified that '[n]o country with unsettled border or minority conflicts will be allowed to join'.[798] The Commission implemented these requirements in its Agenda 2000 in a somewhat lenient form. It first noted that the Pact on Stability had been influential on the settlement of border disputes, pointing out that only a few issues of low intensity remained to be solved.[799] It then stressed, however, that 'before accession, applicants should make every effort to resolve any outstanding border dispute among themselves or involving third countries [and] [f]ailing this, they should agree that the dispute be referred to the International Court of Justice'.[800] The Commission further clarified its stance stipulating that:

> [i]n any event, all candidate countries should therefore, before accession negotiations are completed, commit themselves to submit unconditionally to compulsory jurisdiction, including advance ruling of the International Court of Justice in any present or future disputes of this nature, as Hungary and Slovakia have already done in the abovementioned disagreement.[801]

In respect to the minority issues, it emphasised that:

> [m]inority problems if unresolved could affect democratic stability or lead to disputes with neighbouring countries. It is therefore in the interest of the Union and of the applicant countries that satisfactory progress in integrating minority populations be achieved before the accession process is completed, using all opportunities offered in this context.[802]

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796) *E.g.* John O'Brennan, *The Eastern Enlargement of the European Union* (Routledge, London/NY 2006) 27. *See* also *Van Elsuwege* (n 501) 227–228. Other authors, *e.g. Hillion* (n 770) 17, note that the criterion has been added with the Helsinki European Council (10, 11 December 1999) Presidency Conclusions, but recognises, however, that Agenda 2000 already contained a section on border disputes and the need for their settlement.

797) 'Whose Stability Pact', *Economist* (18 March 1995) 55.

798) ibid.

799) *Agenda 2000* (n 749) 51.

800) *Agenda 2000* (n 749) 51. The examples of Hungary and Slovakia on the one hand and of Lithuania and Latvia on the other were enumerated as positive instances of the peaceful settlement of disputes. At the time, the dispute between Hungary and Slovakia over the Gabčíkovo dam has been referred to the ICJ while the maritime frontier between Lithuania and Latvia was in a 'process of being settled'.

801) *Agenda 2000* (n 749) 51.

802) *Agenda 2000* (n 749) 41.

The importance of the peaceful settlement of disputes in the light of the condition was further highlighted in the Presidency Conclusions of the Luxembourg European Council, which referred to the common commitment of applicant countries to good neighbourliness.[803] In particular, the Council decided to 'bring together the Member States of the European Union and the European States aspiring to accede to it and sharing its values and internal and external objectives'[804] for the forthcoming European Conference proposed by the Commission. The following paragraph summarised explicitly the values expected to be shared between the states:

> The members of the Conference must share a common commitment to peace, security and good neighbourliness, respect for other countries' sovereignty, the principles upon which the European Union is founded, the integrity and inviolability of external borders and the principles of international law and a commitment to the settlement of territorial disputes by peaceful means, in particular through the jurisdiction of the International Court of Justice in the Hague.[805]

Ultimately, all applicant states were invited and attended the Conference apart from Turkey,[806] which although invited, did not participate due to its dissatisfaction with the conclusions of the Luxembourg European Council.[807] The Conference restated the priority given by all thirteen candidate countries to their commitment to the values and objectives of the Union and particularly to the need for peaceful settlement of disputes in accordance with the UN Charter. In addition, the Helsinki European Council also urged candidate countries to endeavour to solve their 'outstanding border disputes and other related issues'[808] or to refer them to the ICJ on failing to find a solution within a reasonable time.[809]

803) *Luxemburg European Council* (n 750) para. 5.

804) *Luxemburg European Council* (n 750) para. 4. The European Conference was envisaged as a 'multilateral forum for political consultation, intended to address questions of general concern to the participants and to broaden and deepen their cooperation on foreign and security policy, justice and home affairs, and other areas of common concern, particularly economic matters and regional cooperation' (para.7).

805) *Luxemburg European Council* (n 750) para. 5.

806) Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia and Cyprus were invited and participated in the European Conference. Malta submitted its application in the following year and was then invited.

807) Gilles Dorronsoro, 'The EU and Turkey: Between Geopolitics and Social Engineering' in Roland Dannreuther (ed.), *European Union Foreign and Security Policy: Towards a Neighbourhood Strategy* (Routledge, London/NY 2012) 48−61, 49. In the context of Turkey, the Council concluded that the political and economic conditions giving access to negotiations were not satisfied, and considered that a strategy should be drawn up to prepare the country for accession 'by bringing it closer to the European Union in every field' (paras 27 and 31). This situation changed with the *Helsinki European Council* (n 796), when Turkey was granted candidate status (para. 12).

808) *Helsinki European Council* (n 796) para. 4.

809) *Helsinki European Council* (n 796) para. 4.

2.3 Implementation of the good neighbourliness condition: the example of Cyprus

As discussed in Chapter 3 in detail, the EU promoted good neighbourly relations among CEEc mainly through the Pact on Stability, which was initiated, moderated and financed by the Union itself. It should also be recalled that the Pact on Stability was conducted outside the enlargement framework and states concerned merely needed to promise that they would comply with international standards. The EU did not strictly link the progress of candidate countries to the settlement of their bilateral disputes, despite all its encouragement in that direction. The nearest it came to applying conditionality to a settlement of a bilateral dispute before the fifth enlargement took place was in the case of Cyprus.

The Republic of Cyprus applied in 1990 for EU membership in the name of the whole island, albeit with the disapproval of the Turkish Cypriots who first wanted to the Cyprus issue resolved.[810] Recognised only by Turkey, Northern Cyprus is considered by the EU and the wider international community as occupied territory of the Republic of Cyprus.[811] The prospective accession of the island to the Union promised unique opportunity for the settlement of the issue,[812] but also brought uncertainty regarding the overall handling of the de facto divided island before and after its eventual accession.

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810) Engin Karatas, 'The Politics of Accession' in James Ker-Lindsay, Hubert Faustmann and Fiona Mullen (eds), *An Island in Europe: The EU and the Transformation of Cyprus* (I.B. Tauris, NY 2011) 13–41, 22. Jolanda van Westering, 'Conditionality and EU Membership: The Cases of Turkey and Cyprus' (2000) 5 Eur. Foreign Affairs Rev 95–118, 107, underlines that Turkish Cypriots opposed to EU accession of Cyprus, because that would have 'impl[ied] an international recognition of the Greek-Cypriots as the only legitimate government and rulers over the whole territory'. Also, according to that author, the opposition of Turkish Cypriots was strengthened by the decision of the Union not to start accession negotiations with Turkey.

811) UNSC Res 550 (11 May 1984) UN Doc S/RES/550, reads: '[g]ravely concerned about the further secessionist acts in the occupied part of the Republic of Cyprus which are in violation of resolution 541(1983), namely the purported "exchange of Ambassadors" between Turkey and the legally invalid "Turkish Republic of Northern Cyprus" and the contemplated holding of a "Constitutional referendum" and "elections", as well as by other actions or threats of action aimed at further consolidating the purported independent state and the division of Cyprus'. In *Cyprus v Turkey*, App. No. 25781/94 (ECtHR, 10 May 2001), the ECtHR noted that Turley exercises 'effective overall control over northern Cyprus' (para. 77). *See* also European Parliament, 'Resolution on Cyprus' Membership Application to the European Union and the State of Negotiations', COM (2000) 702 – C5–0602/2000 – 1997/2171(COS), noting that 'Cyprus, as a candidate country, is in the paradoxical situation whereby for 27 years 37% of its territory has been occupied by Turkey; whereas, since the fall of the Berlin Wall, Nicosia is the only divided capital city in Europe' (point D).

812) Unlike TRNC residents, the majority of the Cypriot population in the south believed that Cyprus' accession to the EU would contribute to the settlement of the issue. *Hoffmeister* (n 788) 85, points to the poll of April 1991, according to which 76% of Cypriots from the south believed that the EU accession of the island would help achieve resolution of the problem. Also, in para. 46 of the European Commission's, 'Commission Opinion on the Application by the Republic of Cyprus for Membership', Doc/93/5 of 30 June 1993 (Opinion on the application of Cyprus), the Commission asserted that the Government of the Republic of Cyprus shares its conviction that *inter*

Indeed, the requirement for a settlement of the problem not only affected Turkey's membership aspirations, but also had an impact on Cyprus' application. Due to the unresolved issue, the Commission decided not to act upon Cyprus' application.[813] The Lisbon European Council, almost two years after the application, merely concluded that '[r]elations with Cyprus […] will be developed and strengthened by building on the association agreements and their application for membership and by developing the political dialogue'.[814]

The Commission only started to prepare its opinion on the application after the unsuccessful talks on the proposal of the (then) UN Secretary General, Boutros Boutros-Ghali for a secular, bi-zonal and bi-communal federation composed of two politically equal states, which was to be submitted to both communities for referendum.[815] In the opinion, it clearly emphasized that the integration of the island 'implies a peaceful, balanced and lasting settlement of the Cyprus question – a settlement which will make it possible for the two communities to be reconciled, for confidence to be re-established and for their respective leaders to work together'.[816] The Commission added, however, that 'as soon as the prospect of a settlement is surer, the Community is ready to start the process with Cyprus that should eventually lead to its accession'.[817] This already indicated that the EU intended to make the future accession of the island conditional upon a settlement of the issue.[818] If no settlement was to be reached, the situation in the opinion of the Commission would have to be reassessed and the question of Cyprus' accession reconsidered in January 1995.[819]

The Corfu European Council in 1994 was a turning-point in the story, envisaging that Cyprus would join the other countries from the fifth enlargement round,[820]

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alia 'the result of Cyprus's accession to the Community would be increased security and prosperity and that it would help bring the two communities on the island closer together'. It also referred to the Turkish Cypriots, concluding that although 'object[ing] to the conditions under which the application for membership was made, [they] are fully conscious of the economic and social benefits that integration with Europe would bring their community'.

813) *Hoffmeister* (n 788) 86.

814) Lisbon European Council (26, 27 June 1992) Presidency Conclusions, para. 1.4.

815) *See* Report of the Secretary General on his Mission of Good Offices in Cyprus of 3 April 1992, S/23780 and UNSC Res 750 (10 April 1992) UN Doc S/RES/750. With regard to the 'Set of Ideas' of the Boutros Boutros-Ghali, *see Hoffmeister* (n 788) 68–70.

816) European Commission, 'Commission Opinion on the Application by the Republic of Cyprus for Membership', Doc/93/5 of 30 June 1993 (*Opinion on the application of Cyprus*).

817) *Opinion on the application of Cyprus* (n 816).

818) *Tocci* (n 787) 108, for instance, argues that a settlement of the dispute was effectively a condition in the Opinion on the application of Cyprus. *See* also Angela K Bourne, 'European Integration and Conflict Resolution in the Basque country, Northern Ireland and Cyprus' (2003) 4(3) Perspectives on European Politics and Society, 391–415, 394.

819) *Opinion on the application of Cyprus* (n 816).

820) Corfu European Council (24, 25 June 1994) Presidency Conclusions, section B.

despite the lack of a solution to the problem. In its Communication to the Council of 6 February 1995, the Commission re-expressed its concerns with regard to the unsolved question.[821] However, it opined that the accession negotiations with Cyprus could start six months after the conclusion of the Amsterdam Intergovernmental Conference, which intended to revise the provisions of the Maastricht Treaty which had caused implementation problems, and to prepare the EU for the future enlargements.[822] On 6 March 1995, the General Affairs Council agreed to start the accession negotiations with Cyprus, taking into account the conclusions of the Intergovernmental Conference.[823] The decision to start the accession negotiations with Cyprus was further confirmed at the Cannes European Council in June 1995, as suggested by the Commission.[824] This more-or-less confirmed the abandonment of the settlement of the Cyprus issue as a condition for the further progress of that country.[825] The shift in the EU institutions' position did not reflecting any positive momentum in resolving the Cyprus problem but resulted from political bargaining.

In particular, Greece agreed to lift its veto to the Customs Union agreement with Turkey, which it had used due to the unresolved Cyprus issue, in exchange for securing the opening of the accession negotiations for Cyprus.[826] Unsurprisingly, the two decisions – the lifting the veto of the Customs Union and the opening the accession negotiations with Cyprus six months after the conclusion of the Intergovernmental Conference arrived simultaneously at the meeting of the General Affairs Council on 6 March 1995.[827] The Customs Union was too significant

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821) European Commission, Communication to the Council in view of the reexamination of the question of Cyprus' accession to the European Union, SEC (95) 205 final (*Reexamination of the question of Cyprus' accession to the European Union*). See also *Hoffmeister* (n 788) 89.

822) *Re-examination of the question of Cyprus' accession to the European Union* (n 821).

823) *See* Joint Press Release, available at: <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/023a0010.htm> last accessed 14 October 2014.

824) Cannes European Council (26, 27 June 1995) Presidency Conclusions, para. II.1.

825) *Tocci* (n 787) 108.

826) ibid. *See* also *Hoffmeister* (n 788) 89; 108; *Grigoriadis* (n 789); Charalambos Tsardanidas and Stelios Stavridis, 'Greece: From Special Case to Limited Europeanization' in Reuben Wong and Christopher Hill (eds), *National and European Foreign Policies: Towards Europeanization* (Routledge, London/NY 2011) 111–130, 120; Panayotis J Tsakonas, 'How Can the European Union Transform the Greek-Turkish Conflict' in *Arvanitopoulos* (n 780) 107–120, 110; Geoff Beridge, The UN and the World Dyplomatic System: Lessons from the Cyprus and US–North Corea Talks' in Dimitris Bourantonis and Marios L Evriviades (eds), *A United Nations for the Twenty-First Century: Peace, Security, and Development* (Kluwer Law Intl, The Hague 1996) 105–126, 113; Tozun Bahcheli, Cycles of Tension and Rapprochement: Prospects for Turkey's Relations with Greece in Tareq Y Ismael and Mustafa Aydın (ed.), *Turkey's Foreign Policy in the 21st Century: A Changing Role in World Politics* (Ashgate, Aldershot 2003) 161–180, 174; *Çakir* (n 790) 35.

827) *Tocci*, ibid, comments in this respect that '[t]he French Presidency skilfully linked the removal of the December 1994 on the final stage of the Turkish–EU customs union with the initiation of Cyprus' accession negotiations six months following the end of the 1996 Intergovernmental Conference'.

politically and economically to Europe to be sacrificed.[828]

Nevertheless, the lifting of the condition did not imply that the issue of Cyprus' accession would be completed ignored. In fact, Cyprus started its accession negotiations with the Union in 1998 with a clear expectation that the problem would be settled.[829] The Union has further stood firm on the position for a settlement of the issue, despite not making the accession of Cyprus conditional upon it, and have Member States insisted on inclusion of Turkish Cypriots in the negotiation talks.[830] One day before the first round of negotiations with Cyprus, four Member States (France, Germany, Italy and the Netherlands) declared jointly that a settlement of the dispute was urgently required because the negotiations would have caused 'a number of problems that originate[d] in the special situation of Cyprus'.[831] Greece argued, however, that Cyprus' Government attempts to bring the Turkish Cypriots to the negotiation table had been unsuccessful 'due to the fact that Turkey, which occupies part of the island, is holding Cyprus' accession hostage'.[832] In addition, Greece recalled that all candidate countries should be assessed on the basis of the same criteria and should participate in the accession process on an equal footing, as noted at the Luxemburg European Council.[833]

Differences aside, all Member States agreed on the need to include Turkish Cypriots in the negotiation process. The EU referred repeatedly to the invitation of the President of the Republic of Cyprus to the Turkish Cypriots to 'nominate representatives to be included as full members of the Cypriot team, which [would] conduct the negotiations'[834] in its working papers, reserving the right to reopen chapters 'at an appropriate moment'.[835] The possibility of making Cyprus' accession

828) *E.g. Karatas* (n 810) 28.

829) *See Cannes European Council* (n 824) para. II(1).

830) Nathalie Tocci, *EU Accession Dynamics and Conflict Resolution: Catalysing Peace Or Consolidating Partition in Cyprus* (Ashgate, Aldershot 2004) 129.

831) Joint Statement made by Italy, France, Germany and the Netherlands on the Greek Cypriot–EU Membership Process During the EU General Affairs Council (9 November, 1998) available in French at: <http://www.mfa.gov.tr/joint-statement-made-by-italy_-france_-germany-and-the-netharlands-on-the-greek-cypriot-eu-membership-process-during-the-eu-general-affairs-council_br_november-9_-1998.en.mfa> last accessed 14 October 2014. For an English version of an extract of the text, *see* the authentic text in *Hoffmeister* (n 788) 100.

832) An extract of the text is available in *Hoffmeister* (n 788) 100.

833) ibid.

834) Statement by President Clerides relating to Turkish Cypriot Participation, 12th March 1998, available at: <http://www.cvce.eu/content/publication/2005/5/27/2bf0d586-d159-4f26-8185-6f3265bbe13f/publishable_en. pdf> last accessed 14 October 2014.

835) The EU Common positions included the following text: 'the EU notes that the invitation of the Cyprus government to include representatives of the Turkish Cypriot community in the negotiations has so far not been taken up, and that the Conference may therefore return to this chapter at an appropriate moment'. *See* also, *Hoffmeister* (n 788) 100.

to the Union conditional upon settlement of the dispute was, nevertheless, ruled out. The Helsinki European Council in 1999, stated that 'a political settlement will facilitate the accession of Cyprus to the European Union [but] [i]f no settlement has been reached by the completion of accession negotiations, the Council's decision on accession [would have been made] without the above being a precondition'.[836] The safe accession route for Cyprus was again strengthened with the help of Greece, which expressed its preparedness to block the whole upcoming enlargement round if any Member State tried to exclude the prospective accession of the divided Cyprus at the Copenhagen European Council.[837] In the words of the Greek ambassador to the EU, it was 'unthinkable for any Greek [political] party to vote in favour of accession that does not include Cyprus' and if Cyprus was 'not among the first lot, there [would have been] no enlargement'.[838] The Copenhagen European Council in 2002 finally concluded negotiations and welcomed Cyprus to join the Union on 1 May 2004. It further decided to suspend the application of the acquis to the northern part of the island if the dispute was not settled by the time of Cyprus' accession and until the Council decided unanimously to the contrary, at the Commission's suggestion.[839]

The efforts to settle the issue strengthened with a new UN initiative that 'had the explicit backing of the US, the EU Commission, the European Parliament and Javier Solana, the General Secretary of the European Council and High Representative for the "Common Foreign and Security Policy" of the EU'.[840] In particular, on 11 November 2002, the (then) UN Secretary General, Kofi Annan, proposed a 'Basis for Agreement on Comprehensive Settlement of the Cyprus Problem' (Annan Plan),[841] which was to establish a bi-communal, bi-zonal federal

836) *Helsinki European Council* (n 796) para. 9(b).

837) Sharon Spiteri, 'Greece: without Cyprus no EU enlargement', *EU Observer* (13 June 2002) available at: <http://euobserver.com/enlargement/6615> last accessed 14 October 2014. *See* also Heather Grabbe, 'Challenges of EU Enlargement' in Anatol Lieven and Dmitri V Trenin (eds), *Ambivalent Neighbours: The EU, NATO and the Price of Membership* (Carnegie Endowment for International Peace, Washington, D.C. 2003) 67–89, 82 and Stefan Engert, *EU Enlargement and Socialization: Turkey and Cyprus* (Routledge, NY 2010) 52–65.

838) Quoted in 'The Middle East: Abstracts and Index' vol 26 (Northumberland Press, Pittsburgh 2002) 43.

839) Copenhagen European Council (12, 13 December 2002) Presidency Conclusions, para. 12.

840) Jerry Sommer, *Security in Cyprus: Threat Perceptions, Possible Compromises and the Role of the EU* (Bonn International Center for Conversation, Bonn 2005) 20. *See* also the European Council's conclusions from the time after the launch of the UN initiative until the accession of Cyprus to the EU: Seville European Council (21, 22 June 2002) Presidency Conclusions, para. 24; Brussels European Council (24, 25 October 2002) Presidency Conclusions, para.4; *Copenhagen European Council* (n 839) para.10; Brussels European Council (20, 21 May 2003) Presidency Conclusions, para.85; Thessaloniki European Council (19, 20 June 2003) Presidency Conclusions, para. 39; and Brussels European Council (25, 26 December 2004) Presidency Conclusions, para. 49.

841) UN, 'Basis for Agreement on Comprehensive Settlement of the Cyprus Problem' (as revised), available at: <http://www.globalsecurity.org/military/library/report/2004/annan-cyprus-problem_maps_26feb03.pdf> last accessed 14 October 2014.

state composed of two states – a Greek Cypriot state and a Turkish Cypriot state.[842] After intense negotiations and five versions of the Annan Plan, two separate simultaneous referenda were held in Cyprus on 24 April 2004 which resulted in rejection of the plan for reunification of the island.[843] The divided island became a part of the Union on 1 May 2004, contrary to the hopes and expectations of the Union for a reunited Cyprus.

Although the whole of Cyprus is considered EU territory, the application of the acquis has been 'suspended in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not have effective control'.[844] The terms under which the free movement of persons, good and services apply to the border (the 'green line') between the areas where the acquis was suspended and areas controlled by the Government of the Republic of Cyprus and also to the boundary between the former and the UK Eastern Sovereign Base area, have been regulated by the EU's Green Line Regulation 866/2004.[845] The scope of the Green Line Regulation was, as noted by Skoutaris, 'required in order to address the lacuna in the EC legal order created by the suspension of the acquis and to put an end to the isolation of the Turkish Cypriot community, which has expressed its desire for a future within the EU at the referendum on 24 April 2004'.[846] Nevertheless, the abovementioned Regulation had also to consider 'the legitimate concern of the only internationally recognized government on the island that any authority in those "Areas" should not be recognized by the EU or its Member States'.[847]

The settlement of the Cyprus issue remained an important precondition for Turkey's progress towards the EU. Unlike Cyprus which, backed by Greece, escaped having settlement become a strict precondition of its accession, no such circumstances can be imagined in the case of Turkey. This is due to the fact that no Member State has any particular interest in 'fighting' over Turkey's accession to the Union as Greece did in the case of Cyprus. The chances for Turkey to 'get away' without settlement have also been weakened after the accession of the Republic of Cyprus to the Union. In fact, Cyprus' accession to the Union led automatically to the illegal occupation of EU territory by a candidate country, given that the situation

842) *See* in great detail *Hoffmeister* (n 788).

843) The Greek and Turkish Cypriots answered the following question at the referendum: '[d]o you approve the Foundation Agreement with all its Annexes, as well as the constitution of the Greek Cypriot/Turkish Cypriot State and the provisions as to the laws to be in force, to bring into being a new state of affairs in which Cyprus joins the European Union united?' The majority (66.70%) voted against this solution (75.83% of the Greek Cypriot voters and 35.09% of the Turkish Cypriot voters).

844) Article 1(1) Protocol No 10 on Cyprus of the Act of Accession [2003] OJ L 236/955.

845) Council Regulation 866/2004 of 29 April 2004 on a regime under Article 2 of Protocol No 10 of the Act of Accession as amended by Council Resolution 293/2005 of 17 February 2005 (para. 3).

846) *Skoutaris* (n 433) 728.

847) ibid.

in Cyprus has been classified as illegal occupation by Turkey under international law and by the EU itself.[848] The situation gets even more complicated knowing that, just like Greece, the 'new' Member State would not hesitate to exercise its right of veto to block the ongoing negotiations with Turkey due to the unresolved issue, notwithstanding its consent for the beginning of such negotiations.[849] In these circumstances of inequality between the conflicting states, but also of a persisting infringement of the territorial integrity and sovereignty of one Member State, settlement of Cyprus' issue in the light of the good neighbourliness principle can scarcely be imagined.

3. The good neighbourliness condition in EU enlargement with Western Balkans

The countries of the former Yugoslavia were deliberately excluded from the Pact on Stability, because at the time when this initiative was launched, the conflict in this region had already escalated into violence.[850] This situation did not fit that initiative's attempt at preventive diplomacy.[851] Nevertheless, following the adoption of the Pact on Stability, the EU focused on the question of the medium and a long-term stabilisation of the territory of former Yugoslavia. Various initiatives have been established to strengthen good neighbourliness relations in the region. However, the Western Balkan countries did not escape the good neighbourliness condition as applied to the settlement of bilateral disputes in the Union's enlargement policy. The involvement of the Western Balkan countries in vertical disputes with Member States largely complicated their membership prospects.

848) *Karatas* (n 810) 15.

849) The Republic of Cyprus has already employed its veto to block the negotiations of Turkey to the Union requiring a settlement of the issue. At its summit on 11 December 2006 and at the recommendation of the Commission, IP/06/1652 of 29 November 2006, the EU Council blocked the opening of eight chapters 'covering policy areas relevant to Turkey's restrictions as regards the Republic of Cyprus' due to its failure to implement entirely the Additional Protocol to the Ankara Agreement. In addition, on 8 December 2009, Cyprus blocked the opening of six chapters due to the non-compliance of Turkey with the EU Council, 'Declaration by the European Community and its Member States', C/05/243 of 21 September 2005, referring to the recognition of the Republic of Cyprus and the normalization of the relations between Turkey and all Member States (para. 4) as well with the obligation from the Negotiation Framework and the conclusions of the Council of December 2006. Aside from the blockages related to Cyprus, on 25 June 2007, France blocked the opening of four additional chapters, being interested in an alternative relationship with Turkey instead of full membership. A clear view of the blockages to the opening and closing of the negotiation chapters is presented in the Twelfth Report of Session 2010–2012 of the House of Commons Foreign Affairs Committee 'UK–Turkey Relations and Turkey's Regional Role', 81–85, available at: <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/1567/1567.pdf> last accessed 14 October 2014.

850) Hans-Georg Ehrhart, 'Prevention and Regional Security: The Royaumont Process and the Stabilization of South-Eastern Europe' (1998) OSCE YB 327–346, 330.

851) ibid.

3.1 Good neighbourliness initiatives

In line with the Dayton Accord,[852] the EU presented a platform which was meant to contribute to the stabilisation of the Western Balkans region.[853] On the basis of this platform, which explained the development of the process, the (then) five successor states that emerged from the former federation and other states and international organisations,[854] adopted a 'Declaration on the process of stability and good neighbourliness'.[855] This Declaration started the so-called Royaumont Process, which drew inspiration from the Pact on Stability for CEEc, but which was intended for the more problematic, southeast part of the continent.[856] The Process was aimed at stabilisation, 'comprising political, civil, cultural and information-related aspects of establishing good neighbourly relations and subregional cooperation'.[857] Apart from the regular meetings between foreign ministry officials, parliamentarians and NGOs to discuss various political, economic and cultural issues, the Royaumont Process did not result in significant achievements.[858]

The Royaumont Process was followed by the Regional Approach, which was defined by the General Affairs Council of 26 February 1996.[859] It applied first to those countries which had no mandate to negotiate association agreements at that time i.e. to Western Balkan countries.[860] The EU applied strict conditionality to the

852) The General Framework Agreement for Peace in Bosnia and Herzegovina (with Annexes), initialled in Dayton, Ohio on 21 November 1995 and signed in Paris on 14 December 1995, 35 ILM 75 (1996) (*Dayton Agreement*).

853) *See* Gemma Collantes-Celador and Ana E Juncos, 'Security Sector Reform in the Western Balkans: The Challenge of Coherence and Effectiveness' in Magnus Ekengren and Greg Simons (eds), *The Politics of Security Sector Reform: Challenges and Opportunities for the European Union's Global Role* (Ashgate, Farnham/Burlington 2011) 127–154, 134.

854) The meeting was held in Royaumont and was attended by the Foreign Ministers of the (then) 15 EU Member States, Bulgaria, Romania, Slovenia and Turkey and representatives of the (then) five successor states that had emerged from the former Yugoslavia – Albania, Bosnia and Herzegovina, Croatia, Serbia and Montenegro including Kosovo and the Republic of Macedonia. The Assembly of the Republic of Montenegro made a formal Declaration of Independence on 3 June 2006, after an independence referendum was held on 21 May 2006 and after the referendum results were officially confirmed by the commission on 31 May 2006. The Assembly of Kosovo adopted a Declaration of independence on 17 February 2008.

855) Declaration on the Process of Stability and Good Neighbourliness, Royaumont, 13 December 1995.

856) *Bechev* (n 593) 32.

857) *Ehrhart* (n 850) 332.

858) *Bechev* (n 867). *See* also Hans-Georg Ehrhart, 'A Good Idea, but a Rocky Road Ahead: The EU and the Stability Pact for South Eastern Europe' in David Carment and Albrecht Schnabel (eds), *Conflict Prevention: Path to Peace or Grand Illusion?* (UN UP, Tokyo/NY 2003) 112–132.

859) Conclusions of the General Affairs Council of 26 February 1996, followed by a Commission report on common principles for future contractual relations with certain countries in South-Eastern Europe: Report from the Commission to the Council and the European Parliament COM (96) 476 final of 2 October 1996.

860) *Bechev* (n 867) 32.

Western Balkan countries to achieve the aims envisaged in the Regional Approach.[861] For this reason, the Council established several political and economic conditions to be fulfilled by these countries as the basis for further development of bilateral relations in the fields of trade, financial assistance and economic cooperation, as well as of prospective contractual relations with the European Community.[862] These conditions distinguished between general and specific obligations for the countries covered by the Approach. General obligations applied to all countries under the Approach and required democratic reforms, respect for human rights, minority protection, return of refugees and displaced persons, economic reforms and regional cooperation.[863] Specific obligations applied only to post-conflict Western Balkan countries[864] and required cooperation with the International Criminal Tribunal on former Yugoslavia (ICTY) on the basis of peace agreements.[865]

The compliance of Western Balkan countries with the Council's conditions was assessed in the Commission's Annual Reports. The conditionality regime established under the Regional Approach did not include any prospects of membership for Western Balkan countries but it was maintained through the trade and financial assistance offered by the Union to build stability in the region.[866] Nevertheless, 'to project a power in its immediate neighbourhood, the EU had to make at least implicitly certain commitments to embrace the target-countries of its foreign policy as future members'.[867] The turning point was the outbreak of the Kosovo conflict,[868] which triggered new initiatives for the stabilisation of the Western Balkans.

861) *E.g.* Christian Pippan, 'The Rocky Road to Europe: The EU Stabilisation and Association Process for the Western Balkans and the Principle of Conditionality' (2004) 9(2) Eur. Foreign Affairs Rev 219–245, 224.

862) Conclusions of the General Affairs Council of 29 April 1997.

863) *See,* for instance, Council Conclusions and Declaration on the former Yugoslavia, Annex 1: Bull, EU 1/2–1996, point 1.4.108; and *Common Principles for Future Contractual Relations with Certain Countries in South-Eastern Europe* (n 859).

864) All Western Balkan countries except Albania and Macedonia – *see* European Commission, Communication to the Council on operational conclusions – EU stabilisation and association process for countries of South-Eastern Europe Bosnia and Herzegovina, Croatia, Federal Republic of Yugoslavia, former Yugoslav Republic of Macedonia and Albania, COM/2000/0049 final (*European Commission, Communication to the Council on operational conclusions – SAP*), points 4 and 5.

865) *Common Principles for Future Contractual Relations with Certain Countries in South-Eastern Europe* (n 859).

866) *E.g.* Maire Braniff, *Integrating the Balkans: Conflict Resolution and the Impact of EU Expansion* (I.B. Tauris and Co Ltd., London 2011) 84.

867) Dimitar Bechev, 'Between Enlargement and CFSP: the EU and the Western Balkans', <http://www.google.co.uk/url?sa=trct=jq=esrc=ssource=webcd=1ved=0CC4QFjAA url=http%3A%2F%2Fwww.lse.ac.uk%2FinternationalRelations%2Fcentresandunits%2FEFPU%2FEFPUconferencepapers2004%2FBechev.doc ei=WVQ9U7dqxZjUBaXYgNAE usg=AFQjCNGiwsQK-eI8nepxfQ3n7PTKnC5fzw bvm =bv.63934634,d.d2k> last accessed 14 October 2014.

868) For detailed legal analysis *see* Heike Krieger, *The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999* (CUP, Cambridge 2001). For an understanding of the different aspects of the conflict *see* Florian Bieber and Židas Daskalovski (eds), *Understanding the*

On 10 June 1999, a Stability Pact for South Eastern Europe was adopted at EU initiative.[869] This initiative resembled closely the earlier Pact on Stability for CEEc, being also based on bilateral and multilateral agreements on good neighbourly relations.[870] The overall aim of achieving stability in the region was to be built upon peaceful and good neighbourly relations, preserving the multinational and multiethnic diversity of the countries in the region and protecting minorities.[871] To that end and with a view to promoting good neighbourly relations, EU Member States and other participants including necessarily all Western Balkan countries, reaffirmed their:

> commitment to all the principles and norms enshrined in the UN Charter, the Helsinki Final Act, the Charter of Paris, the 1990 Copenhagen Document and other OSCE documents, and, as applicable, to the full implementation of relevant UN Security Council Resolutions, the relevant conventions of the Council of Europe.[872]

The EU did not consider the Stability Pact for South East European countries (SEEc) a part of any particular pre-accession strategy. Moreover, as with the Pact on Stability, the initiative was institutionally placed under the OSCE's auspices and EU was not the sole stakeholder in the process.[873] More importantly and in parallel to the Pact on Stability in South Eastern Europe, the EU launched the Stabilisation and Association Process (SAP) which was expected to play a significant role in the reconciliation between the Western Balkan countries at which it was directed.[874]

In its operational conclusions from 26 May 1999, the Commission proposed the creation of a SAP for SEEc.[875] This initiative was sanctioned by the Council, which

869) *See* Council of the European Union, '1999/345/CFSP: Common Position of 17 May 1999 adopted by the Council on the basis of Article 15 of the Treaty on European Union, concerning a Stability Pact for South-Eastern Europe', [1999] OJ L 133/1.

870) *See* para. 6 Stability Pact for South Eastern Europe, available at: <http://www.stabilitypact.org/constituent/990610-cologne.asp> last accessed 14 October 2014.

871) *See* para. 10 *Stability Pact for South Eastern Europe* (n 870).

872) *See* para. 5 *Stability Pact for South Eastern Europe* (n 870).

873) *See* in more detail Sophia Clément, 'External Institutional Frameworks and Subregionalism in South-Eastern Europe' in Renata Dwan (ed.), *Building Security in Europe's New Borderlands: Subregional Cooperation in the Wider Europe* (East West Institute, NY 1999) 71–94.

874) The European Commission's proposal for the conclusion of the Stabilisation and Association Process for SEE states: Commission, 'Stabilisation and Association Process for countries of South Eastern Europe' (Communication) COM (1999) 235 final, was sanctioned by the General Affairs Council, which confirmed the development of the Regional Approach into a Stabilisation and Association Process (SAP) in its Conclusions of 21 June 1999.

875) European Commission, 'Communication to the Council and the European Parliament on the Stabilisation and Association Process for countries of South Eastern Europe' COM (99) 235 final, 26 May 1999.

confirmed the development of the Regional Approach into a SAP in its Conclusions of 21 June 1999.[876] Unlike the Stability Pact for SEEc, the SAP was directed only at the Western Balkan countries. The inspiration for such a grouping was the belief that security problems in the Balkans could be dealt much more easily if they were put in a regional and developmental context.[877]

The SAP was meant to offer 'a new kind of contractual relationship taking fully into account the individual situations of each country with the perspective of EU membership on the basis of the Amsterdam Treaty and once the Copenhagen criteria have been met'.[878] The importance of the SAP was announced at the Feira European Council, which identified all Western Balkan countries as potential candidates for membership and which remains the main framework for the enlargement of the Union for countries from that region.[879] The Zagreb Summit Declaration of 24 November 2000, further highlighted that historic changes have given:

> 'a new impetus to a policy of good neighbourliness based on the negotiated settlement of disputes, respect for the rights of minorities, respect for international obligations, including with regard to the ICTY, a lasting resolution of the problem of refugees and displaced persons and respect for States' international borders.[880]

Evidently, the EU's approach to good neighbourliness and the application of conditionality in the case of Western Balkan countries extended to the specific obligations of the post-conflict states[881] to cooperate with the ICTY and to ensure the safe return of refugees and displaced persons, in addition to the other state duties.[882] Such obligations are not new to the good neighbourliness principle. Not only were they emphasised within the Regional Approach, but also formed the basis of the early Resolution on 'International co-operation for the prevention of immigration which is likely to disturb friendly relations between nations' of the UN General Assembly.[883] Moreover, these specific commitments stem from the international obligations undertaken by post-conflict states and are as such, largely

876) Conclusions of the General Affairs Council of 21 June 1999.
877) Vladimir Gligorov, 'European Partnership with the Balkans' (2004) 2(2) European Balkan Observer 2–7, 3.
878) Cologne European Council (3, 4 June 1999) Presidency Conclusions.
879) Feira European Council (19, 20 June 2000), Presidency Conclusions, para. 24.
880) Point 2 Zagreb Summit Declaration, 24 November 2000, <http://www.esiweb.org/pdf/bridges/bosnia/ ZagrebSummit24Nov2000.pdf> last accessed 14 October 2014.
881) This affected all Western Balkan countries except Albania and Macedonia – *see* (n 864).
882) *See* also the Conclusions of the General Affairs Council of 29 April 1997.
883) *See* I.2 above.

connected to the UN fundamental principle of cooperation in good faith, which forms the legal basis of the good neighbourliness principle.[884]

The SAP rests on Stabilization and Association Agreements (SAA), Autonomous Trade Measures and other economic and trade relations, Financial Assistance and regional cooperation, and good neighbourly relations.[885] The opportunity to enable countries to make full use of the support offered by the Union through an effective combination of these instruments depending on the efforts made by each country allowed for successful application of the conditionality principle.[886] SAA and their implementation were in the centre of the SAP and became the main instruments of the Union's enlargement strategy towards the Western Balkan countries.

a) Stabilisation and Association Agreements

The mid-point of the SAP is the conclusion of an SAA.[887] SAAs and their implementation became a cornerstone for the ultimate accession of Western Balkan countries. The conclusion of an SAA represented 'a far-reaching legal relationship

884) As noted by Göran Sluiter, 'Cooperation of States with International Criminal Tribunals' in Antonio tonio Cassese, *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009) 187–200, 192, the duty of states to cooperate with the ICTY emanates primarily from para. 4 UNSC Res 827 (25 May 1993) UN Doc S/Res/827, stipulating that 'all States shall cooperate fully with the International Tribunal and its organs'. Moreover, the author argues that the resolution not only refers to the UN Member States, but to all states, although noting that countries which are not Members are not bound by the UN Charter or by the Resolutions of the Security Council. Furthermore, Article X of Annex IA of the *Dayton Agreement* (n 852) imposes an obligation for the parties to fully cooperate 'with all entities involved in implementation of this peace settlement […] including the International Tribunal for the Former Yugoslavia'. In line with the Third Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia Since 1991, UN Doc. A/51/292, S/1996/665 (1996), para. 166, '[b]y signing the Accord, the parties thereto, the Federal Republic of Yugoslavia (Serbia and Montenegro), the Republic of Bosnia and Herzegovina, the Republic of Croatia, the Federation of Bosnia and Herzegovina and Republika Srpska, have formally recognized the Tribunal and undertaken to cooperate with it'. The weaknesses of the cooperation mechanisms used are analysed by Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 EJIL 2–17. Annex VII of the *Dayton Agreement* (n 852) incorporates the duty of states to ensure safe return of refugees and displaced persons.

885) European Commission, Stabilisation and Association Process: <http://ec.europa.eu/enlargement/policy/ glossary/terms/sap_en.htm> last accessed 14 October 2014.

886) cf Arolda Elbasani, 'The Stabilisation and Association Process in the Balkans: Overloaded Agenda and Weak Incentives?' (2008) EUI Working Papers SPS 2008/03, available at: <http://cadmus.eui.eu/handle/1814/ 8447> last accessed 14 October 2014.

887) *See* in more detail J Marko and J Wilhelm, 'The Balkans and the Newly Independent States: Stabilisation and Association Agreements' in Andrea Ott and Kirstyn Inglis (eds), *Handbook on Europe Enlargement: A Commentary on the Enlargement Process* (TMC Press, The Hague 2002) 165–174.

between the EU and the country concerned, entailing mutual rights and obligations'[888] for the parties. The financial assistance provided to the SAP countries was strictly dependant on their performance.[889]

The development of the Regional Approach into an SAP did not a priori change the conditions for the start of negotiations on contractual relations, but it rather changed their nature − replacing the prospect of a Cooperation Agreement with that of an SAA.[890] Thus, the SAP also foresees that the conditions for the opening of negotiations are those laid down in the Council Conclusions of 29 April 1997.[891] The various negotiation steps involved the fulfilment of these conditions followed by a Commission Report on the feasibility of the opening of negotiations for an SAA with the affected country. The Commission's 'feasibility report' is further assessed by the Council and if positive, the Commission is invited by the Council to prepare a proposal for negotiation directives.[892] The adoption of negotiation directives by the Council marks the opening of the negotiations for an SAA with a country. The SAA has to be ratified by all Member States before it enters into force. Nevertheless, pending ratification, certain parts of the SAA are put into effect through an Interim Agreement.[893] Once an SAA enters into force, a new set of joint bodies coordinating the implementation of the Agreement is established at ministerial level, at high official level and at technical level.[894]

The SAAs are tailor-made and each Western Balkan country apart from Kosovo has already signed one as of the date of writing.[895] Nevertheless, each agreement is intended to have the common purpose of bringing countries into association after a

888) E.g. UK Parliament, House of Commons, European Scrutiny Committee on 'The EU and Serbia', point 11.1, available at: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmeuleg/19-ix/19ix13.htm> last accessed 14 October 2014.

889) Council Regulation 2666/2000 of 5 December 2000 on assistance for Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia, repealing Regulation 1628/96 and amending Regulations (EEC) 3906/89 and (EEC) 1360/90 and Decisions 97/256/EC and 1999/311/EC [2000] OJ L 306/1.

890) *European Commission, Communication to the Council on operational conclusions – SAP* (n 864) point 2.

891) *European Commission, Communication to the Council on operational conclusions – SAP* (n 864) point. 4.

892) *European Commission, Communication to the Council on operational conclusions – SAP* (n 864) point 4.

893) *E.g.* 'Interim Agreement on trade and trade-related matters between the European Community, of the one part, and Bosnia and Herzegovina, of the other part', [2008] OJ L 233/6; 'Interim Agreement on trade and trade-related matters between the European Community, of the one part, and the Republic of Montenegro, of the other part', [2007] OJ L 345/2; 'Interim Agreement on trade and trade-related matters between the European Community, of the one part, and the Republic of Serbia, of the other part', [2010] OJ L 28/2.

894) *E.g.* European Commission, IP/05/122 Press Release, 1 February 2005.

895) The negotiations of the SAA between the European Union and Kosovo started on 28 October 2013 and the conclusion of the Agreement is expected in 2014 – *see* European Commission, June 2006 (in force 1 April 2009); Bosnia and Herzegovina has signed the SAA with the EU on

transitional period through implementation of the same core obligations. The idea of sharing the EU values related to democracy, the rule of law, respect for human rights including minority rights, market economy and good neighbourly relations is central to all SAAs.[896] By signing the SAAs, Western Balkan countries committed to gradually aligning to the EU legislation in a number of areas, to respect the shared values of the Member States and to cooperate with the EU on security issues.[897] The relationship between the EU and the Western Balkan countries is considered one-sided during the whole process.[898] As put by Trauner, '[t]he EU essentially sets the rules and conditions, whereas the prospective candidate country has to content itself with expressing possible problems and concerns'.[899]

b) European Partnerships

Another important step forward in the relations between the EU and the Western Balkan countries was achieved at the Thessaloniki European Council in 2003, followed by the EU 'Western Balkans' Summit.[900] At the Summit, the Council adopted the 'Thessaloniki Agenda for the Western Balkans - Moving towards the European integration'.[901]

The Agenda had significant meaning for the Western Balkan countries. It was adopted at the invitation of the Brussels European Council[902] to examine ways and means to strengthen EU stabilisation and association policy with respect to Western Balkan countries based on experiences from the enlargement process. The most important innovation endorsed by the Agenda was the enhancement of the SAP with a new instrument entitled European Partnership (EP).[903]

16 June 2008 (not in force yet); Croatia signed an SAA with the EU on 29 October 2001 (in force 1 February 2005), since the accession of Croatia to the Union on 1 July 2013, its relations with the Union are governed by the 'Treaty Between the Member States of the European Union and the Republic of Croatia Concerning the Accession of the Republic of Croatia to the European Union' [2012] OJ L 112/10; Macedonia signed an SAA with the EU on 9 April 2001 (in force 1 April 2004); Montenegro signed an SAA with the EU on 15 October 2007 (in force 1 May 2010); Serbia signed an SAA with the EU on 29 April 2008 (in force 1 September 2013).

896) *European Commission, Communication to the Council on operational conclusions – SAP* (n 864) point 5.

897) *E.g.* European Commission, Report from the Commission – The Stabilisation and Association process for South East Europe – Second Annual Report SEC (2003) 339; SEC (2003) 340; SEC (2003) 341; SEC (2003) 342; SEC (2003) 343.

898) Florian Trauner, 'EU Justice and Home Affairs Strategy in the Western Balkans Conflicting Objectives in the Pre-Accession Strategy' (2007) CEPS Working Document No. 259, 2.

899) ibid.

900) Thessaloniki European Council (19, 20 June 2003) Presidency Conclusions.

901) Thessaloniki Agenda for the Western Balkans – Moving towards European Integration annexed to the Thessaloniki European Council's Presidency Conclusions (*Thessaloniki Agenda*).

902) Brussels European Council (20, 21 March 2003) Presidency Conclusions.

903) Council Regulation 533/2004 of 22 March 2004 on the establishment of European Partnerships in the framework of Stabilisation and Association Process [2004] OJ L 86/1 (*Council Regulation, 533/2004*).

The EPs are instruments that identify the priorities and the specific needs of the individual countries, with a view to encouraging the measures required to achieve European standards.[904] They contain a list of criteria which serve as a basis for measuring the progress of countries and guide the financial support provided by the Union. The EPs are evolving instruments and are updated according to the fulfilment of the commitments undertaken by the parties and the new challenges presented in the SAP. They were 'inspired by the APs for candidate countries and adopted to the specificities of the SAP'.[905] The countries from the region were expected to draw up national plans to implement the EPs.[906] Council Regulation 533/2004 enabling the adoption of EPs for SAP countries stipulated that the follow-up of these Partnerships is ensured within the framework of the mechanisms established under the SAP, notably the Annual Reports.[907]

Unlike the APs, which served as a 'key feature' of the pre-accession strategy applied in the view of the fifth and sixth enlargement rounds, the EPs are not applied in the accession process, but rather set the preconditions that the Western Balkan countries need to fulfil to become eligible for accession. It should also be noted that the EPs did not replace the APs in the enlargement context for the Western Balkan countries. The APs still serve their initial purpose as key instruments in the pre-accession stage for candidate countries. Once a country is granted a candidate status, the updated versions of their EP are entitled AP.[908] The difference between EPs and APs is more in the terminology used and not in the substance of the two instruments. Nevertheless, this terminological difference distinguishes the potential candidate countries from the de facto candidate countries. In the words of the Commission, the change of the name is needed to make the partnership instruments more understandable, since 'it is appropriate to have the same name for the partnerships for those countries which have the same status in the accession process'.[909]

The confusion over the different accession strategies for candidate and potential candidate countries was somewhat clarified by Council Regulation 1085/26 establishing the Instrument for Pre-Accession Assistance (IPA).[910] The IPA was initiated to streamline the EU's financial allocations and to achieve more impact with

904) Article 1, *Council Regulation 533/2004* (n 903).
905) *Thessaloniki Agenda* (n 901).
906) *Elbasani* (n 886).
907) *Council Regulation 533/2004* (n 903).
908) *E.g.* Council Decision 2008/212 on the principles, priorities and conditions contained in the European Partnership with the former Yugoslav Republic of Macedonia and repealing Decision 2006/57/EC [2008] OJ L 80/32.
909) European Commission, 'Proposal for a Council Regulation amending Regulation 533/2004 on the Establishment of Partnerships in the Framework of the Stabilisation and Association Process' COM (2007) 662 final.
910) Council Regulation 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession As-

the resources available. It was invented to serve the interests of coherence and consistency of Community assistance for candidate and potential candidate countries.[911] The assistance for candidate countries is based on the priorities identified in the APs, planned in the view of the Copenhagen criteria and on the progress made in the adoption and implementation of the acquis and regional cooperation.[912] The assistance for potential candidate countries is based on the priorities identified in the EPs, planned in view of the Copenhagen criteria and on the progress made in implementing the SAAs, including regional cooperation.[913]

3.2 The challenge of bilateral disputes

Moving slowly towards the EU, Western Balkan countries faced the challenge of solving their bilateral disputes. Unlike bilateral disputes between CEEc which were mainly horizontal in nature, the bilateral disputes of Western Balkan countries often involve Member States and as such are vertical in nature, following Rodin's classification. However, as illustrated in the case of Cyprus, circumstances can differ where the interests of Member States are affected by the settlement of the bilateral issue. This is even more the case where the Member States are directly affected, rather than acting in support of another country. The involvement of Member States in bilateral disputes with candidate countries can complicate the application of the good neighbourliness condition in the Union's enlargement policy.

The good neighbourliness condition as applied at the present stage of integration of the Western Balkan countries entails successful settlement of bilateral disputes involving candidate countries. The progress of candidate countries is directly linked to the fulfilment of the condition. The prospect of accession has been regarded by the Commission 'as a powerful incentive for the States concerned to settle any border disputes'.[914] However, enlargement practice has shown that not only border disputes, but virtually any bilateral issue between states can become a problem and be associated to the good neighbourliness condition, which complicates the application of this condition further.

Recognising the important role played by bilateral disputes, the European Commission has more recently dedicated a new paragraph to 'bilateral questions' as key challenges to the integration process in its 2009–2010 Enlargement Strategy.[915] It clarified that '[b]ilateral questions, including border issues' which have been

sistance [2006] OJ L 210/1 (*IPA Council Regulation*).
911) *IPA Council Regulation* (n 910) rec. 13.
912) *IPA Council Regulation* (n 910) rec. 14.
913) *IPA Council Regulation* (n 910) rec. 15.
914) *Agenda 2000* (n 749) 51.
915) *Enlargement Strategy 2009* (n 726).

affecting the enlargement process increasingly, should be solved between the 'parties concerned'.[916] In the light of the integration process, states should work towards finding 'mutually acceptable solutions, and concluding agreements, on outstanding issues with neighbouring countries'[917] but can also request that the Commission get involved in finding solutions when this is appropriate. It is a responsibility of the states involved to settle their disputes 'in a spirit of good neighbourliness and bearing in mind the overall EU interests'.[918]

The emphasis put on the 'overall EU interests' suggests that such interests should prevail over national interests in the context of finding solutions to bilateral disputes. In particular, solutions to bilateral disputes should not harm the 'EU's strategic interests in stability, security, and conflict prevention',[919] which enlargement policy serves. Along similar lines, the Commission concluded that bilateral disputes 'should not hold up the accession process',[920] implying that strategic EU interests should not be 'trapped' by national state interests. This was even more explicitly stated in the 2011–2012 Enlargement Strategy, where the Commission recognised that '[b]lockages linked to bilateral issues can compromise the transformative power of the enlargement process'.[921] At the same time, however, the Commission required early solutions to the bilateral issues during the enlargement process.[922] This was further clarified in the European Parliament resolution on enlargement, which stipulated that:

> any acceding state should resolve its main bilateral problems and major disputes with neighbours, particularly those concerning territorial issues, before it can join the Union; recommend[ing] strongly that these issues be addressed as early as possible in the accession process, in a constructive and neighbourly spirit and preferably before the opening of accession negotiations, so that the latter are not negatively affected; in this regard, considers it essential to take account of the EU's overall interests, its values, and the obligation to fully comply with the acquis and respect the principles on which the EU itself is founded.[923]

In the same context, the Parliament called on the EU to support the efforts of

916) *Enlargement Strategy 2009* (n 726).
917) *Enlargement Strategy 2009* (n 726).
918) *See* (n 726).
919) Commission, 'Enlargement Strategy and Main Challenges 2008–2009' (Communication) COM (2008) 674 final (*Enlargement Strategy 2008*).
920) *Enlargement Strategy 2008* (n 919).
921) *Enlargement Strategy 2011* (n 726).
922) *Enlargement Strategy 2011* (n 726). *See* also the *Enlargement Strategy 2012* (n 726).
923) European Parliament Resolution on Enlargement: Policies, Criteria and the EU's Strategic Interests 2012/2025 (INI), 22 November 2012 (*EP Resolution on Enlargement 2012*).

states in resolving their disputes 'in line with the provisions of international law, the UN Charter and the relevant UN resolutions, as well as the Helsinki Final Act'.[924] It encouraged parties involved in 'disputes whose continuation is likely to impair implementation of the acquis or endanger the preservation of international peace and security'[925] to find peaceful resolutions and 'to refer the matter to the International Court of Justice or to commit themselves to a binding arbitration mechanism of their choice or else work constructively within an intensive mediation mission'[926] if necessary. The Parliament also called on the Commission and the Council to develop an arbitration mechanism for resolving bilateral and multilateral disputes between states in accordance with the EU Treaties.[927]

The efforts of the Commission and the Parliament to implement good neighbourliness in accordance with the obligations of states under international law overlaps with the more recent commitments of states within their regional initiatives. Thus, the Ministers for Foreign Affairs of the Countries of South-Eastern Europe have jointly declared in the 'Thessaloniki Declaration on Good-Neighbourly Relations, Stability, Security and Cooperation in the Balkans', that 'relations among the countries of the region should be based on the universally recognized principles of good-neighbourly relations set forth in the Charter of the United Nations, the Helsinki Final Act and the Charter of Paris for a New Europe'.[928] They further reaffirmed their determination to respect all ten principles of the Helsinki Final Act, necessarily including the sovereign equality of states and the peaceful settlement of disputes.[929] Additionally, the General Assembly encouraged the 'strengthening of the relations among the States of South-Eastern Europe on the basis of respect for international law and agreements, in accordance with the principles of good-neighbourliness and mutual respect'.[930]

In spite of all their commitments to respect good neighbourliness as established

924) *EP Resolution on Enlargement 2012* (n 923).925) *EP Resolution on Enlargement 2012* (n 923).

926) *EP Resolution on Enlargement 2012* (n 923).

927) *EP Resolution on Enlargement 2012* (n 923).

928) Annex I(I)(A) of the 'Thessaloniki Declaration on Good-Neighbourly Relations, Stability, Security and Cooperation in the Balkans' (1 July 1997) UN Doc A/52/217, adopted at the meeting of the Ministers for Foreign Affairs of the Countries of South-Eastern Europe, held at Thessaloniki, Greece, on 9–10 June, 1997 (*Thessaloniki Declaration*). Similar wording can be found in the Annex I of the 'Sofia Declaration on Good-Neighbourly Relations, Stability, Security and Cooperation in the Balkans' (16 July 1996) UN Doc A/51/211, adopted at the meeting of the Ministers for Foreign Affairs of the Countries of South-Eastern Europe, held at Sofia, on 6–7 July 1996; and also in the Resolutions of the UN General Assembly on the 'Development of Good-Neighbourly Relations Among Balkan States': UNGA Res 48/84 (13 January 1994) UN Doc A/Res/48/84;UNGA Res 50/80 (11 January 1996) UN Doc A/Res/50/80; UNGA Res 50/48 (8 January 1998) UN Doc A/Res/50/48.

929) *Thessaloniki Declaration* (n 928). *See* also Chapter 2 for detailed explanation of the Helsinki Final Act and Charter of Paris for New Europe.

930) Para. 6 UNGA Res A/55/27 (20 November 2000) UN Doc/A/55/27; para. 9 of the: UNGA Res

in international law, Member States have effectively used the good neighbourliness condition in the enlargement with Western Balkan countries to obviate their obligations under international law, to which the bilateral dispute involving Croatia and Slovenia and the unresolved dispute between Macedonia and Greece testify.[931]

i. Application of good neighbourliness condition to Croatia

Croatia and Slovenia were involved in a bilateral dispute which mainly concerns a boundary demarcation of a small gulf in the northeast extreme of the Adriatic Sea. The bilateral dispute between the two countries, which caused a delay to Croatia's accession negotiations, was not made an issue at the time of the Slovenian accession. As analysed previously, the EU did not apply the good neighbourliness condition strictly to the settlement of bilateral disputes in the case of the CEEc. It did become an important issue for Slovenia, however, once that country joined the Union and left Croatia behind.[932]

The Negotiating Framework for Croatia provided explicitly that the advancement of the negotiations with that country will be guided by its progress in preparing for accession, measured in particular against 'Croatia's commitment to good neighbourly relations'[933] and its 'undertaking to resolve any border disputes in conformity with the principle of peaceful settlement of disputes in accordance with the United Nations Charter, including if necessary compulsory jurisdiction of the International Court of Justice'.[934] This legal framework for settlement of bilateral disputes among states in light of the good neighbourliness condition has been promoted ever since the establishment of the requirement in the Union's enlargement policy, notwithstanding the lack of its practical application. The problem with the application of the good neighbourliness condition to the settlement of the bilateral dispute between Slovenia and Croatia was in the departure of the Member State from this legal framework.

Although both Slovenia and Croatia wanted to see a settlement of the bilateral dispute, they disagreed on the method which was to be used to reach a solution. Assuming to have the law on its side, Croatia was in favour of using international

A/56/18 (29 November 2001) UN Doc/A/56/18; UNGA Res A/57/52 (22 November 2002) UN Doc/A/57/52; UNGA Res A/59/59 (3 December 2004) UN Doc/A/59/59; para 8 of the UNGA Res A/61/53 (6 December 2006) UN Doc A/61/53.

931) *See* Elena Basheska, 'The Good Neighbourliness Condition in EU Enlargement' (2014) 1(1) Contemporary Southeastern Europe (2014) 92–111.

932) For an overview of the border dispute, *see Uilenreef* (n 767) 15–22.

933) Principle 13 of the Negotiating Framework for Croatia, Luxembourg, 3 October 2005, <http://ec.europa.eu/ enlargement/pdf/croatia/st20004_05_hr_framedoc_en.pdf> last accessed 14 October 2014.

934) Principle 13 of the *Negotiating Framework for Croatia* (n 933).

arbitration, such as the ICJ for the settlement of the dispute, while Slovenia preferred a '[political] mediation instead of judicial arbitration'.[935] Stepping out of the legal framework, Slovenia used the good neighbourliness condition to achieve political gains by securing non-juridical arbitration, which promised the country a more favourable outcome. To secure its position, Slovenia effectively blocked the opening or closing of fourteen negotiation chapters with Croatia, not all of them connected to compliance with the accession criteria.[936] It had more explicit reservations, however, with reference to the good neighbourliness requirement in relation to Chapter 31 on Foreign, Security and Defence Policy.[937] Slovenia's reservation for the settlement of the issue was directly connected to the good neighbourliness accession condition.[938]

After many discussions and failed initiatives, the (then) European Commissioner for Enlargement, Olli Rehn, introduced a new proposal through a short article. Referring to the Negotiating Framework for Croatia, the Commissioner underlined that there is also a European framework for dealing with the delimitation of the border between Croatia and Slovenia. In particular, in accordance with the UN Charter, the parties could agree between each other to choose 'either non-binding or binding third party settlement or a combination of them to settle a dispute'.[939] Ultimately, the two parties ended their disagreement by signing an arbitration agreement, and on 1 July 2013,[940] Croatia became the 28th Member State of the EU.[941] The award of the Arbitral Tribunal will be binding on the two parties and should constitute a definitive settlement of the dispute.[942]

The Commission applauded the launch of the arbitration process between Slovenia and Croatia. In the words of the European Commissioner for Enlargement, Štefan Füle, the:

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935) *Uilenreef* (n 767) 17.

936) *Hillion* (n 732) 201.

937) For an overview of the border dispute, *see Uilenreef* (n 767) 22.

938) In the Reports of the Commission on Croatian progress, the above chapter made specific reference to the good neighbourliness requirement included in the political criteria and covering *inter alia* the border issue between Slovenia and Croatia. *See* for instance: Commission 'Croatia 2007 Progress Report' (Staff Working Paper) SEC (07) 1431, 6 November 2007; Commission 'Croatia 2008 Progress Report' (Staff Working Paper) SEC (08) 2694, 5 November 2008; Commission 'Croatia 2009 Progress Report' (Staff Working Paper) SEC (09) 1333, 14 October 2009; Commission 'Croatia 2010 Progress Report' (Staff Working Paper) SEC (10) 1326, 9 November 2010.

939) *Uilenreef* (n 767) 17.

940) Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, signed 4 November 2009, <http://www.vlada.si/fileadmin/dokumenti/si/projekti/2010/ Arbitrazni_sporazum/10.a_Arbitra%C5%BEni_sporazum_-_podpisan_EN.pdf> (*Arbitration Agreement*) last accessed 14 October 2014.

941) Treaty of Accession of Croatia [2012] OJ L 112/10.

942) Article 7(2) of the *Arbitration Agreement* (n 940).

> common agreement [was] a very welcome signal for the positive development of the good neighbourly relations between the two countries as well as for the Western Balkans regions showing that even difficult issues can be best solved by means of dialogue and cooperation.[943]

The Agreement itself also refers to the good neighbourliness principle as law applicable to the settlement of the issue between the two parties.[944] Uilenreef sees the inclusion of the good neighbourliness principle as a kind of escape clause to the application of international law, noting that the Arbitration Tribunal 'would not exclusively apply international law […] but also the principles of equity and good neighbourly relations in order to achieve a fair and just outcome'.[945] However, as analysed in Chapter 1 of this work, the of good neighbourliness principle has its legal basis in international law and therefore, its inclusion in the Arbitration Agreement cannot legitimately serve the political considerations of states contrary to international law. As rightly argued by Avbelj and Letnar Černič:

> [w]ith the benefit of historical hindsight it can be claimed that delimitation is essentially and crucially a sensitive political question. However, political questions cannot be solved within a vacuum allowing arbitrary and one-sided measures based on the maxim of the rule of the most powerful. Political questions have to be resolved within the realm of law. The role of the law -and by speaking about sovereign states we are primarily and foremost in the field of international law- is to enable, to facilitate, and to safeguard a peaceful political discourse the result of which, if it remains

943) European Commission, Launch of the arbitration process between Slovenia and Croatia, IP/12/25, Press Release, 17 January 2012. Similarly, Slovenia's misuse of its membership status and powers in another sector, concerning a banking dispute with Croatia, has been viewed as a significant achievement for the good neighbourly relations between the two countries. Slovenia postponed the ratification of Croatia's Accession Treaty until it had sight of a suitable framework for the settlement of the issue. Croatia's compliance with the Slovenian demands have been misguidedly described at the EU level as 'a very good example how *joint efforts in the area of good neighbourly relations* bring benefits for both sides and provide basis to solve open issues' –*see* 'Slovenia–Croatia: Commissioner welcomed deal on Ljubljanska Banka' MEMO/13/187 of 7 March 2013, <http://europa.eu/rapid/press-release_MEMO-13-187_en.htm> last accessed 14 October 2014 (emphasis added).

944) Article 4 *Arbitration Agreement* (n 940) stipulates that the Arbitral Tribunal shall apply: (a) the rules and principles of international law for the determinations (of the course of the maritime and land boundary between the Republic of Slovenia and the Republic of Croatia); (b) international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances for the determinations (of Slovenia's junction to the High Sea and the regime for the use of the relevant maritime areas)'.

945) *Uilenreef* (n 767) 19.

within the valid framework of the legal discourse, is a legally valid and acknowledged outcome.[946]

It remains to be seen whether the Arbitral Tribunal will apply the good neighbourliness principle in the realm of law, i.e. in accordance with its legal framework as established in international law, or as a tool to serve state political considerations.

ii. Application of good neighbourliness condition to Macedonia

The second example in EU enlargement policy of the good neighbourliness condition being applied outside its legal framework is the case of Macedonia. Macedonia successfully escaped the armed conflicts that followed the break-up of Yugoslavia and the EU viewed the country as a strong contributor to achieving stability through the concept of regional cooperation and maintaining good relations with its neighbours. In the words of the Commission, the country was 'continuously [showing] its readiness to maintain good neighbourly and cooperative relations with all countries in the region'.[947] The Commission further recognised that the country played a key role in establishing stability in the region, especially during the Kosovo crises.[948] Its generally cooperative attitude helped Macedonia move quickly towards EU membership, at first. The country submitted its membership application on 22 March 2004 and had already been granted candidate status on 16 December 2005.[949]

However, despite the overall positive picture, an unsolved dispute between Macedonia and Greece started to deteriorate the candidate country's reputation as a good neighbour. The main obstacle is known as the 'name dispute', which has involved Macedonia and Greece in lengthy negotiations.[950] Since the early 1990s, the name of the newly independent state became one of the dominant issues in the politics of the neighbouring countries. The dispute over the name occurred at a variety of levels and in a variety of contexts. The problems that the newly independent country faced with its admission to the UN and with its recognition by EU Member States was only an introduction to the saga which continued with its

946) Matej Avbelj and Jernej Letnar Černič, 'The Conundrum of the Piran Bay: Slovenia v. Croatia – The Case of Maritime Delimitation' (2007) 5 J. Int'l L. and Policy 1–19, 2.

947) European Commission, 'Regional Approach to the countries of South-Eastern Europe: Compliance with the conditions in the Council Conclusions of 29 April 1997' (Staff Working Papers) SEC (98) 586 and SEC (98) 1727.

948) European Commission, 'Former Yugoslav Republic of Macedonia Stabilisation and Association Report' (Staff Working Paper) SEC (02) 342.

949) Brussels European Council (15, 16 December 2005), Presidency Conclusions, para. X(24).

950) For a brief summary of the arguments of the two states and a chronological record of the developments regarding the dispute *see* CoE: Parliamentary Assembly – Working papers – 2008 Or-

prospective accession to NATO and the EU.[951] The two countries involved have different views, not only as to the problem's solution but also as to its substance, which at the time of writing have still not been solved.

Greece strongly opposed its neighbour's constitutional name, claiming that no other region in the Balkans apart from its own could be associated or identified with the ancient kingdom of Macedonia.[952] More precisely, Greece views the use of the constitutional name of Macedonia an 'usurpation of a name belonging to Greek history and heritage'.[953] Greece presents this historical clarification as the essence of the problem, with the issue of the name thus being only the 'tip of the iceberg'.[954] In its opinion, Macedonia is trying to rewrite history, which extends to provocative gestures and numerous other acts following the Republic's independence. For Greece, the process of obfuscating historical facts in the neighbouring country through school books that treat the region of (ancient) Macedonia as a single geographical entity, a '[p]art of [which] is said to have been portioned between several states in the region – including Greece – which implies full-scale foreign occupation',[955] could spark a spirit of revenge among the general public and provoke territorial claims in future.[956] In addition, according to Greece, the name Macedonia used by its northern neighbour 'creates a risk of confusion with the Greek region of Macedonia and may bring about prejudice to exports of products from [that] region'.[957]

To begin with, Macedonia dismissed fears that recognising the country under its constitutional name could legitimise territorial claims as groundless. It justifies this reasoning by pointing to various amendments to its Constitution, which explicitly rule out the possibility of territorial claims and also with its goal to integrate within the European and Euro-Atlantic structures in a spirit of peace and cooperation.[958]

Contrary to its southern neighbour, Macedonia believes that the opposition to the use of the constitutional name is artificial and motivated by the Greek desire to deny the existence of the Macedonian minority in Greece.[959] In other words,

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dinary Session (Second part) 14–18 April – Volume III (2008) 37–41.

951) *See* III.1.4 above.952) Loring M Danforth, *The Macedonian Conflict* (PUP, Princeton, NJ 1995) 11−27. *See* also Victor Roudometof, *Collective memory, national identity, and ethnic conflict: Greece, Bulgaria, and the Macedonian question* (Praeger Publishers, Westport, CT 2002) 265. For more details *see* III.1.4 above.

953) CoE, Political Affairs Committee's Information Report Doc. 11524, 8 February 2008. More extensive analysis on the Greek approach of the dispute may be found in *Kofos* (n 559) 226−263.

954) *Political Affairs Committee's Information Report* (n 953). *See* also Tom Gallagher, *The Balkans in the New Millennium*: *In the Shadow of War and Peace* (Routledge, NY 2005) 5.

955) *Political Affairs Committee's Information Report* (n 953). An extensive explanation on the history of the states may be found in Keith Brown, *The Past in Question: Modern Macedonia and the Uncertainties of Nation* (PUP, Princeton, NJ 2003).

956) *Political Affairs Committee's Information Report* (n 953).

957) *Political Affairs Committee's Information Report* (n 953).

958) *Political Affairs Committee's Information Report* (n 953).

959) *Political Affairs Committee's Information Report* (n 953).

Macedonia views the opposition to its constitutional name as 'a skilful cover-up of continued Greek oppression of its ethnic minorities, including ethnic Macedonians who continue to live within Greek borders'.[960] This is related to the fact that Greece does not recognise ethnic minorities within its borders and a proper census has not been permitted to prove their existence.[961] In 2008, when asked by the Macedonian Prime Minister to discuss the rights of the Macedonian minorities in Greece, the former Greek Prime Minister, Kostas Karamanlis gave the following answer: '[t]here is no "Macedonian" minority in Greece. There never has been. In this respect any allegations regarding the existence of such a minority are totally unfounded, politically motivated and disgraceful of the historic realities of the Region'.[962] This denial of the existence of the Macedonian ethnic minority is considered to have the further consequence of denying the return of the properties belonging to Macedonian refugees who were evacuated from Greece as children during the Greek Civil War (1946-1949).[963] Thus, contrary to Greece, its northern neighbour argues that the dispute over the name issue has nothing to do with Macedonia itself, but that it is

960) Argie N Bellio and Metodija A Koloski, 'Name Dispute Covers up Real Macedonian Problem', available at: <http://www.journalgazette.net/apps/pbcs.dll/article?AID=/20071210/EDIT05/712100368> last accessed 14 October 2014.

961) ibid. Contrary to the findings of the Helsinki Committee, Greece claims to be an ethnically pure state and denies the existence of ethnic Macedonians within its borders. *See* in particular the Greek Helsinki Monitor and Minority Rights Group 'Report about Compliance with the Principles of the Framework Convention for the Protection of National Minorities (along guidelines for state reports according to article 25.1 of the Convention)', 18 September 1999, available at: <http://miris.eurac.edu/mugs2/do/blob.html?type=html serial=10445267022
23> last accessed 14 October 2014. *See* also the most recent Country Report of the US State Department Human Rights Practices: Greece 2012 Human Rights Report <http://www.state.gov/documents/organization/204503. pdf> last accessed 14 October 2014. For extensive analysis on the position of ethnic and religious minorities in Greece *see* Nicholas Sitaropoulos, 'Freedom of Movement and the Right to a Nationality v. Ethnic Minorities: The Case of ex Article 19 of the Greek Nationality Code' (2004) 6 Eur. J. Migration and L. 205–223.

962) The whole version of the letter (in English) may be found in 'Караманлис: Во Грција никогаш не постоело македонско малцинство', *Утрински Весник* (19 July 2008), available at: <http://utrinski.mk/?ItemID= 2D3B93C0E1B44C45B144AB636C8121FF> last accessed 14 October 2014.

963) In particular, Article 19 of the Greek Nationality Code (Legislative Decree 3370/1955), which was in force from 1955 until 1998, provided for deprivation of citizenships of citizens of non-Greek descent as opposed to citizens of Greek descent who left Greece 'with no intent to return'. Such policy, as noted by *Sitaropoulos* (n 961) 205, resulted with deprivation of 60,004 Greeks 'of different descent' of their citizenships, affecting significantly 'Slavomacedonians'. That provision as analysed by the author, 'was not produced in 1955 in a socio-legal vacuum. In the Greek politico-legal history of the 20th century there was a long tradition of similar legislative (denationalisation) measures aimed, in effect, at ethnic and ideological cleansing' affecting largely 'migrants Slavomacedonians' (p. 211). An extensive explanation of the denial of the Greek state to recognise the civil rights of the Macedonian political refugees and of the Macedonian ethnic minority in Greece, including a case against Greece before the European Court of Human Rights can be found on the official webpage of the Macedonian Human Rights Movement International <http://www.mhrmi.org/news/2003/october15d_e.asp> last accessed 14 October 2014.

largely connected to its Macedonian ethnic minority and their civil rights.

Following the admission of Macedonia to the UN, that organisation undertook bringing the two parties to an agreement through special mediators.[964] However, the exhaustive negotiations did not bring them even close to a mutually acceptable solution. On the contrary, the pressure placed on both Greece and Macedonia resulted in aggravation of the relations between the neighbouring countries which only started to improve after the signing of the Interim Accord.[965]

The Interim Accord, which is a legally binding document, regulated the conduct of Greece and Macedonia and became the main framework for development of their relations.[966] The two countries 'agree[d] to continue negotiations under the auspices of the Secretary-General of the United Nations pursuant to Security Council resolution 845 (1993) with a view to reaching agreement on the difference described in that resolution and in Security Council resolution 817 (1993)'.[967] The legal framework for the settlement of the issue was thus established along with the related UN Resolutions and agreed between the two countries in the Interim Accord. The Interim Accord also secured the future Euro-Atlantic integration of the newly independent state. Greece committed not to block the accession of Macedonia under its provisional name in any regional or international organisation. In particular:

> [u]pon entry into force of [the] Interim Accord, the Party of the First Part [Greece] agrees not to object to the application by or the membership of the Party of the Second Part [Macedonia] in international, multilateral and regional organisations and institutions of which the Party of the First Part [Greece] is a member; however, the Party of the First Part reserves the right to object to any membership referred to above if and to extent of the Party of the Second Part is to be referred to in such organisation or institution

964) *See* UNSC Res 817 (7 April 1993) UN Doc S/RES/817 on the admission of Macedonia to the UN, which *inter alia* welcomed 'the readiness of the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia, at the request of the Secretary-General, to use their good offices to settle the above-mentioned difference, and to promote confidence-building measures among the parties'. *See* also UNSC Res 845 (18 June 1993) UN Doc S/RES/845, which urged the parties 'to continue their efforts under the auspices of the Secretary-General to arrive at a speedy settlement of the remaining issues between them'.

965) Thus, on 16 February 1994, the Greek government placed a total embargo on Macedonia, with the sole exception of food and pharmaceuticals. On 22 April 1994, the Commission brought an action against Greece in front of the European Court of Justice providing that the Member State misused its powers by failing to justify the unilateral measures prohibiting trade – Case C-120/94 *Commission of the European Communities v Hellenic Republic* [1996] ECR I-1513. With the conclusion of the *Interim Accord* (n 582) Greece lifted the trade restrictions and the Commission decided to withdraw its application, having no longer an interest in pursuing the proceedings.

966) *Interim Accord* (n 582).

967) Article 5(1) of the *Interim Accord* (n 582).

> differently than in paragraph 2 of the United Nation Security Council Resolution 817(1993) (Former Yugoslav Republic of Macedonia).[968]

Article 11(2) of the Interim Agreement went even further, stipulating an obligation on Greece to actively support the on-going economic development of Macedonia 'through international cooperation, as far as possible by a close relationship of [that country] with the European Economic Area and the European Union'.[969] Clearly, the Interim Accord provided an opportunity for the re-establishment and deepening of the cooperation between the neighbouring countries. It further reaffirmed the willingness of the parties to respect the good neighbourliness principle as being:

> [g]uided by the spirit and principles of democracy and fundamental freedoms and respect for human rights and dignity, in accordance with the Charter of the United Nations, as well as the Helsinki Final Act, the Charter of Paris for a new Europe and pertinent acts of the Organization for Security and Cooperation in Europe.[970]

As a concrete contribution to the good neighbourly relations among the Balkan countries, Macedonia initiated the adoption of the UN resolution on the 'Development of good neighbourly relations among Balkan states'.[971] Furthermore, the normalisation of the relations between the two neighbours resulted in a number of agreements providing for cooperation in the fields of trade, investment promotion, combat against organised crime and drug smuggling etc. In fact, since the signing of the Interim Accord, the economic relations and cooperation between the two countries resumed to such an extent that Greece is currently one of the most important foreign economic partners and investors in Macedonia.[972]

968) Article 11(1) of the *Interim Accord* (n 582).
969) Article 11(2) of the *Interim Accord* (n 582).
970) Preamble to the text of the *Interim Accord* (n 582).
971) UNGA Res 50/80 (12 December 1995) UN Doc A/RES/50/80. The country expressed in this context (25 August 1997) UN Doc A/52/373 its willingness to cooperate and develop: 'good-neighbourly relations with all neighbouring countries based on mutual respect and equal rights of all nations; respect for the inviolability of the existing international borders and territorial integrity of the States respect; political dialogue as a means for solving problems; respect for the human rights of persons belonging to national minorities in accordance with international law; integration in the European institutions and consistent observance of the established European standards in the relations among countries in the region, as defined in the Helsinki Final Act and the Paris Charter for a New Europe, with firm determination and activities with a view towards the Balkans becoming not only geographically, but essentially an integral part of Europe'.
972) *See* a country profile report at: <https://globalconnections.hsbc.com/downloads/treasury_management_profile -mk.pdf> last accessed 14 October 2014.

This significant, although mostly economic, cooperation between Greece and Macedonia served to distract from the unsuccessful negotiations between the two countries. While the negotiations under the UN auspices continued, neither country seemed particularly interested in resolving the problem. Any more vigorous attempt to resolve the issue could have undermined their strong economic cooperation, since these two neighbours were able to agree on almost anything but their history or the minorities question.

The progress in the relations between Greece and Macedonia was positively assessed in the Commission's reports.[973] The name issue, though still pending resolution, was not of primary importance. While encouraging the two neighbours to settle this issue, the Commission did not dedicate much space to the problem in its reports. This is not the same as saying that the good neighbourliness condition as applied to the settlement of bilateral disputes in Union enlargement policy was ignored in the case of Macedonia. It is rather that the circumstances surrounding the settlement of the dispute kept the EU out of the picture.

Firstly, as explained earlier in the text, the compulsory legal framework for the settlement of the issue was established in accordance with the relevant Security Council Resolutions and agreed by the two parties to the Interim Accord and thus, fully conforming with the rules of international law. Secondly, the guarantees for unblocking Macedonia's progress towards NATO and EU membership and for the further support on that route by Greece under the Interim Accord form essential conditions for successful negotiations between the two countries, intended to lead eventually to the settlement of the issue. In such circumstances, any pressure by the Union would have been unnecessary and even contrary to the agreed terms for the settlement of the issue under the rules of international law. Therefore, it should be not surprising that the EU kept out of the problem as much as possible. This situation changed with the aggravation of the relations between the two neighbouring countries,[974] which culminated with the Greek veto of Macedonia's accession to

973) European Commission, Services Report of 3 October 1997; European Commission, 'Regional Approach to the countries of South-Eastern Europe: Compliance with the conditions in the Council Conclusions of 29 April 1997' (Staff Working Papers) SEC (98) 586; SEC (98) 1727; SEC (99) 714and SEC (00) 168/2.

974) The attempts made by both sides not to provoke each other could never have been successful for long. The disputed history at the centre of the name issue covered many other matters which, in a difficult regional context are far more complicated. The two states blamed each other for provocations and of issuing propaganda, strictly forbidden under Article 7(1) of the Interim Accord. The vagueness of the term 'propaganda' left a lot of space for both sides to interpret their actions differently. Subsequently, every action with any connection with the (far or most recent) history of the countries was capable of being interpreted as propaganda. One of these instances of 'provocative propaganda', also noted by the European Commission in European Commission, 'The Former Yugoslav Republic of Macedonia 2007 Progress Report' (Staff Working Paper) SEC (07) 1432 final, was the renaming of the airport of Skopje after Alexander the Great. This 'provo-

NATO in 2008.[975]

Although the Greek veto on the accession of Macedonia to NATO is not in itself connected to the country's prospective EU membership, its negative impact should not be underestimated.[976] That act, as confirmed by the ICJ, constituted a direct breach of Article 11(1) of the Interim Accord which prohibited Greece from vetoing the accession of Macedonia to international organisations or to institutions of which

cation' marked the worsening of the relations between the two neighbouring countries. The actions taken by the each country separately had the clear intention of highlighting the uncooperative and unfair attitude of its opponent.

975) In the light of the worsening relations as described, and an upcoming NATO Summit (2−4 April 2008) which announced membership invitations for three Western Balkan countries, including Macedonia, Greece announced its intention to block the accession of Macedonia to NATO if the name issue was not resolved before the Bucharest Summit, notwithstanding its commitment not to block the membership of the country to international organisations under its provisional name under the Interim Accord. The official position of Greece before the NATO Summit was that it would agree only with a descriptive name which would contain a 'geographical' determination that would be applied in the overall (internal and external) communications of its neighbouring country. This precondition strictly limited the chances for finding mutually acceptable solution. While Macedonia did not object loudly to the possibility of accepting such a name for external purposes, it strongly rejected the possibility of using the same for internal 'consumption'. The generally accepted view in Macedonia is that the acceptance of a new name for internal use would require the Macedonian people to deny their own national identity and cultural heritage. The UN Envoy, Matthew Nimetz, tasked with helping Athens and Skopje find a solution to their lengthy dispute, proposed several possible names before the NATO Summit including the following suggestions: 'Constitutional Republic of Macedonia', 'Democratic Republic of Macedonia', 'Independent Republic of Macedonia', 'New Republic of Macedonia' and 'Republic of Upper Macedonia'. In the light of these proposals, Greece was willing to negotiate only in respect of the last two suggestions which according to Greece contained geographic determination that would distinguish the neighbouring country from the Greek province. Macedonia considered the name 'Upper Macedonia' as a good basis for further negotiation but without withdrawing from its position that the 'new' name cannot be used for internal purposes. From such diametrically opposing standpoints, the neighbouring countries were unable to find a mutually acceptable solution before the NATO Summit and as a consequence, Greece fulfilled its promise and blocked Macedonia's NATO membership.

976) While NATO and EU membership conditions are not directly connected, they do overlap to a certain extent. This is particularly true of the requirement for peaceful settlement of bilateral disputes, which now forms an accession condition for both NATO and EU membership. Most EU candidate countries from CEE and the Western Balkan countries later on faced this requirement to become NATO members. This was implied in a number of relevant documents while the Membership Action Plan of 1999 explicitly noted that aspirants would, among other things, be expected to settle their international disputes by peaceful means – *see* 'Membership Action Plan', NATO Press Release NAC-S(99)66, 24 April 1999, para. I.2. Preceding relevant documents include the 'Rome Declaration on Peace and Cooperation', NATO Press Communiqué S-l (91) 86, November 8, 1991, para 14; the 'Partnership for Peace: Invitation and Framework Document' NATO Press Communiqué M-1(94) 2, January 10–11 January 1994, para. 2; and the 'Basic Document of the Euro-Atlantic Partnership Council', NATO Press Release M-NACC-EAPC-1(97)66, 30 May 1997, para 1. NATO followed the initiatives of the Pact on Stability in Europe and initiated by the EU for the same purpose of peaceful settlement of disputes, to ensure compliance by states. Thus, Hungary for instance, would have been left out of the enlargement round in 1999 if it had

it itself is a member.[977] The membership of Macedonia to NATO was made explicitly conditional upon the settlement of the name issue contrary to the earlier binding agreement between the two neighbouring states. Indeed, the Bucharest Summit Declaration reads:

> [w]e recognize the hard work and the commitment demonstrated by the former Yugoslav Republic of Macedonia to NATO values and Alliance operations. We commend them for their efforts to build a multi-ethnic society. Within the framework of the UN, many actors have worked hard to resolve the name issue, but the Alliance has noted with regret that these talks have not produced a successful outcome. Therefore we agreed that an invitation to the former Yugoslav Republic of Macedonia will be extended as soon as a mutually acceptable solution to the name issue has been reached. We encourage the negotiations to be resumed without delay and expect them to be concluded as soon as possible.[978]

Although carefully phrased, the response of the NATO partners reflects that their opposition to the accession of Macedonia to that organisation represented the action of an individual Member State rather than a collective decision.[979]

The NATO veto had almost an immediate impact in the EU enlargement context. In fact, the Accession Partnership with Macedonia which preceded the Bucharest Summit had already shifted away from the previous EU approach and listed the solution over the name issue in the short term priorities for the country with a view of ensuring good neighbourly relations.[980] The Council explicitly stated that Macedonia should '[e]nsure good neighbourly relations, in particular by intensifying efforts with a constructive approach to find a negotiated and mutually acceptable solution to the

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ality for Post-Socialist Institutional Change – From Cross-Country Evidence to the Case of Macedonia: Empirical Evidence on NATO Accession Incentives' (2010) Kieler Analysenzur Sicherheitspolitik No. 28, available at: <http://www.ispk.uni-kiel.de/fileadmin/user_upload/Kieler%20Analysen%20zur%20Sicherheits politik/KAzS28.pdf > last accessed 14 October 2014. *See*, more generally, Rick Fawn, *International Organizations and Internal Conditionality: Making Norms Matter* (Palgrave Macmillan, Basingstoke/NY 2013) and Anatol Lieven and Dmitri V Trenin (eds), *Ambivalent Neighbors: The EU, NATO and the Price of Membership* (Carnegie Endowment for International Peace, 2003 Washington)**.**

977) This violation by Greece was later confirmed in a judgement of the ICJ of 9 December 2011. *See Application of the Interim Accord of 13 September 1995 (The former Yugoslav Republic of Macedonia v. Greece)* [2011] ICJ Rep 2011 (*Macedonia v. Greece*).

978) Point 20 of the Bucharest Summit Declaration, available at: <http://www.nato.int/cps/en/natolive/official_ texts_8443.htm> last accessed 14 October 2014.

979) *See* paras 81 and 82 in *Macedonia v. Greece* (n 977).

980) Council Decision, 2008/212 on the principles, priorities and the conditions contained in the European Partnership with the Former Yugoslav Republic of Macedonia and repealing Decision 2006/57/EC [2008] OJ L 80/32 (*Council Decision 2008/212*).

name issue with Greece, in the framework […] and avoid actions which could negatively affect them'.[981] Only two months after the NATO Summit, the Brussels European Council underlined that the 'maintaining good neighbourly relations, including a negotiated and mutually acceptable solution on the name issue remains essential'[982] for the further progress of Macedonia towards the EU. Such a reaction was not only inconsistent with the previous EU approach but also ignored the legal significance of the Interim Accord, if not actively encouraging its further violation.

Namely, the breach of the Interim Accord evidently jeopardised the legal framework of good neighbourly relations between the two countries by shifting the conditions under which the dispute was to be solved. The abstention of Greece from objections to Macedonia's prospective EU membership, as envisaged in the Interim Accord, was the only guarantee for preserving equality of the two countries in the process of settling the dispute.

The ICJ judgement confirming Greece's violation did not change the situation on the ground.[983] Moreover, the Court rejected to order the infringing party to comply with its international obligations, although concluding that its judgement 'would affect existing rights and obligations of the Parties under the Interim Accord and would be capable of being applied effectively by them'.[984] Referring to its previous case law,[985] the ICJ considered that '[a]s a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed'.[986] However, the condemnation of Greece was insufficient reason for compliance of that state with the rules of international law.[987] Contrary to the ICJ's presumptions, Greece did not comply with its obligations under the Interim Accord. The judgment has also had little impact of note at an EU level. Despite five recommendations from the European Commission for the opening of accession negotiations with Macedonia, the Council's approval has been continuously postponed.[988]

The Commission omitted an important aspect of the good neighbourliness condition – the minorities' dimension of the concrete dispute between the two states. The attempts of the Macedonian Government to provoke a reaction from the Union in this respect were also unsuccessful. Macedonia's main requirement is summarised

981) *Council Decision 2008/212* (n 980)
982) Brussels European Council (19, 20 June 2008) Presidency Conclusions, para. 56.
983) *See Macedonia v. Greece* (n 977).
984) *Macedonia v. Greece* (n 977) para. 53.
985) *Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 2009, para. 150.
986) *Macedonia v. Greece* (n 977) para. 168.
987) *See* in this respect the Declaration of Judge Ad Hoc Vukas to the judgment, warning about the possible consequences of the ICJ's decision not to order the infringing party to comply with the judgement.
988) The Commission has been recommending the opening of the negotiations five times in row, i.e. since 2009 – *see* in particular the *Enlargement Strategy 2013* (n 726) point 13.

in the following paragraph of the letter sent to the President of the European Commission:

> [t]he Government of the Republic of Macedonia appeals, within your competences, to personally engage for Greece's strict obeying of the obligations stemming from international instruments regarding human rights, with special emphasis on free expression of ethnic identity and all rights stemming from that. Our expectation is Greece, as a member of the EU and NATO, to start dialogue which will lead to meeting the recommendations of the European Commission (against Racism and Intolerance).[989]

Taking into account the absence of a coherent policy on protection of minorities in EU law and hence, the lack of Union competences in the field, the answer from the President of the European Commission was straightforward:

> [t]he Commission is strongly attached to the respect of fundamental rights and freedoms. Nevertheless, it is important to clarify that the European Union has no general competence to deal with issues such as identities of minorities, their rights, acquisition of citizenship and restitution of properties, arising in its Member States. This is the primary responsibility of the Member States in the light of their constitutional traditions and international obligations.[990]

However, contrary to its international obligations, the Member State involved neither recognises the rights of minorities, nor is interested in discussing the position of the affected persons in the light of the good neighbourliness condition as applied to the issue. This is in contrast with the EU's insistence on solving minority issues as an essential component of the condition. Ironically, the President of the European Commission ended his letter by reminding that '[m]aintaining good neighbourly relations remains essential for the progress of [Macedonia] towards the European Union'.[991] This assertion loses any significance in light of what preceded it in the

989) The extract of the letter (in English) is available at: <http://www.maticanaiselenici.com/en/?page=read_ newsid=7361>, the whole version of the letter (in Macedonian): 'Писмо од премиерот Никола Груевски до Барозо', *Вечер* (21 July 2008) is available on: <http://www.vecer.com.mk/?ItemID=15AB45001598024C9F18 F619F699B937> last accessed 14 October 2014 (emphasis added).

990) The statement of the President of the European Commission is available at: <http://www.hri.org/news/greek/apeen/2008/08-07-26_3.apeen.html> last accessed 14 October 2014 (*Statement*).

991) *Statement* (n 990).

letter. Impeded by Member States which flout its rules, the EU has failed to implement the good neighbourliness condition as applied to bilateral disputes occasioned inter alia by minority issues to its accession process.

In his speech to the European Parliament annual debate on the progress of Macedonia towards EU accession of 2013, the special Rapporteur for that country and Member of the European Parliament – Richard Howitt, questioned the European Council rather rhetorically:

> Are you using the challenges of the country as a convenient excuse? Have you really considered what will happen if this country slides back towards conflict and fragmentation? Looking at the last year, does the European Council accept its own responsibilities resulting from the delay and rejection? Do you understand that when you are in a queue and find yourself continually pushed past, getting further and further from the front, at some point you walk away from the queue altogether? My own report was postponed in this European Parliament pending agreement to end the political crisis. I now fear the European Council may itself have to contemplate postponing its June decision. Perhaps a better outcome than yet another rejection? Indeed by the end of this year, I cannot predict whether this will be a country where EU accession negotiations have begun? Or one which may have lost its candidate status altogether? What I do know is that this is a country and a people who deserve a chance.[992]

Macedonia has neither started accession negotiations, nor has it lost its candidate status. It has 'only' lost one more opportunity for the opening of accession negotiations after the Commission's positive recommendation and the lack of Council approval.[993] The current deadlock does not contribute to the maintenance of good neighbourly relations, but certainly provokes nationalism in the fragile multi-ethnic society, with the potential of endangering peace and stability in the region.[994] In the most recent 2013–2014 Enlargement Strategy, the Commission highlighted 'that a decision to open accession negotiations would contribute to creating the conditions conducive to improving good neighbourly relations in general and, in

992) European Parliament debates, 22 May 2013, available at: <http://www.europarl.europa.eu/sides/getDoc.do? pubRef=-//EP//TEXT+CRE+20130522+ITEM-016+DOC+XML+V0//EN> last accessed 14 October 2014.

993) *See* the last positive progress report of the Commission, 'The Former Yugoslav Republic of Macedonia 2013 Progress Report' (Staff Working Paper) SWD(2013) 413 final, 16 October 2013 and the accompanying *Enlargement Strategy 2013* (n 726).

994) For detailed analysis of the current situation in the country *see* Erwan Fouéré, 'Macedonia – A Country in Crisis' (2013) CEPS Policy Brief, No. 299.

particular, to finding a mutually acceptable solution to the name issue, which [it] considers essential'.[995] It further reminded that:

> [f]ailure to act on [its] recommendation poses potentially serious challenges to the former Yugoslav Republic of Macedonia and to the EU. This calls into question the credibility of the enlargement process, which is based on clear conditionality and the principle of own merits. The lack of a credible EU perspective puts at risk the sustainability of the country's reform efforts.[996]

The Commission's recommendations are overshadowed by Greece's non-compliance with its international obligations contrary to the good neighbourliness principle. This also creates a risk for future enlargements.

A consequence of this is that State commitments not to block the progress of their neighbours on their path towards the EU become meaningless once they become Member States. For instance, learning from its own experience, on 21 October 2011, Croatia adopted a 'Declaration on the Promotion of European Values in Southeast Europe', which stipulates that:

> Croatia firmly believes that outstanding issues between states which are of a bilateral nature, such as border issues, must not obstruct the accession of candidate countries to the European Union from the beginning of the accession process until the entry into effect of the Accession Treaty.[997]

Similarly, on 19 April 2013, Serbia and Kosovo reached the 'First agreement of principles governing the normalization of relations', containing a similar provision with Article 11(1) of the Interim Accord, only producing the same duty for both parties involved: '[i]t is agreed that neither side will block or encourage others to block, the other side's progress in their respective EU paths'.[998] Judging by current practice, these commitments will play no role in enlargement practice, unless the EU decides to stick more strictly to its commitment to promote international law in its actions on the international scene. If applied outside its legal framework, the good neighbourliness condition can represent nothing more but a lost opportunity for securing peaceful

995) *Enlargement Strategy 2013* (n 726).

996) *Enlargement Strategy 2013* (n 726).

997) 'Narodne novine' broj 121/11, the whole version of the text in English is available on: <http://www.sabor.hr/ Default.aspx?art=47289 sec=765> last accessed 14 October 2014.

998) Para. 14 of the 'First agreement of principles governing the normalization of relations', <http://www.rts.rs/ upload/storyBoxFileData/2013/04/20/3224318/Originalni%20tekst%20Predloga%20sporazuma.pdf>
last accessed 14 October 2014.

settlement of disputes between states through the enlargement process.

4. Conclusions to Chapter IV

The Copenhagen criteria laid the basis of the conditionality principle which enables the Union to 'set the rules of the game'[999] in the enlargement process and to shape the behaviour of candidate countries to a significant extent. Good neighbourliness in the enlargement process has been applied within a similar setting. It has become an important condition in the EU enlargement process, applying to the settlement of bilateral disputes amongst states. Such a condition is in accordance with the good neighbourliness principle which presumes the peaceful settlement of disputes and with the obligation of the Union to promote international law in its 'action on the international scene'.[1000] The application of the good neighbourliness condition, however, requires parallel advancement of equality between states, which is hardly sustainable in circumstances of asymmetric powers between Member States and candidate countries. This complicates the application of the condition in the enlargement process.

In circumstances of asymmetry of powers, the good neighbourliness condition has evidently been applied outside its legal framework, not serving justice but the political considerations of Member States. The cases of Croatia and Macedonia are most evident examples of such practices by Member States. Thus, while '[t]he idea of conditionality [is indeed] beautiful in theory',[1001] it cannot be always the most appropriate tool in the enlargement process. Agreeing with Kochenov, 'law and politics follow different rationales and are most likely to come into conflict when simultaneously regulating the same issue. One naturally tends to undermine the achievements of the other'.[1002] The good neighbourliness condition can be successfully applied in the enlargement policy of the Union only if is applied in the realm of law.

999) Heather Grabbe, 'Europeanization Goes East: Power and Uncertainty in the EU Accession Process' in Kevin Featherstone and Claudio M Radaelli (eds), *The Politics of Europeanization* (OUP, Oxford 2002) 13.

1000) *See* the introductory part of Chapter 3 of this work.

1001) *Kochenov* (n 724) 56.

1002) ibid 324.

CHAPTER V

General conclusions: Applying good neighbourliness through solidarity … or rather conditionality?

Neighbourliness represents the oldest and most lasting relationship between states.[1003] Theory and practice have shown that states sharing borders are more likely to form alliances or to go to war against each other than other (non-contiguous) countries.[1004] Territorial contiguity is considered to be both 'the basis of a "regional" organization'[1005] and a 'facilitating condition for conflict'.[1006] As is evident from this study, contiguity can either be a productive factor in interstate relations, enabling increased cooperation at different levels, or a destructive one, giving cause to a series of disputes between states. Borders, as noted by Starr and Most, even when not causing wars, do 'at least create a structure of risks and opportunities in which conflictual behavior is apparently more likely to occur'.[1007] Taking into account the significant importance of good neighbourliness as a main principle in the international law governing interstate relations and constraining the independent actions of states, this study aimed to clarify the substance and the functioning of the good neighbourliness principle. The wide application of the principle not only to immediate neighbours but also to states from the same region and even to all states

1003) *See* Paul R Hensel, 'Territory: Geography, Contentious Issues, and World Politics' in John A Vasquez (ed.), *What Do We Know About War* (2nd edn Rowman Littlefield, Plymouth 2012) 3–26, 26.

1004) *E.g.* William Reed and Daina Chiba, 'Decomposing the Relationship Between Contiguity and Militarized Conflict' (2010) 54(1) AJPS 61–73, 61.

1005) Hans Kelsen, *Collective Security Under International Law* (United States Government Printing Office, Washington 1957; repr. by The Lawbook Exchange, Clark, New Jersey 2001) 259.

1006) *See* Paul F Diehl, 'Geography and War: A Review and Assessment of the Empirical Literature' (1991) 17(1) International Interactions: Empirical and Theoretical Research in International Relations, 11–27, indicating geography as a 'source of conflict' and as a 'facilitating condition for conflict'.

1007) Harvey Starr and Benjamin Most, 'A Return Journey: Richardson, Frontiers, and War in the 1945–1965 Era' (1978) 22(3) Journal of Conflict Resolution 441–462, 444 (emphasis in original).

in the world was a further reason for establishing the legal framework and clarifying the functioning of the principle in different legal contexts.

A number of questions have been answered through this study to provide a detailed assessment of the essence and application of the good neighbourliness principle. Relying extensively on international instruments, state practices and opinio juris, case law and the opinions of well-known specialists, a particular emphasis has been put on the legal substance of the principle. Most scholars accept good neighbourliness as a principle of international law, treating it either as a general principle of law or as a rule of customary law.[1008] Given the broad legal nature of the principle and its constant repetition in state practice, it is suggested in this study that the principle can be described as a general principle of law, but also as being of customary nature.

As has been demonstrated in Chapter 1, the good neighbourliness principle has a clear legal framework which is constructed out of the legal fundaments and corresponding rights and duties of states in international law. It is founded upon the strict observance of the principles of the UN Charter and of the Declaration on Friendly Relations, which form its legal basis in international law.[1009] The compliance of states with the legal basis of the principle in their foreign policies is crucial to the maintenance of friendly relations between and in the sphere of neighbours. One such basis is sovereign equality of states which is at the heart of the good neighbourliness principle.[1010]

States are equal in international law, enjoying the same rights and having equal capacity in their exercise. The sovereign equality of states implies their judicial equality, the rights inherent in their full sovereignty, a duty to respect the personality of other states, the inviolability of territorial integrity and the political independence of state to freely choose and develop their political, social, economic and cultural systems, and a duty to comply fully and in good faith with their international obligations and to live in peace with other states.[1011] Respect for the sovereign equality of states is vital to the maintenance of friendly interstate relations. A violation of that principle beyond the level of tolerance, i.e. where significant damage is caused, would also lead to an infringement of the good neighbourliness principle, as discussed throughout this study.

The legal framework of the good neighbourliness principle is further enhanced by the rights and duties of states in international law.[1012] These were defined to a certain extent by the UN Sub-Committee on good neighbourliness. First and

1008) *See* I.1.3 above.
1009) *See* I.2.1 above.
1010) *See* I.1.2 above.
1011) *Declaration on Friendly Relations* (n 35).
1012) *See* I.2.2 above.

foremost, the good neighbourliness principle obliges states in international law to refrain from activities which can clearly have harmful effects on the territory of neighbouring states. Actions of states taken directly or indirectly, to provoke or encourage a movement which may cause disturbances in a neighbouring state, are in breach of the first duty of states under the principle. A violation of the principle not only exists where the harm caused is material or physical, non-physical interferences in all the fields of application of the good neighbourliness principle where such harm could manifest itself should also be avoided. This duty of states produces many other obligations in the light of good neighbourliness principle. States should thus take all necessary measures to eliminate or minimise the negative effects caused by their actions. Such measures would need to be taken to prevent serious or irreversible damage, even where threats or potential threats are not certain. The duty to prevent requires states to act with due care or diligence according to the facts and circumstances in each case. Furthermore, states must inform, consult and negotiate with neighbouring countries with respect to the activities and events on their own territories, which could clearly affect the latter. Such a duty refers to the planned activities of states rather than incidents which can seriously affect neighbouring countries. This duty on states is underpinned by the logic of the good neighbourliness principle, which 'obligates states to try to reconcile their interests with the interests of neighboring states'.[1013] It is suggested elsewhere in this study, however, that the duty of states to inform, consult and negotiate with their neighbouring countries should not be interpreted as an obligation on states to obtain permission from neighbouring countries in shaping their policies or as a right for neighbouring countries to grant such permission. Furthermore, not all interferences can invoke the liability of states in the light of the good neighbourliness principle. Neighbouring countries owe each other a certain degree of tolerance. The duty of tolerance in the light of the principle functions as a de minimis rule or as a minimum threshold for the gravity of the harm caused before the liability of states can be invoked. In other words, the duty of tolerance imposes an obligation on states to tolerate insignificant damage resulting from interferences caused by other states' actions. States must also refrain from actions which could aggravate a conflict or a dispute between neighbouring countries and must take measures to attenuate such situations gradually. Both duties emanate from the more general duty of states to the peaceful settlement of disputes, the first imposing a negative obligation on states and the second requiring positive action from states, such as negotiation, enquiry, mediation, conciliation, judicial settlement, resort to regional agencies or arrangements, and other peaceful means. Finally, there is a more general obligation on states to take measures to improve and develop friendly relations, reflecting the breadth and depth of the good

1013) Jan Schneider, 'New Perspectives on International Environmental Law' (1973) 82(8) Yale L.J. 1659-1680, 1664.

neighbourliness principle. The need for multifaceted cooperation between neighbouring states for the strengthening of their good neighbourly relations has been highlighted by the UN at numerous occasions and most explicitly in the context of the Western Balkan states and South East European states. Such an interpretation should not be surprising given the fact that the list of duties is not exhaustive and can further develop within the ambit of the legal basis of the principle. The situation with the number of fields where the principle is applied is similar.

The good neighbourliness principle has developed primarily and most extensively in the field of international environmental law. Its profound development in the field of environmental law results from the principle's substance. Neighbouring countries are the first to perceive most directly the spill-over of any transboundary environmental damage. As Pop rightly observes, the catastrophic nuclear accident of Chernobyl did not obviously affect Argentina and Australia, but neighbouring European states.[1014] Nevertheless, although having a significant meaning for the development of international environmental law, the principle of good neighbourliness is not restricted to environmental issues between states. The large number of fields enumerated by the Sub-Committee on good neighbourliness aside, interstate cooperation in the light of the principle can extend to all fields where the relevant rights and duties of states manifest themselves.[1015]

Having discussed the legal framework and fields of application of the good neighbourliness principle in international law, this study proceeded to analyse the functioning of the principle in the EU legal system. The principle's legal framework in international law is also important at the EU level, since both the EU and its Member States are obliged to respect international law. Deviation in this respect can lead to inconsistent interpretation and application of the principle, undermining its significance and legal value in international law.

The functioning of the principle of good neighbourliness in EU law

The EU legal order exists autonomously from international law. As a supranational entity, the EU is characterised by direct effect, supremacy and pre-emption, all of which have underpinned its development into a distinctive political entity, different from other international organisations.[1016] In fact, the EU has been viewed as being closer to a federal state than to an international organisation.[1017] This has allowed for

1014) *Pop* (n 1) 83.
1015) *See* I.2.3 above.
1016) *See* II.2.1 above.
1017) Joseph HH Weiler, 'The Transformation of Europe' (1991) 8 The Yale L.J. 2403–2483, 2407. *See* also *Schütze* (n 225), classifying the EU as a 'federal' Union after discussing its foundational, institutional and functional dimensions.

the somewhat autonomous development of the good neighbourliness principle within the new supranational framework, despite the fact that the EU legal system exists in harmony with international law. The extent to which the principle of good neighbourliness can develop freely under the supranational framework depends largely on the relationship between the EU law and international law.

As demonstrated in Chapter 2 of this study, the EU must respect international law in the exercise of its powers.[1018] The rights and obligations of states emanating from the good neighbourliness principle are binding on the EU as far as they codify the customary rules of general international law. However, EU law is the main framework for regulating interstate relations within the Union. Member States can no longer bring proceedings against each other related to matters under EU competence outside the EU legal framework. In other words, where the rights and obligations of states stemming from the good neighbourliness principle are covered by EU law, proceedings between Member States shall be dealt within the EU framework exclusively. International agreements concluded by the EU form an integral part of EU law from the moment of their coming into force. International agreements concluded by the EU are thereby 'truly incorporated as the law of the land in the EU legal system',[1019] receiving the same treatment as other EU legal acts and also becoming directly effective where their nature and substance allow for this. Such incorporation is conditional upon the conformity of international agreements with EU primary law, as are the actions of Member States based on international agreements. In particular, Member States cannot carry on their international obligations if these are incompatible with EU primary law, but must take all appropriate measures to eliminate the incompatibilities created. Not even UN acts enjoy absolute primacy over the EU law. Member State obligations stemming from such acts cannot derogate from the fundamental rights and freedoms which now form part of the EU legal system or from EU primary law in general. The duties of states under the UN Charter enjoy primacy over the acts of EU secondary law, but not over primary law in general nor the general principles of which fundamental rights form a part in particular.

This relationship results from the autonomous character of the EU legal system and the constitutionalisation of the EU Treaties, which can no longer be viewed merely as international agreements. It implies that in the EU law and between the Member States, the good neighbourliness principle develops primarily in accordance with the rules of the new legal order, which establishes the conditions for the application of international law. The superior position of EU primary law has helped the strengthening of the protection of fundamental rights at UN level, which certainly

1018) *See* II.2.2 above.
1019) *Etienne* (n 312) 7.

contributes to the further development and implementation of the good neighbourliness principle in international law.[1020]

Since its commencement, the integration process 'has been directed towards changing the structure and the rules of international relations'.[1021] This change in the relationship between the Member States has made the EU an excellent example and an authentic model of good neighbourliness. Good neighbourly relations have been built on the common rather than individual interests of Member States and of the Union. While still a valid concept, the territorial sovereignty of states has started losing its significance to the maintenance of good neighbourly relations in the supranational framework, wherein such relations are pursued through the solidarity and loyal cooperation by which the EU and its Member States are bound.[1022] The internal market has weakened the traditional concept of borders by erasing all differences in treatment between 'domestic' and 'imported' people, goods, services and capital, which now move freely in the EU as within a state rather than as between states. The concept of EU citizenship has somewhat eroded the national sovereignty of states by granting EU citizens a number of specific rights, necessarily including the right to move and reside freely in any Member State. Member States are not in a position to decide independently of the rights of their own nationals or of the rights of the citizens of other Member States residing in their territory. Lastly, the Schengen agreement provided for abolition of border checks between Schengen countries and for the creation of a single external border for the Schengen area, to which common immigration procedures apply. Member States no longer exclusively define or control their borders but are jointly responsible for the control of the external borders of the Schengen territory.

Territorial issues between states have become largely irrelevant in the new framework of supranational cooperation between the Member States. Even though there are still a number of unresolved territorial and border issues between Member States which have lasted for decades and even for centuries, none of these are seen nowadays as having the potential of escalating into serious conflicts. The integration process, while not providing for the settlement of border issues, did draw Member States together in eliminating or minimising the negative effects of borders. If such disputes are however brought in connection with the EU law, threatening to undermine the achievements of the integration process, it would be for the EU dispute settlement mechanism to safeguard the compliance of the Member States involved. The possibility for settlement of disputes between the Member States at

1020) *See* II.1.2 above.

1021) Giovanni Grevi, 'Reflections After the No Votes: What Makes the EU an International Actor?', available at: <http://www.iss.europa.eu/fr/publications/detail-page/article/reflections-after-the-no-votes-what-makes-the-eu-an-international-actor/> last accessed 14 October 2014.

1022) *See* II.2 above.

the EU level depends on the nature of the issue.[1023] If such an issue falls within the scope of EU law, it is dealt with under Article 258 TFEU and Article 259 TFEU in accordance with the ECJ's exclusive jurisdiction. The procedure under both Treaty provisions is largely in the hands of the Commission, which avoids the direct confrontation between the Member States involved. Where bilateral disputes fall outside EU law, they should in principle be solved under the rules of international law. Article 273 TFEU, however, provides the option of 'borrowing' the ECJ for the settlement of disputes between the Member States which fall outside the scope of EU law and which are merely connected to the 'subject matter' of the Treaties. While never used in practice so far, Article 273 TFEU certainly opens up possibilities for the settlement of international disputes at the EU level.

The situation at the EU external level is different. The EU is committed to respect and promote international law in its foreign relations. By virtue of Articles 3(5) and 21 TEU, the Union is obliged to respect and promote the good neighbourliness principle in its foreign relations as established in international law. Moreover, the EU has widely used the notion of 'good neighbourliness' to describe the relations it aims to establish with its neighbours. The new Article 8(1) TEU clarified that such relations will be founded on the EU values which coincide with the fundamental values essential to international relations established with the United Nations Millennium Declaration. Article 8 TEU codifies to a large extent the foreign relations practice of the Union in promoting such values.

Starting with the declaration of independence of the Turkish Republic of Northern Cyprus (TRNC), the EC and its Member States showed their joint decisiveness to respect the rights and duties of states in the light of good neighbourliness principle as established in international law, emphasising the need to respect states' sovereignty, independence and territorial integrity.[1024] In the wake of the dissolution of the Soviet Union and Yugoslavia, the Member States went even further in coordinating their approach by setting conditions for the recognition of new states in accordance with the principle of good neighbourliness and with EU values. These included respect for the rule of law, democracy and human rights, protection of the rights of minorities, respect for the inviolability of all frontiers, acceptance of relevant commitments with regard to disarmament and nuclear non-proliferation, as well as to security, regional stability and to settle peacefully all questions concerning state succession and regional disputes. The Guidelines on the recognition of new states elevated the neighbouring factor into a condition for the recognition of new states by bringing into consideration the possible effects of the recognition on the neighbouring states. However, the implementation of the good neighbourliness condition through the Guidelines has proved less successful. The example of former the Yugoslavia has shown that the

1023) *See* II.3 above.
1024) *See* II.1.1 above.

process of recognition of new states was dominated by political considerations rather than being led by the established legal facts.

The EU remained faithful to its rhetoric in its attempt to contribute to regional stability through the promotion of good neighbourly relations.[1025] The Pact on Stability for the CEECs copied the framework employed in the process of recognition of new states, only updating the requirements embodied in the Guidelines in accordance with the new international instruments guaranteeing the protection of minorities. The large number of bilateral treaties under the Pact on Stability proved the existence of state practices regulating questions related to the inviolability of frontiers and the treatment of minorities in the light of good neighbourliness principle. They have further framed the political commitments of states into a legal framework. However, the EU has not made the progress of CEE candidate countries towards membership conditional upon the implementation of these bilateral agreements. The international mechanisms could hardly achieve the desired result. Most of the options for the implementation of the agreements under the auspices of the OSCE – including instruments and procedures for conflict prevention, the peaceful settlement of disputes and the human dimension – and for using domestic court proceedings, referring disputes arising from good neighbourliness treaties to the ICJ or using joint intergovernmental mechanisms for cooperation, have hardly ever been used.

The protection of kin minorities in interstate relations, which is one of the core questions regulated in the bilateral treaties on good neighbourliness, is explained in the Report of the Venice Commission and in the Bolzano Recommendations.[1026] In general, the protection of minority rights is an obligation on home states, while adoption of unilateral measures by kin states is legitimate if the principles of territorial sovereignty of states, pacta sunt servanda, friendly interstate relations and respect for human rights – particularly the prohibition of discrimination – are respected. With the exception of the fields where international custom exists, such in education and culture, kin states are not allowed to take unilateral measures which can have extraterritorial effect on foreign citizens (primarily their kin minorities) without the consent of the home state. The same approach has been adopted by the Independent International Fact-Finding Mission, supported and financed by the Union, in the context of the conflict in Georgia. The flip side to such an approach, however, is the possibility for interference in the internal affairs of the state deemed to be responsible by requiring it to obtain consent for its actions from another state. The obligation of states to inform, consult and negotiate with neighbouring countries about their domestic actions must not grow into a duty to request permission for such acts from other states. Such a requirement is contrary to the principle of good

1025) *See* II.2 above.
1026) *See* II.1 above.

neighbourliness between states based on the sovereign equality of states. The misunderstanding of the duty of states to inform, consult and negotiate in this respect can lead to the wrongful assessment of the application of the good neighbourliness principle, as was the case in the relations between Russia and Georgia. Moreover, no one duty in the light of the principle is less important than any other. The lack of protection for human rights and minority rights is an important element of the good neighbourliness principle leading to serious conflicts. The Fact-Finding Mission has paid less attention to this question by assessing only one aspect of the good neighbourliness principle in the context of the conflict and arriving at a somewhat presumptuous conclusion.

Having discussed the EU's role in strengthening the good neighbourliness principle in theory, and its less successful attempts at implementing it in its foreign relations, this work further analysed the functioning of good neighbourliness in the EU's enlargement policy. The European integration process has been historically regarded as a peace project which allowed for reconciliation among former enemies and for the peaceful development of interstate relations. In 2012 the EU received a Nobel Prize for peace, which is indeed 'something quite remarkable although not universally appreciated'.[1027] The award was meant to direct public attention towards the contribution of the Union for over six decades 'to the advancement of peace and reconciliation, democracy and human rights in Europe'.[1028] The EU's stabilising role has helped to transform most of Europe 'from a continent of war to a continent of peace'.[1029] The enlargement has been a successful tool for the spreading peace across the continent and a powerful incentive for transforming candidate countries. Such transformation has been enabled through the accession conditions, which developed to a great extent in the EU's enlargement practice.

Starting with the fifth enlargement, the EU linked its financial and other support to candidate countries as well as their progress towards membership to the fulfilment of the Copenhagen criteria, which were introduced in response to the increased interest of many post-communist countries in becoming members of the Union.[1030] The principle of conditionality which was first enforced through the Copenhagen criteria also applied to the newly introduced condition of good neighbourliness. The good neighbourliness condition has further crystallised through the fifth enlargement, being first and foremost introduced as a means of preventing the importation of border disputes and minority issues into the EU.[1031] As such, good neighbourliness

1027) Nigel Foster, *Foster on EU Law* (4th edn OUP, Oxford 2013) 4.

1028) 'The Nobel Peace Prize 2012 to the European Union (EU) – Press Release, available at: <http://www.nobel prize.org/nobel_prizes/peace/laureates/2012/press.html> last accessed 14 October 2014 (*Nobel Prize Press Release*).

1029) *Nobel Prize Press Release* (n 1028).

1030) *See* IV.1.1 above.

1031) *See* IV.2.2 above.

has become an important accession condition, applying inter alia to the settlement of bilateral disputes in the enlargement process.

The application of conditionality to bilateral disputes in the enlargement process is not incompatible with the principle of good neighbourliness as established in international law per se. As a promoter of international law in its relations with the wider world, the EU has a legal duty to require the settlement of disputes by peaceful means as one of the main postulates of the good neighbourliness principle. Nevertheless, such a condition must be applied consistently and within the legal framework of the good neighbourliness principle. Asymmetric relations between the EU and its Member States on the one hand and candidate countries on the other increase the likelihood that this legal framework will be violated and the condition will be transformed into a powerful lever for achieving political aims. Put differently, the good neighbourliness condition can easily become a powerful tool in the hands of the Member States to achieve favourable outcomes for their bilateral disputes with candidate countries. Enlargement practice has shown that the Member States affected by or involved in bilateral disputes with candidate countries do not hesitate to use the condition to fulfil their national interests rather than supporting the common EU interest in spreading peace and security through the promotion of the good neighbourliness principle in the enlargement process. The case of Cyprus[1032] in the fifth enlargement round and the cases of Croatia[1033] and Macedonia[1034] in the previous and ongoing enlargements of the EU into the Western Balkans reveal a strong politicisation of the good neighbourliness condition in the enlargement process.

The enlargement process has been used by the affected Member States not as a means to secure peaceful settlement of disputes in the light of good neighbourliness principle but as a platform for avoiding international obligations under that principle. Contrary to their obligations to support the Union's external and security policy actively and unreservedly and to comply with the EU's actions in that area, a number of Member States involved in bilateral disputes with candidate countries have used the enlargement process to achieve political advantage. Law is barely able to achieve any meaningful results in the application of the good neighbourliness condition in the enlargement process. This certainly amounts to misuse of the good neighbourliness principle and its corollary condition in the enlargement process, which can lead to further aggravation between the relations of the states involved in the bilateral disputes and to impair the reformation process as a primary goal of the pre-accession conditionality. Moreover, this constructive violation of the good neighbourliness principle, supported and maintained de facto through the

1032) *See* IV.2.4 above.
1033) *See* IV.3(i) above.
1034) *See* IV.3(ii) above.

enlargement process, can lead to destabilisation of the fragile societies in these candidate countries, too long excluded from the EU.[1035]

While the model of good neighbourliness based on solidarity and loyal cooperation has indeed created an authentic and advanced model of interstate relations which could never have been achieved under international law alone, the use of conditionality has proved to be an ineffective and inappropriate method for implementing the principle and achieving its intended outcomes for the furtherance of the peaceful coexistence, dialogue and cooperation between states. The EU obviously loses credibility by 'promoting' the misuse of the good neighbourliness principle in its foreign relations and enlargement policy. If the political considerations of Member States contribute more to the peace and stability than the strict observance of the law, the EU should consider redefinition of its priorities to be more consistent with the implementation of the good neighbourliness condition. Nevertheless, if securing stability remains the Union's key priority, and its inherent concomitant commitment to promote the rules of international law in general and the principle of good neighbourliness in particular in its relations with the wider world, then it seems that the EU should start treating it as such, by playing a more responsible and mature role in the region. The compliance of Member States with their obligations under the rules of international law in accordance with EU law is highly desirable for establishing good neighbourliness at the external EU level. If applied outside the law, good neighbourliness cannot legitimately serve the EU's interests in promoting international law in its relations with the wider world, nor 'peaceful relations based on cooperation'.[1036]

As put by Wallace, '[t]he European Union has a long record of rhetorical commitments to foreign policy initiatives, not followed through by national governments'.[1037] Implementation of good neighbourliness principle in accordance with international law does not exist in current EU foreign relations or enlargement context. Instead, good neighbourliness principle is used as a convenient tool for promoting Member States' domestic agendas contrary to rules of international law. The EU has been unable to deliver on its own promises and commitments in respect to good neighbourliness principle, acting rather 'as a clearing-house for national interests'.[1038] Put aside uncertainties for the concerned third countries 'in terms of predictability and transparency',[1039] the wrongful implementation of good

1035) *E.g. Fouéré* (n 994)

1036) Article 8(1) TEU.

1037) William Wallace, 'Looking after the Neighbourhood: Resposibilities for the EU-25' (2003) Notre Europe Policy Paper No. 4, 7.

1038) Michelle Pace, *The Politics of Regional Identity: Meddling with the Mediterranean* (Routledge, Abingdon/ NY 2006) 22.

1039) ibid.

neighbourliness principle in EU foreign relations and enlargement can impede the established framework of good neighbourliness principle in international law given the important role of the EU in (co-) shaping the international legal order.[1040] A genuine reconsideration of good neighbourliness principle at the EU external level is urgently needed for bringing law on track. Until then, the implementation of good neighbourliness principle in EU foreign relations and enlargement remains only an empty rhetorical commitment.

1040) *E.g.* Dimitry Kochenov and Fabian Amtenbrink, 'Introduction: the Active Paradigm of the Study of the EU's Place in the World' in *Kochenov and Amtenbrink* (n 198) 1-18.

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Samenvatting

Goed nabuurschap is, wat betreft harmonieuze interstatelijke verhoudingen, één van de belangrijkste beginselen van het internationaal recht. Het komt voort uit het idee van territoriale soevereiniteit en gelijkheid der staten in het internationaal recht, en is een sleutelbeginsel dat de vredige coëxistentie tussen staten ondersteunt. Soevereine staten zijn gelijk voor de wet, genieten dezelfde rechten en hebben dezelfde rechtsbevoegdheid. In interstatelijke betrekkingen is het uitoefenen van de aan volwaardige soevereiniteit inherente rechten is alleen mogelijk waar het beginsel van goed nabuurschap gerespecteerd wordt. Schending van het beginsel kan daarentegen leiden tot serieuze confrontaties of militaire conflicten, met name tussen aan elkaar grenzende staten.

Niettemin vereist het respecteren van het beginsel van goed nabuurschap een precieze definitie van het juridisch kader. Ondanks het significante belang van dit beginsel, is het niet in internationaal recht gecodificeerd. Bovendien wordt het in de academische literatuur onvoldoende behandeld, zoniet volledig genegeerd. Hoewel een aantal wetenschappers een bijdrage aan de discussie over het beginsel hebben geleverd, beoogt deze studie de vele verschillende aspecten, en de toepassing ervan binnen verscheidene concrete rechtsgebieden, samen te brengen. Anders dan vorige bijdragen begint deze studie bij het begin door een aantal fundamentele vragen te stellen. Wat is de rechtsgrondslag van het beginsel in het internationaal recht? Welke juridische rechten en plichten rusten er op staten, in het licht van het beginsel? In welke gebieden, en hoe, wordt het beginsel toegepast? Hoe functioneert het principe buiten het internationaal recht? Is de Europese Unie een authentiek model van goed nabuurschap? Zou het beginsel op legitieme wijze toegepast kunnen worden door middel van het beginsel van voorwaardelijkheid dat vaak wordt ingezet in de betrekkingen van de EU met de rest van de wereld, en zou dat werkelijk een verschil maken? Wat vertelt de toepassing van het beginsel op recente interstatelijke geschillen ons over het karakter van het beginsel, en de uitvoering ervan? En het belangrijkste: wat kan het recht bijdragen aan de verbetering van interstatelijke betrekkingen?

Het moge duidelijk zijn dat er nog een groot aantal andere belangrijke vragen betreffende dit beginsel naar voren kan komen. Deze studie pretendeert niet al deze vragen te beantwoorden, maar alleen maar een begin te maken met het dichten van het gat in de academische literatuur. Te dien einde zal deze studie een gedetailleerde beoordeling verschaffen van de essentie en van de toepassing van het beginsel van goed nabuurschap, daarbij de bovenstaande vragen beantwoordend, en zodoende een

bredere discussie op gang proberen te brengen. De voorliggende studie bestaat uit vijf hoofdstukken – vier concentreren zich op het functioneren van het beginsel in een verschillende juridische context, en het vijfde hoofdstuk trekt hieruit conclusies. Omdat het beginsel voortkomt uit het internationaal recht, zullen de vele aspecten ervan in eerste instantie worden uitgelegd in de context van het internationaal recht.

De voornaamste stelling die in het eerste hoofdstuk naar voren komt, en die in de rest van de studie gevolgd wordt, is dat het beginsel van goed nabuurschap een duidelijke juridische waarde heeft. Daarom poneert het eerste hoofdstuk goed nabuurschap als een juridisch beginsel, oftewel de juridische basis en de daaraan verbonden rechten en plichten van staten in het internationaal recht. De stelling dat het beginsel inhoudsloos is wordt pertinent verworpen in deze studie. Het belang, dat op zoveel verschillende niveaus aan dit beginsel wordt gehecht, is zeker niet zonder reden. Het verbinden van verschillende juridische normen met het beginsel van goed nabuurschap in verscheidene internationale instrumenten, in de statenpraktijk en *opinio juris*, jurisprudentie en opinies van bekende specialisten, bewijst het belang ervan in het internationaal recht, en onderstreept de rijkheid van de specifieke juridische inhoud.

Na de analyse van het juridisch kader en de toepassingsgebieden van het beginsel van goed nabuurschap in het internationaal recht, stelt deze studie de rol van het beginsel in de rechtsorde van de EU vast. Daartoe worden drie verschillende contexten onderzocht: interstatelijke betrekkingen binnen de EU, buitenlandse betrekkingen van de EU en uitbreiding van de EU. Anders dan in de eerste juridische context, waarbinnen interstatelijke verhoudingen voornamelijk vorm krijgen door het supranationale kader van de EU, sorteert het beginsel van goed nabuurschap in de overige twee contexten voornamelijk effect door het beginsel van voorwaardelijkheid. Noodzakelijkerwijs is het in alledrie de contexten de vraag hoe succesvol de EU is in het uitvoeren van beginsel en in het versterken van goede nabuurschapsbetrekkingen tussen staten.

Het tweede hoofdstuk van deze studie volgt de toepassing van het beginsel van goed nabuurschap in de nieuwe omstandigheden die zijn onstaan door het supranationaal kader. Goede nabuurschapsbetrekkingen zijn een essentiële rol gaan spelen in het EU recht, en onderbouwen de essentie van het integratieproject. De manier waarop het beginsel in het EU recht functioneert verschilt echter van wat men ziet in het traditionele internationaal recht. Het supranationale juridische kader heeft een nieuwe context voor de ontwikkeling van goede nabuurschapsbetrekkingen gecreëerd, door de structuur en de regels van interstatelijke betrekkingen te veranderen. Het heeft de essentie en functie van staatsgrenzen fundamenteel veranderd, en daarmee het algehele beeld van territoriale soevereiniteit, waar het beginsel van goed nabuurschap in het traditioneel internationaal recht in eerste

instantie op is gebaseerd, drastisch gewijzigd. De bescherming van de rechten van staten, inherent aan de volledige soevereiniteit in het licht van het beginsel van goed nabuurschap, kan ook in de nieuwe context van gedeelde soevereiniteit in twijfel worden getrokken.

Na een analyse van de interne aspecten van het beginsel vervolgt de studie met een verkenning van de betrokkenheid van de EU bij het bevorderen van goed nabuurschap op internationaal niveau. De EU is, als een belangrijke internationale actor, verantwoordelijk voor het bevorderen van vrede, democratie en mensenrechten in de hele wereld, maar met name in haar directe omgeving. Op Verdragsniveau dient de EU zich in te zetten ter bevordering van het internationaal recht, waar het beginsel van goed nabuurschap noodzakelijkerwijs onder valt, in haar betrekkingen met de rest van de wereld. Echter, de Verdragen verduidelijken niet hoe het beginsel uitgevoerd moet worden. De EU heeft, in de praktijk, de nadruk gelegd op grensgeschillen en minderheidskwesties in het licht van het beginsel van goed nabuurschap. Hoewel deze kwesties niet nieuw zijn voor het beginsel zoals vastgesteld in het internationaal recht, heeft het gebruik van het beginsel van voorwaardelijkheid in de buitenlandse betrekkingen van de EU een enigszins nieuwe dimensie aan de uitvoering van het beginsel verleend. Hoever was de EU bereid te gaan bij de uitvoering van het beginsel van goed nabuurschap door het beginsel van voorwaardelijkheid? Het derde hoofdstuk poogt deze vraag te beantwoorden door de verschillende constellaties waarin het beginsel van goed nabuurschap is toegepast, te analyseren.

Het beginsel van goed nabuurschap is ook in een effectief toetredingscriterium met betrekking tot het uitbreidingsproces vertaald. Door haar gebruik van het voorwaardelijkheidsbeginsel heeft de EU de voortgang van het toetreden van kandidaat-lidstaten gekoppeld aan het schikken van hun bilaterale geschillen, in het licht van het beginsel van goed nabuurschap. De reden voor het stricte gebruik van voorwaardelijkheid is duidelijk – voorkomen dat er eventueel onopgeloste geschillen in de EU worden geïmporteerd. Het introduceren van voorwaardelijkheid in het uitbreidingsbeleid van de EU vergroot de de verantwoordelijkheid van de EU om, tijdens het proces van het 'toe-eigenen' van het beginsel en in overeenstemming met haar betrokkenheid bij het respecteren en het bevorderen van het internationaal recht in haar betrekkingen met de rest van de wereld, een effectieve toepassing van het internationaal recht te garanderen. In het vierde hoofdstuk wordt de vraag behandeld, of de EU succesvol is geweest in het uitvoeren van de voorwaarde van goed nabuurschap, aangaande bilaterale geschillen in het uitbreidingsproces, in overeenstemming met het internationaal recht. De tekst illustreert de bevindingen door het analyseren van de consistentie en het respect voor het juridisch kader van het beginsel van goed nabuurschap zoals toegepast op bilaterale verschillen in het uitbreidingsproces.

Het vijfde en laatste hoofdstuk presenteert de algemene conclusies van dit onderzoek. De potentiële toepassing van het beginsel van goed nabuurschap buiten het juridisch kader zou kunnen leiden tot een inconsistente interpretatie en zelfs tot de onrechtmatige uitvoering van het beginsel zoals vastgesteld in het internationaal recht. Dit zou niet alleen neerkomen op misbruik van het beginsel van goed nabuurschap in het uitbreidingsproces, maar zou bovendien het beoogde doel van het beginsel, te weten het voorzien in vreedzame coëxistentie, dialoog en samenwerking tussen staten, in gevaar brengen.

Samenvattend verduidelijkt dit onderzoek het juridisch kader van het beginsel van goed nabuurschap in het internationaal recht door de rechtsgrondslag en de rechten en plichten van staten, die uit het beginsel zelf en uit gebieden, waar het van toepassing is, voortvloeien, uiteen te zetten. Verder onderzoekt het hoe het beginsel in het EU recht functioneert, waarbij het zich concentreert op drie verschillende juridische contexten – interstatelijke betrekkingen binnen de EU, buitenlandse betrekkingen van de EU en uitbreiding van de EU. Anders dan in de eerste context, waarbinnen goed nabuurschap zich manifesteert door de beginselen van loyale samenwerking en solidariteit tussen de EU en haar lidstaten, wordt goed nabuurschap in de andere twee contexten toegepast door middel van voorwaardelijkheid. Na het analyseren van sterke en zwakke punten van alledrie de contexten wordt in de conclusie van de studie besproken of het beginsel van goed nabuurschap beter op zichzelf fuctioneert of juist toegepast moet worden in het EU recht door middel van solidariteit of voorwaardelijkheid.

Propositions

1. Good neighbourliness is a legal principle, producing specific rights and duties for states in international law.

2. The implementation of the good neighbourliness principle in accordance with international law rests on equal treatment of states before the law.

3. The all-embracing nature of the good neighbourliness principle provides for its application in many different, if not all fields where the duties and rights of states manifest themselves.

4. The functioning of the good neighbourliness principle in EU law differs from what can be observed in traditional international law.

5. The integration process has changed the relationship between the Member States and has made the EU an excellent example and an authentic model of good neighbourliness.

6. The application of conditionality in EU foreign relations and enlargement is not incompatible with the principle of good neighbourliness as established in international law per se.

7. The EU has failed to apply the good neighbourliness principle consistently in its foreign relations.

8. The good neighbourliness principle has become an accession condition of overwhelming importance in EU enlargement process.

9. The EU has failed to interpret and to apply the good neighbourliness principle consistently and within its legal framework in the enlargement process.

10. Neighbourly love might be overestimated, but neighbours are there to stay – burning their house down puts your own safety at stake, yet no unnecessary romance needed.

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