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ENVIRONMENTAL PROTECTION THROUGH THE PRISM OF ENLARGEMENT: TIME FOR REFLECTION

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Abstract

In the wake of crises and "enlargement fatigue", EU politics deprioritized enlargement. Recently, however, the Commission motioned a reinvigorated enlargement prospect for the Western Balkans, identifying Serbia and Montenegro as the front runners. This paper advises that in going forward, the EU should also look back at its five decades of enlargement. The article focuses on environmental protection – a key EU public policy – and the way in which it features in the ever-evolving accession conditions and accession acts. It emerges that environmental protection has been marginalized throughout EU's enlargement history. Taking Serbia as a case study, it is shown that this is highly problematic, since environmental protection is linked to safeguarding the rule of law – an essential criterion for EU membership. The role of environmental protection in the EU's enlargement policies should thus be reprioritized.

1. Introduction

Over the past half-decade, the EU paused all enlargement initiatives. The many reasons were neatly summarized as requiring a break for the Member States to reflect on what the EU had achieved thus far, and to decide on how to proceed as a Union.[1] Recently, however, the Commission hinted at a new moment in the EU's integration policy and a possible end to the so-called enlargement fatigue.[2] In its Communication on A Credible Enlargement

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1. Commission, White Paper on the future of Europe: Reflections and scenarios for the EU27 by 2025, COM(2017)2025.

2. Szolucha, "The EU and 'Enlargement Fatigue': Why has the European Union not been able to counter 'Enlargement Fatigue'?", 6 *Journal of Contemporary European Research* (2010), 1.

Perspective for and Enhanced EU Engagement with the Western Balkans, admission of new members that meet membership criteria can be expected from 2025, with Serbia and Montenegro as the current front runners in the integration process.[3]

As the EU moves on in this direction, the present study recommends looking back at the fifty years of EU enlargement. This is an ambitious task, and the paper looks more closely at environmental protection – that is, "one of the Community's essential objectives",[4] as well as a central component of European market integration[5] – and the way in which it features in the ever-evolving accession conditions and accession acts.

Admittedly, this may seem an outdated project. After all, interest in the detailed technical issues of accession negotiations is faint, and these are often considered to be rather dull.[6] What is more, despite the Commission's recent reinvigorated approach to enlargement in the Western Balkans, there are widespread reservations about the exact timing and scope of such expansion.[7] In fact, recent events that saw the UK trigger Article 50 TEU and thereby its exit from the Union[8] are thought of as "accession in reverse",[9] moving the EU

3. Communication from the Commission, A credible enlargement perspective for and enhanced EU engagement with the Western Balkans, COM(2018)65 final at 6.

4. Case C-240/83, *Procureur de la République* v. *Association de Défense Des Brûleurs D'huiles Usagées* ("ADBHU"), EU:C:1985:59, para 13.

5. The EU has a long history of adopting laws to safeguard and uphold environmental standards – even when the Union lacked specific environmental decision-making power – in the name of furthering the internal market, and thus European integration; see Bogojević, "Mapping public procurement and environmental law intersections in discretionary space" in Bogojević, Groussot and Hettne (Eds.), *Discretion in EU Public Procurement Law* (Hart Publishing, 2019), pp. 161, 164. Today, the Treaties clearly mark the significance of environmental safeguarding in Art. 114(3) TFEU, which obliges the Commission to consider a high level of environmental and consumer protection when proposing to approximate laws on the basis of the functioning of the internal market, and insists on enforcing environmental standards, as outlined in Art. 21(2)(d) TEU; Arts. 11 and 191–192 TFEU, and Art. 37 of the EU Charter of Fundamental Rights, as conditionality for any commercial operation on the EU market. Art. 3(3) TEU aims at "and a high level of protection and improvement of the quality of the environment" with regard to the core objective of establishing the internal market.

6. Camps, *Britain and the European Community 1955–1963* (Princeton University Press, 1964), p. vi.

7. See Peel and Khan, "The EU's enlargement summit", *Financial Times* (17 May 2018). There is also still no official promise of membership for the Western Balkans, see EU-Western Balkans Summit, "Sofia declaration" (17 May 2018), available at <www.consilium.europa.eu/media/34776/sofia-declaration_en.pdf> (all websites last visited 7 Jun. 2010).

8. Prime Minister Theresa May's letter to Donald Tusk triggering Art. 50 TEU on the 29 Mar. 2017, available at <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf>.

9. Barker, "Brexit: EU and UK battle over 'an accession in reverse'", *Financial Times* (3 Dec. 2017).

away from enlargement. Looking back at accession conditions and accession acts, however, is an important exercise – especially in a period where the EU project is being reconsidered[10] – for the following two reasons.

To start with, accession acts detail the complicated and technical process of market *creation* in a European context. Heated negotiations on whether to agree on "importing two extra lorry loads of Bulgarian strawberry jam and an extra 12 kilos of Slovak ham per Member State per day"[11] may appear as a mere technicality found in the relevant accession documents, or political arm-wrestling. Yet upon closer scrutiny, these debates show that the internal market does not exist in a legal or political vacuum. Rather, it is constructed in a process where the relevant States need to agree on possible market structures, interventions and derogations in the form of transitional measures that the accession acts outline. From this viewpoint, accession acts tell important stories about the many ways in which individual States interconnect with the European market.[12] They also inform us about which national measures the acceding States, now full members of the Union, negotiated hard to maintain, at least as transitional measures. Brexit, together with other political and economic crises experienced by various Member States, suggest that the same measures may emerge, more than decades later, as part of a political discourse that sees the Union as an ill fit for the country in question.[13] From this point of view, accession acts help define the relationship between the EU and its Member States and, as such, are helpful to study.

Second, and following from the above, in examining accession conditions and accession acts we find a marginalized approach to environmental protection throughout the EU's enlargement history. This is not to say that no other EU public policy has been deprioritized in the enlargement procedures to date;[14] however, our study focuses on the environmental blind spot for a number of reasons.

Consistent de-prioritization of this kind has serious legal consequences. It sends a signal to the candidate countries, and thereby frames their understanding of environmental protection, that this is peripheral in the EU market context. This is not to overlook the dynamic and, at times, fraught

10. Editorial comments, "A way to win back support for the European project?", 54 CML Rev. (2017), 1.

11. Zielonka, *Europe as Empire: The Nature of the Enlarged European Union* (OUP, 2007), p. 51.

12. A similar theme is explored in Bogojević, *Emissions Trading Schemes*: *Markets, State and Law* (Hart Publishing, 2013), Ch. 3.

13. See section 3.2. *infra*.

14. See e.g. the EU's position on fisheries with regard to the Spanish accession, or the provisions on free movement of persons in the context of Bulgarian and Romanian accession, as referenced in sections 3.2 and 3.4. *infra*.

relationship between environmental protection and the European market, which is arguably largely due to the ambiguous concept that is the internal market,[15] but here we make a different point. As exemplified by the ongoing accession negotiation proceedings with Serbia,[16] marginalization of environmental matters in accession negotiations has meant that environmental protection is predominately discussed in respect of costly implementation, and as such, in instrumental, economic terms.[17] This projection may be useful in highlighting the need for investment, but it misplaces the attention on monetary concerns. As this study shows, environmental safeguarding is not merely an exercise in managing to transpose costly strategies, targets and standards as prescribed in EU environmental law. Rather, it is a dynamic area of law that is entrenched in questions concerning governance, and it places demands on safeguarding the rule of law – an essential accession criterion. In reflecting on the future of Europe, the role of environmental protection in accession conditions and negotiations thus needs to be revisited and reprioritized.

The present study is carried out in four parts and builds on two interrelated narratives.[18] The beginning, section 2, first maps EU accession criteria and demonstrates how weak an emphasis is placed on environmental matters as a precondition for EU membership, beyond that of needing to implement the existing environmental *acquis*. This narrative is further developed in section 3, which takes a retrospective look, outlining past accession acts in broad brushstrokes. The purpose of this is two-fold: first, to show how accession acts detail market creation in the European context and frame the candidate country's relationship with the EU; and second, to demonstrate that in this type of market construction environmental concerns are marginalized. In section 4, the second narrative is introduced, which is forward-looking. Serbia – a current candidate country – will serve as a case study to point to significant overlaps between the environmental *acquis* and the safeguarding of the rule of law, which is an essential membership criterion. As such, we will argue that environmental concerns must be reprioritized in EU accession negotiations and viewed alongside essential accession criterion. The findings are summarized and discussed in section 5.

15. Weatherill, *The Internal Market as a Legal Concept* (OUP, 2017), chapter 14.

16. General EU Position, Ministerial meeting opening the Intergovernmental Conference on the Accession of Serbia to the European Union (Brussels, 21 Jan. 2014) AD 1/14, CONF-RS 1/14.

17. See section 3 *infra*, and Kapios, "Environmental enlargement in the European Union: Approximation of the *acquis communautaire* and the challenges that it presents for the applicant countries", 2 *International and Comparative Environmental Law* (2002), 4, at 5.

18. "Narrative" is used in the sense of a line of related developments, see e.g. Bogojević, op. cit. *supra* note 12, Ch. 2.

2. The progress of enlargement

2.1. *A short overview*

Enlargement is an essential part of European integration. The Schuman Declaration asserts that "Europe will not be made all at once, or according to a single plan"; rather, the "coming together of the nations of Europe" will occur gradually.[19] The EU's expansion certainly had a slow start. It took more than ten years for the first phase of enlargement to materialize in the early 1970s, when the UK, Ireland and Denmark joined. Subsequently, the number of EU Member States has steadily increased to the current twenty-eight. As a procedure that allows Union institutions to "transform third States into Member States", enlargement is often hailed as "the most successful EU foreign policy".[20]

This is not to say that the politics of enlargement have gone unchallenged.[21] Most recently, in 2017, after a long period of financial crises, an unusually large influx of refugees, the Brexit referendum, and the rise of populist anti-EU parties, the Commission called for a period of reflection on the future of Europe.[22] During this time, enlargement was rarely mentioned in EU strategies,[23] and focus was redirected to "internal challenges within the EU"[24] and the task of consolidating what had already been achieved within the Union. Shortly afterwards, however, a seemingly reinvigorated enlargement policy appeared, as the Commission laid out an accession programme for the Western Balkans, which aimed to include some of those countries in the Union by 2025.[25]

At the same time, the current candidate countries have been warned that the process and conditions for EU membership are "more rigorous and

19. Schuman Declaration delivered on 9 May 1950, available at <europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en>.

20. Hillion, *The Creeping Nationalisation of the EU Enlargement Policy* (SIEPS, 2016), p. 6; a similar view is expressed in the Communication from the Commission to the Council and the European Parliament, Enlargement strategy and main challenges 2008-2009, COM(2008)674.

21. See e.g. Blockmans, "Raising the threshold for further EU enlargement: Process and problems and prospects" in Ott and Vos (Eds.), *50 Years of European Integration: Foundations and Perspectives* (TMC Asser Press, 2009), p. 203.

22. White Paper, cited *supra* note 1.

23. Bohmelt and Freyburg, "Forecasting candidate States' compliance with EU accession rules, 2017–2050", *Journal of European Public Policy* (2017), 1.

24. Available at <juncker.epp.eu/my-priorities>.

25. Communication cited *supra* note 3, at 6. A similar view is expressed in the Conclusions of the President of the European Council (Brussels, 9 Mar. 2017) OR.EN.

comprehensive than in the past".[26] This is expressed in the ever-evolving body of EU accession conditions and the complex accession negotiation methodology, both of which are outlined below. Arguably, the fact that prospective candidate countries face a more stringent membership protocol than past candidates simply reflects the EU's expansion of competences, and, as such, its increasingly rich legal corpus. More significantly, as Hillion has argued, it testifies to the Member States' desire for enforcement of their constitutional requirements, as well as for the formalization of enlargement procedures.[27] In short, it embodies the idea of enlargement conditioned on compliance with those EU standards that ultimately determine the contours of the European market.

The focus here is narrowed to the role that environmental protection plays in the EU's membership requirements.[28] The reasons why the environment deserves such attention are manifold. As a start, environmental protection is listed in the Treaties as one of the EU's core objectives,[29] and it plays a central role in EU's external policy.[30] This study thus aims to gain insight into the ways in which a central value and obligation in the EU legal order is integrated into the EU membership criteria. More importantly, and as will be explained in section 4, environmental safeguarding places demands on upholding the rule of law, which is an essential criterion for EU membership. This deserves attention to ensure that the role of environmental matters in conditioning EU membership is reprioritized.

2.2. *The procedure and the environmental conditions for EU membership*

The application procedure for EU membership has changed significantly since the first enlargement phase, in 1972. At the time when the European Economic Communities Treaty still applied, the applicant country only had to be a "European State" and address its application to the Council, which, "after obtaining the opinion of the Commission", could act by means of a unanimous vote.[31] Following the Lisbon Treaty, the European Parliament has played a more prominent role in this process. Together with national parliaments, it needs to be notified of membership applications, and the Council must obtain

26. Communication from the Commission, Enlargement strategy and main challenges 2013–2014, COM(2013)700 final 2.

27. Hillion, op. cit. *supra* note 20, p. 30.

28. For debates on conditionality in enlargement more broadly, see e.g. Cremona (Ed.) *Enlargement of the European Union* (OUP, 2003).

29. See *supra* note 5.

30. See e.g. Marín Durán and Morgera (Eds.), *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Hart Publishing, 2012).

31. Art. 237 EEC.

the European Parliament's consent before voting on whether to proceed with membership applications.[32] Crucially for this study, the Lisbon Treaty narrows membership eligibility to a European State "which respects the values referred to in Article 2 [TEU] and is committed to promoting them".[33] Article 2 TEU contains a long list of values, including human dignity, democracy, equality, the rule of law, tolerance, and justice, but makes no mention of environmental protection. In fact, the lack of reference to the environment is a general feature not only of the application procedure but also of the accession conditions, with which candidate countries need to comply once granted candidate status, before they can become EU members. These criteria are sourced in the following three overlapping categories, which have been elaborated by the EU institutions as enlargement has progressed.

The first category includes the so-called Copenhagen criteria,[34] which relate to democratic governance and so include demands on institutional stability, the rule of law, and the protection of human rights and minorities. These criteria were laid out in the initial enlargement processes,[35] but have since been revised to the current list of requirements. Neither the original nor the current list mentions environmental considerations.

The second category was introduced especially for the Western Balkans, placing demands on neighbourly and regional cooperation, and was crafted, as such, in light of the region's recent turbulent history.[36] The Commission suggests a "high priority list" for the candidate countries to pursue in this regard, where cooperation on the rule of law, security and migration, socio-economic development, transport and energy connectivity, digital agendas, reconciliation and good neighbourly relations are ranked at the top and described as "specific areas of interest for both the EU and the Western Balkans countries".[37] Despite the fact that environmental issues in the Western Balkans are interconnected, especially considering their common rivers and biodiversity,[38] the criteria do not include cooperation on environmental protection.

32. Art. 49 TEU.

33. Ibid.

34. See European Council in Copenhagen, Conclusions of the Presidency, 21–22 June 1993, SN 180/1/93 REV 1.

35. Hillion, op. cit. *supra* note 20, p. 9.

36. This so-called Stabilization and Association Process is outlined at: <ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/sap_en>.

37. Commission, "EU-Western Balkans: Six flagship initiative" (May 2018), available at <ec.europa.eu/commission/sites/beta-political/files/six-flagship-initiatives-support-transformation-western-balkans_en.pdf>; Commission Communication cited *supra* note 3.

38. See e.g. Weiss et al., *Endangered fish species in Balkan Rivers: Distribution and threats from hydropower developments* (RiverWatch and EuroNature, 2018), 1–162.

The third category, obliging candidate countries to implement the *acquis communautaire*, is the only point in the accession conditions where environmental protection appears. The concept of the *acquis*, albeit profoundly ambiguous,[39] is typically taken to cover the full body of EU rules and principles, as well as judicial decisions that candidate States must adhere to, in order to become EU members.[40] In the context of environmental protection, this means absorbing the complete EU environmental law corpus, which, as will be explained later, gives rise to multiple legal challenges, ultimately relating to governance issues. Here, it should be noted that the environmental *acquis*, contained in Chapter 27, is only one of a total thirty-five "chapters"[41] constituting the *acquis communautaire* that the candidate State must adopt for EU membership. What is more, the Commission has declared that pre-accession policies should focus on "fundamentals first",[42] that is, the successful implementation of Chapter 23 on the judiciary and fundamental rights, and Chapter 24 on justice, freedom and security.[43] The environmental *acquis*, then, is not a priority in the accession procedure.

The methodological approach adopted by the EU institutions to assess the progress of the legal transposition of the *acquis* reinforces this impression. At the time of Croatia's candidacy, so-called benchmarking was introduced. This requires the candidate country to first "open" the prioritized "chapters" – that is, create strategic planning and establish a legislative framework for the chapters' implementation into domestic law – and then "close" these by setting up the necessary institutions, and prove the country's implementation of the relevant *acquis*.[44] Should a candidate State consistently fail to incorporate the "fundamentals" and commit serious breaches of the principles of liberty, democracy, respect of human rights or the rule of law, the EU may suspend negotiations.[45]

39. Delcourt, "The *acquis communautaire:* Has the concept had its day?", 38 CML Rev. (2001), 829.

40. Gialdino, "Some reflections on the *acquis communautaire*", 32 CML Rev. (1995) 1089, at 1090.

41. For the full list, see <ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership/chapters-of-the-acquis_en>.

42. Commission Communication cited *supra* note 26.

43. EU Info Centre, *Negotiation Chapters: 35 Steps Towards the European Union* (2014), 13, available at <europa.rs/images/publikacije/07-35_Steps_Toward_EU.pdf>.

44. For an overview, see Hillion, op. cit. *supra* note 20, pp. 18–23.

45. Vlašić Feketija and Lazowski, "The seventh EU enlargement and beyond: Pre-accession policy *vis-à-vis* the Western Balkans revisited", 10 *Croatian Yearbook of European Law and Policy* (2014), 1, at 14.

The rationale for these "methodological innovations",[46] which are still applied in negotiations with candidate countries, including Serbia, is that if a candidate country fails to meet the basic conditions required by EU governance, they will not be able to comply with "the far more demanding pre-accession conditionality".[47] As Hillion notes, the procedure serves as a mechanism through which the EU and its Member States can firmly control the process of enlargement, providing them with significant leverage in the negotiations.[48] If Schuman was right that enlargement cannot happen all at once but step by step, then it may be necessary to first focus on governance issues. After all, environmental protection is not alone in being secondary to the chapters on the "fundamentals".[49]

The problem, however, is not merely that this delays environmental criteria being met by candidate countries, or that other public policy may be treated similarly in this regard. Undeniably, by holding environmental matters low in the accession list of priorities, the EU appears to momentarily abandon one of its core objectives. More importantly, however, environmental concerns are intertwined with the need to secure the rule of law and, more generally, good governance.[50] This is ignored by the EU; instead, it treats environmental matters as limited to a mere implementation checklist. This latter point is illustrated in section 4 where Serbia's accession negotiations are used as a case study. First, however, we look back on accession acts to date.

3. Accession acts, transitional measures and environmental protection

3.1. *The significance of accession acts unpacked*

The basic idea of the enlargement procedure is that once a candidate country has fulfilled all relevant accession criteria, including the implementation of the *acquis,* it signs an accession act whereby it becomes an EU member and a party to the EU treaties in force. Accession acts to date, however, show that no candidate country has been able to adopt the entire *acquis* before joining,[51]

46. Hillion, op. cit. *supra* note 20, p. 18.
47. Vlašić Feketija and Lazowski, op. cit. *supra* note 45.
48. Hillion, op. cit. *supra* note 20, pp. 20–22.
49. See point made in *supra* note 14, as well as the remaining 33 chapters of the *acquis* (cited *supra* note 41).
50. For an overview of the correlation between the two, see e.g. Loughlin, *Foundations of Public Law* (OUP, 2010), Ch. 11.
51. Kapios, op. cit. *supra* note 17, at 6.

and that agreeing on environmental protection standards has been one of the thorniest issues in accession negotiations, especially in more recent enlargement phases. Often derogations on the *acquis* are negotiated and outlined as transitional measures in the accession acts. In the following, we analyse how environmental protection features in such acts.

Examining transitional measures in this context is unusual. Indeed, accession acts have never been a scholarly fascination, nor is much information available, especially about how the early accessions were negotiated.[52] The accession acts are on average several hundred pages long, and in some cases include more than three hundred transitional measures,[53] which have been agreed upon as part of a long political process, in some instances spanning several decades.[54] Capturing this development is a challenging task; what is more, it is often seen as a technical and uninteresting exercise.[55] After all, transitional measures on the *acquis* eventually come to an end, and if non-transposition of EU law persists, infringement procedures may follow.[56] From this point of view, accession acts may seem to have only temporary and therefore limited legal significance. Yet accession acts deserve attention for at least the following two reasons.

To start with, they outline the complicated and intricate process of market *creation* in the European context, as described in section 3.2 below. Ultimately, transitional measures are agreements about market structures, State interventions and derogations struck between the EU and the candidate country, showing that the internal market is not legally or politically static. Rather, it is carefully crafted and interconnected with the Member States' political preferences and the EU's willingness to make concessions. As such, transitional measures can bring important insights about negotiation positions that the Member States pressed hard to maintain, presumably because they are part of the candidate country's national identity, and as such, contribute to framing its relationship with the EU. Their relevance here shows that the extent to which environmental protection is insisted on in the accession acts is not a mere historical fact – it helps to determine how environmental safeguarding in the EU context is perceived by the candidate country, as well as the EU.

The asymmetry of bargaining power in the EU's favour should not be overlooked. The prospect of acceding to the world's largest market and

52. As pointed out in Cunha, "The European Economic Community's third enlargement", 12 *Jean Monnet/Robert Schuman Paper Series* (2012), 3, at 5.

53. See e.g. Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, O.J. 2003, L 236.

54. For an overview, see Dinan, *Ever Closer Union: An Introduction to European Integration*, 4th ed. (Palgrave Macmillan, 2010), cChs. 2, 4–6.

55. Camps, op. cit. *supra* note 6.

56. See section 3.4. *infra*.

gaining influence in the drafting of EU laws as well as in global politics gives the candidate country great incentives, which translates into significant leverage on the part of the EU in negotiating with acceding countries.[57] Recently, this has meant that the EU unilaterally decides on accession conditions, and expects "compliance and obedience from the applicant States".[58] This negotiating power has been hailed as the source of the EU's "most important success stories".[59] Yet if we examine the accession acts to date, we see that the EU has often been willing to derogate from the environmental *acquis* using transitional measures, which raises important questions about how highly the Union really values and thereby frames environmental protection.

It must be noted that this study provides only snapshots of accession acts, focusing on environmental matters in concluding EU membership. What counts as "environmental" in this context is broadly construed to cover legal provisions adopted pursuant to environmental competences, or policies with an overt environmental dimension.[60] The study of the accession acts is further divided into three parts: the first part covers the enlargement period from 1972 to 1986, where environmental considerations had little or no part in the accession negotiations. This is understandable given that the EU did not yet enjoy explicit environmental competence; yet these accession acts are also important, as they show how the European market has been constructed, and demonstrate the significance of accession acts in projecting which provisions or public policies the EU and the candidate countries fought hard to maintain and which received lower priority. The countries that joined in the second phase, 1995–2004, already had high environmental standards – that the EU insisted should be adjusted on accession, so as not to create trade barriers. In the third phase, 2004–2011, the opposite situation arose: the candidate countries struggled to transpose EU environmental laws and had to negotiate transitional measures regarding environmental matters in order to be able to join by the prescribed deadline.

57. Hix and Hoyland, *The Political System of the European Union* (Palgrave Macmillan, 2011), p. 320.

58. Zielonka, op. cit. *supra* note 11, at 57.

59. As cited in Jordan, Brouwer and Noble, "Innovative and responsive? A longitudinal analysis of the speed of EU environmental policy making, 1967-97", 6 *Journal of European Public Policy* (1999), 376, at 379.

60. Similarly construed in Bogojević, "Judicial dialogue unpacked: Twenty years of preliminary references on environmental matters initiated by the Swedish judiciary", 29 *Journal of Environmental Law* (2017), 263.

3.2. *Constructing the European market*

During the period 1972–1995, the EU (at the time, of course, "EEC") expanded by six Member States: the UK, Ireland and Denmark joined in 1972, and Greece, Portugal and Spain followed in 1981 and 1986 respectively. The negotiations were long and difficult,[61] especially in the case of the UK whose membership de Gaulle vetoed on two occasions.[62] Discussion of environmental protection was limited,[63] which is also due to the fact that the EU was only granted legislative competences on environmental grounds in 1987, when the Single European Act entered into force.[64] Nonetheless, these accession acts highlight the following points.

To start with, what appears from the accession acts is the high level of technicality involved in constructing the EU market. In fact, most of the accession acts in this period concern the organization of the common market, which included determining common measures for quality and marketing standards for fruits and vegetables,[65] as well as their labelling,[66] in addition to deciding in which cases interventionist pricing would be permitted. In the case of the latter, such measures are outlined for a broad range of products,[67] ultimately with the aim of controlling prices and avoiding "excessive competition".[68] The protective provisions served to maintain price stability within the Union – for example, transitional measures were implemented to avoid a surplus of olive oil when Spain joined[69] – as well as to ease the economic transition to the common market for the new Member State.[70] The accession acts thus reveal, in a very detailed fashion, the intense regulatory intervention undertaken in enlarging the European market. This is significant,

61. For an overview of each country's accession, see Kaiser and Elvert (Eds.), *European Union Enlargement: A Comparative History* (Routledge, 2005), Chs. 1–6.

62. For an overview, see Camps, op. cit. *supra* note 6, Ch. 14.

63. For example, the Accession Act 1979 requires the Bird Directive to be supplemented by a column indicating the different species of birds in Greece, see Annex II, Chapter VIII, Treaty of Accession of Greece, O.J. 1979, L 291.

64. This is not to say that there was no EU environmental law prior to this date, see e.g. Kingston, Heyvaert and Čavoški (Eds.), *European Environmental Law* (Cambridge University Press, 2017), chapter 1.

65. See Ch. 2, section 1, Treaty of Accession of Denmark, Ireland, and the United Kingdom, O.J. 1972 L 73: Ch. 2, section 1, Accession Act 1979, cited *supra* note 63.

66. See Art. 69, ibid.

67. Ch. 2, section 2, Accession Act 1972, cited *supra* note 65.

68. Camps, op. cit. *supra* note 6, pp. 459–460.

69. Joint declaration on the adjustment of the "*acquis communautaire*" in the vegetable oils and fats sector, Treaty of Accession of Spain and Portugal, O.J. 1986, L 302.

70. See e.g. Ch. 2, section 1, Accession Act 1979, cited *supra* note 63, which sets out a range of various pricing measures, including guiding, target and fixed pricing, that seek to ensure compensation in transiting to the common market.

as it shows that European economic integration, although it may take distinct forms,[71] does not allow a "divorce of markets from States".[72] Put simply, such integration depends on societal organization brought about by the EU members and the candidate States,[73] and in the accession acts, effort is focused on measures that would have a stabilizing effect on the market.

The type of subject matter that appear in a country's accession act and around which transitional measures are negotiated often reflect its particular character and history. In the case of the UK's accession to the EU, for instance, the issue of trading with the Commonwealth was a key concern in the negotiations,[74] as expressed in the accession act, which allowed the UK special trading arrangements, for example, to import New Zealand's butter and cheese even following its EU membership.[75] In the case of Spain, "the thorniest"[76] chapter to conclude concerned the fishing industry. In its accession act, Spain was granted "the longest term any Member State had ever been granted in any matter at all"[77] when the EU agreed to a seventeen-year period of gradual transition for its fisheries fleet to join Union fishing policy. Although according to the Commission, "the EU fisheries sector represents less than 0.2 per cent of total EU employment", in some regions and Member States, including Spain, "the sector is an important source of jobs".[78] More generally, transitional measures may not be universally significant across the Union, but rather reflect the candidate country's particular interests and identity.

This is significant as it suggests how States acceding to the EU understand their role in the Union and, possibly more importantly, the place of the EU in their domestic settings. Danish accession, for instance, is thought to have been "fairly painless", mainly because Denmark saw EU membership chiefly in economic terms, which in the context of the agricultural support and financing system that the EU had developed "were well suited to Danish interests".[79] By

71. See e.g. El-Agraa (Ed.), *The European Union: Economics and Policies*, 9th ed. (OUP, 2011).

72. Egan, *Constructing a European Market* (OUP, 2001), p. 260.

73. For the idea of markets as social organizations, see Fligstein, *The Architecture of Markets: An Economic Sociology of Twenty-First-Century Capitalist Societies* (Princeton University Press, 2001).

74. Especially in the early period of negotiation between 1955 and 1963, see Camps, op. cit. *supra* note 6, p. 378.

75. See e.g. Protocol 18, Accession Act 1972, cited *supra* note 65.

76. de la Guardia, "In search of lost Europe" in Kaiser and Elvert, op. cit. *supra* note 61, pp. 93, 105.

77. Ibid.

78. Commission Explanatory note on The Social Dimension of the CFP reform, available at <ec.europa.eu/fisheries/reform/docs/social_dimension_en.pdf>.

79. Laursen, "A kingdom divided" in Kaiser and Elvert, op. cit. *supra* note 61, pp. 31, 40.

focusing on economic benefits, the Danish entry negotiations and the formative years of Danish European policy contributed to Denmark's scepticism towards the institutional and political aspects of European integration, as was illustrated in its opt-outs of the Maastricht Treaty in 1992. Laursen describes this as the history of the accession negotiations taking "its revenge".[80] A similar pattern can be observed in the case of Greece, which sought membership mainly for political stability and where "[e]conomic considerations were subordinate to political ones".[81] Later, this was seen as the root of the Greek financial crises, starting in 2010.[82] Similarly, links between the most contested points in the British membership negotiations, such as its budgetary contribution, which was heavily disputed and even stalled the negotiations at one point,[83] may be seen re-emerging in the campaign for the UK to leave the EU.[84]

Obviously, these findings give merely brief indications of the complicated and detailed negotiation period of 1972–1986. Yet they can testify to the significance of revisiting accession acts, as these documents trace the crafting of the European market in a way that reveals the identity of the Member States, and so also that of the EU. They may also serve as indicators of the continued relationship the candidate States have with the EU, which is particularly insightful to reflect on at times of further enlargement, and, for the purpose of this study, in relation to how environmental protection is understood by the candidate countries, as well as the EU in accession negotiations.

3.3. *Negotiating higher national environmental standards*

Following the EU's enlargement to the Iberian Peninsula, it expanded again in 1995 to include Austria, Sweden and Finland among its members. By then, the EU had also established its environmental policy and incorporated a broad range of environmental principles. Still, the "fiercest battles"[85] in the accession negotiations concerned environmental policy, as environmental

80. Ibid., 48.

81. Ifantis, "State interests, external dependency trajectories and 'Europe'" in Kaiser and Elvert, op. cit. *supra* note 61, pp. 70, 82.

82. Watt, "Fingers point at France in Whitehall's Eurozone blame game on Greece", *Guardian* (2 Nov. 2011).

83. Dinan, op. cit. *supra* note 54, p. 45.

84. For an overview of the main arguments on the Leave side, see Craig, "Brexit: A drama in six acts", 41 EL Rev. (2016), 447, at 454–457.

85. Dinan, op. cit. *supra* note 54, p. 106. This is similarly noted in the Commission's press release concerning the accession negotiations, available at <europa.eu/rapid/press-release_MEMO-94-32_en.htm>.

standards were generally higher in the candidate countries,[86] and this clashed with the free movement provisions. An examination of these accession acts thus highlights the following two significant points.

First, candidate countries will face tough negotiations in attempting to maintain environmental law that goes beyond EU's environmental standards and that, as such, might create barriers to trade. In the case of Sweden, one of the most hotly debated questions prior to its EU membership concerned the consequences that its accession to the EU would have on its national environmental standards.[87] The primary concern pertained to the possible watering down of its chemicals regulation, which is why the environment became the first policy sector in Sweden to be the subject of an official strategic memorandum about EU membership.[88] The same went for Austria where "the most sensitive subject in Austrian opinion"[89] related to the Alpine passes, which were thought to be under threat by EU membership that permits free transit through Member State territories. Similarly, Finland had concerns regarding the classification, packaging and labelling of dangerous substances, including pesticides, and therefore sought to maintain its national standards.[90] The EU, however, resisted adamantly to granting long-term exceptions or permanent opt-outs,[91] and as part of the derogations under the free movement provisions, allowed only a four-year transition period during which the candidate countries had to transpose the relevant *aquis*,[92] as well as a particular protocol on transport in Austria.[93] Thus while the EU insists on environmental protection, it does so only to the extent that such protection follows EU standards and does not create (trade) barriers.

Second, and interlinked with the previous point, candidate countries have limited leverage to change EU standards when they are still outside the EU, but this changes once they become full members. For instance, the so-called substitution principle, which formed the cornerstone of Swedish chemical

86. As such, these were labelled "the green troika", see Leifferink and Skou Andersen, "Strategies of the 'green' Member States in EU environmental policy-making", 5 *Journal of European Public Policy* (1998), 254, at 255.

87. Mahmoudi, "Svenska miljörelevanta mål som prövats av EG-domstolen: Festskrift till Ulf Bernitz", 59 *Juridisk Tidskrift* (2001), 59.

88. Det svenska miljöarbetet i EU–inriktning och genomförande (1994–1995) Riksdagen, Regeringens skrivelse 1994/95: 167; Bogojević, op. cit. *supra* note 60, at 266.

89. Commission press release, cited *supra* note 85.

90. European Parliament, *The 1995 Enlargement of the European Union: The Accession of Finland and Sweden* (EPRS, 2015), p. 28.

91. Dinan, op. cit. *supra* note 54, p. 107.

92. Ch. 1, Art. 69 and Annex VIII, Treaty of Accession of Austria, Finland and Sweden, O.J. 1994, C 241.

93. See Protocol 9 on road, rail and combined transport in Austria, ibid.

regulation but at the time of accession was foreign to EU law,[94] was introduced to the EU legal system through the ECJ, in *Toolex*.[95] Today it constitutes one of the key procedural aspects of EU chemicals regulation.[96] Along similar lines, Austria tried in *Schmidberger* to uphold its right to close off traffic on the Brenner motorway to allow environmental demonstrations.[97] Although the ECJ did not grant a general right to reduce the traffic on the Austrian motorway,[98] it reached the conclusion that the Austrian authorities were entitled to consider that the legitimate aim of the demonstration could not be achieved by measures less restrictive of cross-border trade.[99]

Ultimately, the 1995 enlargement period shows that the EU will insist on its own environmental law standards – even if the candidate countries offer greater environmental protection – to avoid the creation of trade barriers on environmental grounds. Once the candidate countries become EU members, however, they can rely on adjudication and the ECJ to broaden the EU's existing environmental law corpus, via negative harmonization. This suggests that accession States are able to raise the EU's environmental standards but only once they are EU members; this demonstrates the delayed significance entrusted to environmental matters in enlargement procedures.

3.4. *Negotiating lower national environmental standards*

The third, and most recent, accession phase saw the EU welcome Central and Eastern countries, in a period in which it grew from fifteen to twenty-eight Member States. This expansion occurred in three stages,[100] but here the various accessions are grouped together on the basis of their shared difficulties in absorbing the environmental *acquis*, which, by the time of their respective accessions, had developed greatly.[101]

94. Nilsson, "REACH-förordningen och Hållbar Kemikaliehantering" in Ebbesson and Langlet (Eds.), *Koll på kemikalier? Rättsliga förändringar, möjligheter och begränsningar* (Lustus Förlag AB, 2010), p. 79. The substitution principle requires replacing one dangerous substance with another, less dangerous substance.

95. Case C-473/98, *Toolex,* EU:C:2000:379, para 47. In brief, the case concerns national environmental measures, and more precisely, Swedish law on chemical products prohibiting trichloroethylene used by Toolex for industrial purposes, which, as such, restricted free movement provisions.

96. For an overview, see Bergkamp (Ed.), *The European Union REACH Regulation for Chemicals: Law and Practice* (OUP, 2013).

97. Case C-112/00, *Schmidberger,* EU:C:2003:333.

98. See e.g. Case C-28/09, *Commission* v. *Austria,* EU:C:2011:854.

99. Case C-112/00, *Schmidberger*, paras. 81–89.

100. Covering Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia acceded in 2004; Bulgaria and Romania in 2007, and Croatia in 2013.

101. For an overview, see Kingston, Heyvaert and Čavoški, op. cit. *supra* note 64.

The difficulties stem from the candidate countries' lack of tradition of observing environmental laws. In the case of the countries with Communist histories, the "predominately Soviet-driven environmental laws"[102] saw limited administrative backing and compliance. More generally, and irrespective of ideological background, the EU environmental *acquis* demanded the introduction of new regimes, rules and practices that the candidate countries had not previously employed.[103] This, in turn, required investment, which was deemed the "single most challenging task facing the new Member States in respect of the environmental *acquis*, compared to other chapters".[104]

As such, this third wave of enlargement is widely regarded as exposing EU environmental law to pressures greater than any previous enlargement.[105] The relevant accession acts evidence this through their numerous transitional measures on the environmental *acquis*,[106] allowing the new Member States to postpone parts of their obligations. This was done partly in the hope that the candidate countries would attract the necessary investment in due time, and in part because it was clear to the Commission that "none of the [2004] candidate countries can be expected to comply fully with the [environmental] *acquis*" by the set deadline.[107]

Allowing derogations on environmental measures, however, runs the risk of the candidate countries failing to incorporate the *acquis* at all, which undercuts the importance of environmental law in the EU. For example, in the case of Croatia,[108] the EU Waste Directive[109] was supposed to be transposed into domestic law by 2015. Three years after the deadline, the Commission found that Croatia had still not complied, prompting the Commission to bring infringement proceedings against Croatia to the ECJ.[110] Similarly, in the case

102. See e.g. the Lithuanian example, Makuch and Macdonald, "Legal transposition and implementation frameworks for Lithuanian approximation of EU environmental law", 15 *European Environmental Law Review* (2006), 277, at 287.

103. Emmert and Petrović, "The past, present and future of EU enlargement", 37 *Fordham International Law Journal* (2014), 1349, at 1401. This idea is further explored in section 4 *infra*.

104. Inglis, "Enlargement and the environmental *acquis*", 13 *Review of European Comparative & International Environment Law* (2004), 135, at 136.

105. Ibid., at 135.

106. For an overview of the 2004 accession, see e.g. Sajdik and Schwarzinger, *European Union Enlargement: Background, Development, Facts* (Transaction Publishers, 2008), p. 344.

107. Commission Communication, Agenda 2000 – Volume I – For a Stronger and Wider Union, DOC/97/6 at 65.

108. Treaty of Accession of Croatia, O.J. 2012, L 112.

109. Directive 2008/98/EC on waste (Waste Framework Directive), O.J. 2008 L 312.

110. Commission Press Release: "Industrial waste: Commission refers Croatia to the court over its failure to protect citizens from industrial waste in Biljane Donje landfill" (8 Mar. 2018), Case C-250/18, *Commission* v. *Croatia*, pending.

of Malta,[111] derogations from provisions in the Birds Directive[112] were granted so as to allow traditional bird trappings for a set period of time.[113] Here it is important to highlight the significance of Malta for nature conservation purposes: it hosts thirty habitat types and fifty-two species covered by the Habitats Directive, and several populations of threatened bird species listed in the Birds Directive.[114] Concerns about the implementation of the Birds Directive remain still today[115] – even following the Commission's infringement actions against Malta on these grounds.[116] Obviously, failures to comply with the environmental *acquis* after the end of the transitional period do not only occur in Member States joining the EU post-2004.[117] Yet what is described here raises questions about the effectiveness of accession conditionality in the way that the environmental *acquis* is applied.

With regard to the accession of Romania and Bulgaria to the EU,[118] it is widely thought that the two countries were "not ready for membership" and that they "suffered from considerable problems with the rule of law".[119] As such, neither country fully met the accession criteria, including the environmental *acquis*, when they joined the EU in 2007.[120] As a control measure, a so-called safeguard clause was inserted into the accession act, which allowed the Council to postpone the membership of either of the two countries by a year, in case of "a serious risk of either of those States being manifestly unprepared to meet the requirements of membership"[121] by the accession date. The provision, however, was never triggered.

Bulgaria and Romania had inherited a heavy dependency on coal and nuclear energy, and so a major obstacle in fulfilling the *acquis* pertained to

111. Accession Treaty 2003, cited *supra* note 53.

112. Arts. 5(a), 5(e), 8(1) and Annex IV(a) of Council Directive 79/409/EEC on the conservation of wild birds, O.J. 1979, L 103.

113. 10 D, Annex XI, Accession Treaty 2003, cited *supra* note 53.

114. Commission Staff Working Document – The EU Environmental Impact Review, Country Report – Malta, SWD(2017)51 final, at 10.

115. Ibid., at 11.

116. Case C-76/08, *Commission* v. *Malta,* EU:C:2009:535.

117. E.g., Spain secured long transition periods for the full transposition of Directive 76/160/EEC on the quality of bathing water but, after it failed to fully transpose it, infringement proceedings were initiated by the Commission, see Case C-278/01, *Commission* v. *Spain*, EU:C:2003:635.

118. Treaty of Accession of the Republic of Bulgaria and Romania, O.J. 2005, L 157.

119. Vlašić and Lazowski, op. cit. *supra* note 45, at 5.

120. Lazowski, "And then they were twenty-seven . . . A legal appraisal of the Sixth Accession Treaty", 44 CML Rev. (2007), 401, at 403.

121. Art. 39, Accession Act 2005.

requirements on transitioning to green energy. For example, the decommissioning of the Kozloduy nuclear power plant was "one of the most difficult issues in Bulgaria's relations with the European Union".[122] The heavy reliance on coal, however, has remained a feature of Eastern and Central Europe economies, which is also evident from the fact that action has been taken – in both legal and political form – to block stricter EU regulation of industrial emissions.[123]

The issues that we have highlighted from enlargement in 2004 and onwards are obviously not unique to the newest Member States. Environmental infringements for non-compliance with EU environmental law and challenges to stricter EU environmental laws are not the exclusive domain of Central and Eastern Europe.[124] The point here is to describe, even if only briefly, how the EU has deprioritized environmental laws in accession acts when candidate countries with lower environmental standards seek membership. This is problematic, as the safeguarding of environmental laws is simply postponed, and considering the implementation deficit of the EU's environmental law corpus,[125] these might never be fully implemented.

4. Environmental protection and the rule of law: Serbia's accession negotiations as a case study

4.1. *Serbia's EU accession: A brief overview*

So far, this article engaged in a narrative that considered the past five decades of EU enlargement. The analysis now switches to a related but different storyline, which is forward-looking, namely Serbia's accession negotiations. Serbia has long pursued EU membership. The initial steps were taken in 2005 when the country entered into negotiations on a Stabilization and Association Agreement; accession negotiations commenced a decade later, in January 2014. At the time of writing, sixteen chapters on wide-ranging topics,

122. Lazowski, op. cit. *supra* note 120, at 426. Similar decommissioning actions took place in the 2004 accession, see e.g. Lithuanian accession, Makuch and Macdonald, op. cit. *supra* note 102, at 288.

123. See e.g. "Bulgaria's move to overturn EU pollution laws a 'terrible political signal'", *ClientEarth* (10 Jan. 2018).

124. Bogojević and Petit, "Deterring the State versus the firm: Soft and hard deterrence regimes in EU law", 23 CJEL (2016), 55.

125. Ibid.

including statistics and public procurement, have been opened and two have been provisionally closed.[126] With regard to the environmental *acquis*, an action plan for the transposition of Chapter 27 is in place,[127] but negotiations, together with the opening of the Chapter, have yet to begin.[128]

Environmental law in Serbia is traceable to the early 1970s, that is, long before its EU membership aspirations fully bloomed. Yet Serbia's main incentive for advancing this area of law is "to develop ties with the European Union"[129] and gradually become an EU Member State. This shows what potential the environmental *acquis* holds in insisting on EU environmental standards beyond the EU's present borders. It is thus unfortunate that the transposition of the environmental *acquis* has been translated into a simple checklist of environmental laws that the candidate country needs to implement, and against which its progress towards accession is evaluated.[130] The political response in Serbia has largely been one of defiance, insisting that "[we] should not hurry to open that chapter [27]",[131] listing the associated high costs as a key factor.[132]

Both accounts of the environmental *acquis* are problematic. True, the costs involved in environmental law compliance are high – the waste and water sectors alone are estimated to require over EUR 7 billion in investments[133] – corresponding to almost a fifth of Serbian GDP.[134] Nonetheless, these narrow, instrumental and monetary views of the environmental *acquis* overlook the dynamic nature of environmental law, and what is more, they neglect the interconnectedness of the environmental *acquis* and the rule of law, which is an essential accession criterion. These two points are explored next.

126. For an overview, see <www.mei.gov.rs/eng/serbia-and-eu/history/>.

127. European Integration Office, *National Programme for the Adoption of the Acquis* (Belgrade, 2014), 756–852.

128. The date, at the time of writing, is set for June 2020, see The Serbian Ministry of Environmental Protection, <www.pregovarackagrupa27.gov.rs/srbija-na-dobrom-putu-da-do-kraja-godine-bude-usvojena-pregovaracka-pozicija-za-poglavlje-27-u-dogovoru-sa-evropskom-komisijom/?lang=lat>.

129. Čavoški, "Development of environmental law and policy in Serbia" in Beširević (Ed.), *Public Law in Serbia: Twenty Years After* (Esperia Publishing, 2012), pp. 259, 262.

130. See e.g. Commission, Serbia 2018 Report, SWD(2018)152 final, at 78; and more recently, Commission, Serbia 2019 Report, SWD(2019)219 final, at 85.

131. Serbia's Minister of Environmental Protection Goran Trivan, "Chapter 27 negotiation position in June but no hurry", *Balkan Green Energy News* (19 Jan. 2018).

132. Ibid.; Antić, *Chapter 27 in Serbia: Money Talks* (Coalition 27, 2019) 10, available at <rs.boell.org/sites/default/files/izvestaj_2019_eng_web.pdf>.

133. National Environmental Approximation Strategy for the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 80/11.

134. According to the World Bank, GDP in Serbia in 2017 was USD 41 billion, see <www.worldbank.org/en/country/serbia/overview>.

4.2. *The dynamic nature of the environmental acquis*

Contrary to what the Commission's checklist suggests, EU environmental law is not just about targets, standards and strategies found in secondary legislation. It is a jurisprudentially rich subject, currently including more than a thousand judgments on environmental matters that EU courts have developed over the last four decades.[135] In doing so, they have given substantive meaning to the several hundred acts that this *acquis* contains. Although various typologies may be applied in outlining its particular definition, EU environmental law is highly dynamic. As explained below, this means that it is entrenched in questions concerning governance[136] and, ultimately, the rule of law, and as such needs to be reprioritized in EU's enlargement policies.

To start with, what counts as "EU environmental law" can be determined in different ways. A broad frame allows any law that may have an impact on the environment to be included, which would cover, for example, EU procurement law directives, following their inclusion of environmental considerations in tendering processes.[137] A narrower view would only consider laws and policies based strictly on EU's environmental competences, or with an overt environmental dimension .[138] What is more, the environmental *acquis* is developing at a high speed and is subject to continuous revision and modification in line with new scientific evidence and legal developments, involving a broad range of actors, including experts, businesses, and public interest groups. For example, in the few years that Serbia has negotiated its EU membership, EU climate change laws – especially the management of the EU carbon market, with its interconnectedness of the private and public sectors – have been overhauled.[139] This is significant for two reasons.

First, it shows the challenge for a candidate country in keeping track of the current version of the environmental *acquis*. Arguably, it could be viewed as a "snapshot" of the corpus of EU environmental laws at the moment of accession,[140] which is a useful image highlighting the laws' dynamic form. Yet this provides limited orientation to candidate countries in adapting their

135. Krämer, "The effectiveness of monitoring the application of EU environmental law" in Garcia Ureta and Bolano Pineiro (Eds.), *New Perspectives on Environmental Law in the 21st Century* (Marcial Pons, 2018), pp. 11, 12.

136. "Governance" is a contested term; here it simply refers to management arrangements that are different from traditional, hierarchical models of regulation, see Fisher, Lange and Scotford, *Environmental Law: Text, Cases, and Materials* (OUP, 2013), Ch. 13.

137. See Bogojević op. cit. *supra* note 5, p. 161.

138. See e.g. Bogojević, op. cit. *supra* note 60.

139. Bogojević, "The revised EU ETS Directive: Yet another stepping stone", 11 *Environmental Law Review* (2009), 279.

140. Gialdino, op. cit. *supra* note 40, at 1092.

national laws to EU standards. In particular, it does not address the issue of whether candidate countries must transpose EU environmental laws that certain other Member States have struggled or outright failed to implement.[141] Similarly, it does not answer to what extent revised but not yet implemented EU environmental directives need to be regarded as the most up-to-date version of the *acquis*, nor whether generously prolonged implementation periods enjoyed by existing Member States in adopting, for example, the Water Framework Directive,[142] may be offered also to the candidate countries, even if the deadline for the adoption of the directive has passed.

Second, and following from this, environmental law developments, as pointed out by Fisher and others, often involve regulatory experiments rather than a linear progression towards a better model of regulation.[143] This means that any attempt at transposition will require dealing with regimes that involve a broad range of stakeholders, as exemplified by the Environmental Impact Assessment (EIA) Directive,[144] and setting up or reforming institutions and laws on which there is limited prior legal background. In other words, it demands imagining environmental law beyond the State.

Connected to this is the fact that EU environmental law stretches across policy boundaries and demands intervention in a broad array of legal and non-legal areas.[145] This may seem an obvious point considering the inherent "polycentric, interdisciplinary, normative and scientifically uncertain nature of environmental problems",[146] which concern a great variety of subjects, including air and water quality; waste; nature conservation; industrial pollution; risk and chemicals management; climate change; genetically modified organisms; and noise.[147] What this means, nevertheless, is that each environmental problem demands a diverse range of legal responses, which tend to depart from traditional, hierarchical modes of regulation. For example, EU climate change law demands the creation of a highly regulated carbon market in which emission permits are traded within and beyond the EU's

141. For an overview, see Bogojević and Petit, op. cit. *supra* note 124.

142. Directive 2000/60/EC of the European Parliament and of the Council of 23 Oct. 2000 establishing a framework for Community action in the field of water policy, O.J. 2000, L 327.

143. Fisher, Lange and Scotford, op. cit. *supra* note 136, Ch. 12.

144. Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, O.J. 2012, L 26.

145. See Milović (Ed.), "Chapter 27 in Serbia: No-progress report" (Young Researchers of Serbia, 2018), p. 75.

146. Fisher, "Environmental law as 'hot' law", 25 *Journal of Environmental Law* (2013), 347.

147. For an overview of environmental topics relevant to Serbia's opening of Ch. 27, see <www.eu-pregovori.rs/eng/negotiating-chapters/chapter-27-environment/>.

jurisdiction.[148] This is distinct from the EU chemicals regime, which centres around conditions of access to the internal market for chemical manufacturers in the EU,[149] or the Water Framework Directive, which creates a multileveled regime of both soft and hard law.[150] As such, transposing the environmental *acquis* requires more than mere institutional capacity familiar with traditional models of regulation; it demands breaking new legal ground and creating, as well as reforming, existing governance structures. It also shows that the environmental *acquis* is more than a collection of basic terms that need translation; rather, it depends on the adoption of diverse and complex governance structures.[151]

What this brief account of the dynamic features of EU environmental law shows are some of the difficulties in trying to contain EU environmental law within a narrow, instrumental frame. In part, this is because environmental law, as Fisher puts it, is "hot law", meaning that due to its dynamic nature, it can be difficult to settle on a single perspective from which to understand environmental problems and what course of action to take.[152] This co-productive exercise inevitably leads to questions concerning governance issues:[153] it means refiguring administrative and constitutional processes, developing and adapting institutions to new regimes, and offering a platform for public engagement with a range of stakeholders. Therefore, as explained in the next section, the main legal challenges in transposing the environmental *acquis* in Serbia relate to good governance, specifically the rule of law; the current EU accession procedure, however, fails to appreciate this interrelationship.

4.3. *Legal challenges in transposing the environmental acquis*

In its latest enlargement report on Serbia, the Commission finds that "Serbia has achieved *some level of preparation* in the area of environment and climate

148. Directive 2003/87/EC of the European Parliament and of the Council of 13 Oct. 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, O.J. 2003, L 275.

149. Regulation (EC) 1907/2006 of the European Parliament and of the Council of 18 Dec. 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, O.J. 2006, L 396.

150. Water Directive, cited *supra* note 142.

151. See e.g. the many sources used in defining "waste", Scotford, "Trash or treasure: Policy tensions in EC waste regulation", 19 *Journal of Environmental Law* (2007), 367.

152. Fisher, op. cit. *supra* note 146.

153. This is clear in discussion about environmental law in the UK following Brexit, see Lee, "Brexit and environmental protection in the United Kingdom: Governance, accountability and law making", 36 *Journal of Energy and Natural Resources Law* (2018), 351, at 351.

change"[154] but that further action is necessary, especially in strengthening the Environmental Protection Agency, both administratively and financially; intensifying implementation and enforcement of Chapter 27, and implementing the Paris Agreement. Beyond these brief points, and the warning that local governance "should be improved . . . through establishing clear rules on responsibilities for the operation and maintenance of water and wastewater facilities", and strengthening "institutional set-up and national and local administrative capacity"[155] in relation to nature conservation, the report makes no mention of governance concerns or how these are linked to the implementation of the environmental *acquis*.

The interconnectedness is clear, however, when outlining some of the legal challenges in transposing the environmental *acquis* in Serbia. Here, we focus on the EIA Directive,[156] which essentially regulates environmental decision-making. This focus is motivated by the fact that environmental assessments, as a regulatory mechanism, are often considered as "a mainframe of environmental law",[157] and consequently understood to provide a focal point for examining the relationship between environmental law and governance.[158]

In brief, the EIA Directive requires that before a Member State approves projects "likely to have significant effect on the environment",[159] such projects must undergo impact assessments. The question when exactly this obligation arises has been heavily litigated before the ECJ,[160] largely because the obligation is discretionary, and thus open to multiple findings, and also because there is a strong incentive to avoid applying the regime in question.[161] In 2014, the Directive underwent a comprehensive review in order to streamline EIA procedures and offer a more prominent role to legal obligations therein.[162] In short, the procedure is currently such that, once it is

154. Commission, Serbia 2019 Report, cited *supra* note 130, at 85 [emphasis in original].

155. Ibid., at 86.

156. Directive 2011/92/EU, cited *supra* note 144.

157. Holder, *Environmental Assessment: The Regulation of Decision Making* (OUP, 2006), p. 1.

158. Ibid., p. 5.

159. Art. 2(1) Directive 2014/52/EU, amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (EIA Directive), O.J. 2014, L 124.

160. See e.g. Case C-133/94, *Commission* v. *Belgium,* EU:C:1996:181; Case C-392/96, *Commission* v. *Ireland,* EU:C:1999:431.

161. Fisher, Lange and Scotford, op. cit. *supra* note 136, p. 861.

162. See Directive 2014/52/EU, cited *supra* note 159 and Arabadjieva, "'Better Regulation' in environmental impact assessment: The amended EIA directive", 28 *Journal of Environment Law* (2016), 159.

established that a significant effect on the environment is likely,[163] several further procedures are required for determining the scope of the project and gathering information about its impact, including securing consultation and public participation.

The EIA-related conflicts in Serbia have arisen, most prominently, against the legal backdrop of the ratification of the Treaty establishing the Energy Community, which entailed assuming the obligations under Directive 2009/28/EC[164] dealing, *inter alia*, with the promotion of electricity produced from renewable energy sources.[165] This has prompted a sudden and marked increase in the development of hydropower facilities, especially as Serbia has decided to incentivize this energy transition by subsidies and feed-in tariffs.[166] The environmental consequences, however, are dire: the widespread use of small hydropower plants with their pipelines[167] in Serbian rivers threatens to push nearly one in ten of Europe's fish species to the brink of extinction.[168]

The conflict between the two environmental objectives – renewable energy, on the one hand, and water management and biodiversity, on the other – is arguably inherent in the EU regime.[169] What is noteworthy about the application of the relevant Directive in Serbia is the complete disregard for the necessary procedures. This is exemplified by the permits granted for the construction of small hydropower plants in the river valley of the protected nature park "Stara Planina".[170] Although an EIA was carried out, it completely failed to mention the protected habitat[171] or other available reports issued by the Institute for Nature Protection of Serbia, confirming the presence of

163. Unless the project falls under Annex I of the Directive, which means that EIA is mandatory, see ibid.

164. Directive 2009/28/EC on the promotion of the use of energy from renewable sources, O.J. 2009, L 140.

165. Official Gazette of the Republic of Serbia, No. 62/06.

166. For a historical overview see, Panić et al., "Small hydropower plants in Serbia: Hydropower potential, current State and perspectives", 23 *Renewable and Sustainable Energy Reviews* (2013), 341, at 343.

167. No-Progress Report, cited *supra* note 145, at 45.

168. Weiss et al., op. cit. *supra* note 38.

169. Case C-346/14, *Commission* v. *Austria*, EU:C:2016:322.

170. Decision of the Ministry of Environmental Protection on the 18 June 2017, No. 353-02-1374/2017-16.

171. As required by the Code of Regulations on the Declaration and Protection of Strictly Protected and Protected Wild Species of Plants, Animals and Fungi, Official Gazette of RS, No. 5/10, 98/16. Also, the Law on Sustainable Use of Fish Fund, Official Gazette RS, No. 128/14, which grants the site special protected status, was disregarded. On appeal, the Supreme Court of Cassation, Uzp 189/2018 of 26 Sept. 2018, held that the EIA could not be successfully completed by disregarding the Institute for Nature Protection of Serbia, but the implications of this judgment are still uncertain.

strictly protected species.[172] In fact, the practice has been to entrust impact assessments to the developer,[173] which has jeopardized the neutrality of the impact assessments.[174]

In addition to limiting the role of experts in the EIA processes, Serbia has also heavily restricted public participation.[175] Despite the legal obligation, as stipulated in the Directive, to engage with the public,[176] and the Energy Community Secretariat's reminder that public participation "is an integral and essential part of the environmental assessment procedure",[177] the public has had limited, if any, opportunity for input in the issuing of numerous permits to build hydropower plants. For example, the public debate about the building of hydropower plants in Brodarevo, in western Serbia, was organized in the capital during a State emergency, when heavy snow restricted travel to Belgrade.[178]

In a separate instance, and even more dramatically, a complete district of private housing in central Belgrade was demolished in 2017 – without prior notification or consultation – in an area soon thereafter developed as Belgrade's Waterfront luxury properties, leading to concerns about the "collapse of the rule of law in Serbia".[179] More recently, a cable car construction in central Belgrade was initiated without any decision on EIAs, which, nevertheless, the administrative court suspended pending a final ruling on the legality of the construction permit.[180] These examples show that consultation and participation, which are the fundament of the EIA Directive, are not matters of dull technical procedures; rather, connect straight to the

172. See e.g. Report on the Professional Surveillance of the Institute for Nature Protection of Serbia of 10–12 July 2017 No. 026-3083/2 of 26 Dec. 2017.

173. Under Directive 2014/52/EU, cited *supra* note 143, the developer needs to follow specific procedures, as outlined in Art. 5(1)-(3) and ensure, for example, that relevant experts are involved in the assessment reporting.

174. Akademija inžinjerskih nauka Srbije, "AINS ponovo o MHE" (22 Feb. 2019), available at <www.ains.rs>.

175. Drenovak-Ivanović, "Environmental impact assessment in Serbian legal system: Current issues and prospects for revision", 64 *Annals FLB – Belgrade Law Review* (2016), 126.

176. Art. 6(2) Directive 2014/52/EU, cited *supra* note 159.

177. Statement of the Energy Community Secretariat on small hydropower development, 13 Nov. 2018, available at <www.energy-community.org/news/Energy-Community-News/2018/011/13.html>.

178. Nelson, "EIA/SEA of hydropower projects in South East Europe: Meeting the EU standards", 1 *South East Europe Sustainable Energy Policy* (2015), 23, available at <d2ouvy59p0dg6k.cloudfront.net/downloads/hidro_v6_webr.pdf>.

179. "MEPs focus on Serbian Savamala affair", *Euractiv* (23 Feb. 2017); "The collapse of the rule of law in Serbia: the 'Savamala' case", *PointPulse* (17 May 2016).

180. The Decision of Administrative Court, 19 Apr. 2019. For an overview, see <www.rerі.org.rs/en/construction-works-at-kalemegdan-would-act-against-public-interest-administrative-court-has-ordered-suspension-in-cable-car-construction-works-in-kalemegdan-park/>.

notion of good governance and the rule of law. When these values are violated, political unrest may ensue.[181]

Relatedly, access to environmental information, which is relevant to EIA procedures, as well as to environmental governance more generally, is similarly questionably put into force. The view under EU law is that increased public access to environmental information contributes "to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment".[182] What counts as "environmental information" is, in the EU legal order, construed broadly;[183] yet in Serbia, environmental information has been withheld from the public with the simple excuse that the responsible Minister was away on a business trip with the required documents.[184]

Obviously, this is only a glimpse at some of the major legal challenges of transposing the environmental *acquis* in Serbia. It should be noted that these challenges are not unique to Serbia but common to the Western Balkans, and even further afield.[185] In other words, Serbia is presented here as a case study to show that the environmental *acquis* places demands on administrative and constitutional processes and, as such, is a window on good governance and ultimately the rule of law. Therefore, Chapter 27 should not be treated in isolation from the fundamental chapters of EU governance. Admittedly, the Energy Community Secretariat has taken steps towards assessing a complaint about the hydropower expansion in Serbia,[186] and the European Parliament recently reiterated to the Serbian Government that public participation is necessary in such circumstances.[187] These steps, although important, are *ad hoc*. What is required instead is a critical reassessment and reprioritization of how the EU negotiates the environmental *acquis* in enlargement contexts. It should learn from its previous practices and embrace environmental concerns

181. Spasić, "Protest against small hydropower plants to be held in Belgrade on Sunday", *Balkan Green Energy News* (21 Jan. 2019).

182. Preamble Recital 1, Directive 2003/4/EC on public access to environmental information, O.J. 2003, L 41.

183. See Art. 2(1) ibid.

184. Decision of the Commissioner, No. 07-00-03821/2013-03.

185. Nelson, op. cit. *supra* note 178.

186. See Statement of the Energy Community Secretariat, cited *supra* note 177.

187. On 29 Nov. 2018, the European Parliament adopted a resolution on the 2018 Commission Report on Serbia, calling the Serbian Government to adopt the necessary measures to preserve protected areas with regard to the development of hydroelectricity plants in environmentally sensitive areas. It also encourages the Serbian Government to increase transparency on planned projects through public participation and consultation involving all the stakeholders, see para 31, 2018/2146(INI).

not as peripheral to membership, but as a core element of EU accession, and linked to safeguarding good governance and the rule of law.

5. Conclusions: Looking backwards, going forward

It may appear counterintuitive to ask that we look backwards at the five decades of EU enlargement in thinking about the EU's future. The two narratives – one examining the past, specifically the role played by environmental protection in accession acts to date, and one studying the role of the environmental *acquis* in a current candidate country's accession negotiations, here Serbia – are, nonetheless, interlinked.

The narrative of the past allows us to revisit accession acts and explain how the European market is continuously being recreated. At first glance, these acts may seem dull and timeworn, but upon closer scrutiny we see that accession acts are useful illustrations of national identities. Markets and States are closely intertwined, and the European market takes shape according to compromises, concessions, and strongholds in negotiations between the EU and its prospective members. This process moreover frames how certain EU policies, including that of environmental protection, are understood in the context of the EU project.

Following from this, past accession acts evidence the marginalization of environmental concerns in the enlargement process. This is clear from the lack of mention of environmental concerns in accession criteria beyond the *acquis*, and in the numerous transitional measures that have either lowered domestic environmental standards in order to prevent trade barriers or allowed delays in compliance with the Union's higher environmental standards. What is more, compliance with the environmental *acquis* is presented as a checklist of points to be simply ticked off, rather than as a fundamental political and legal commitment, which is present in the EU's objectives as set out in Article 3(3) TEU.

This institutional de-prioritization of environmental protection may seem unsurprising. Arguably, internal market considerations have often been given more weight than environmental concerns,[188] and breaches of EU environmental law are widely allowed to persist due to an "implementation deficit".[189] Nevertheless, the fact remains that environmental protection is a core EU public policy.[190] What is more, by presenting environmental concerns

188. See e.g. Pontin, *The Environmental Case for Brexit: A Socio-Legal Perspective* (Hart Publishing, 2019), Ch. 1.

189. Inglis, op. cit. *supra* note 104, at 135.

190. See *supra* note 5.

as peripheral in the accession criteria and negotiations, the EU overlooks the interconnectedness between the *acquis* and the rule of law, which is an essential accession criterion.

The second, forward-looking narrative took Serbia as a case study. In this context, the article pointed both to the dynamic nature of EU environmental law and the fact that its safeguarding overlaps with the safeguarding of good governance, and ultimately that of the rule of law. What this shows is that the environmental *acquis* should not be negotiated in isolation from fundamental chapters, nor should it be held back, as part of transitional measures once the candidate country joins. Indeed, recent events show that rule of law breaches are difficult to touch once a candidate country becomes a Member State.[191] This is not to say that transitional measures with regard to Chapter 27 should never be permitted. Yet they must be treated with care, taking into consideration the relationship that such exceptions establish between the EU and the incoming Member State, how they position environmental protection in the EU legal order, and what type of European market they will create.

191. See e.g. Wennerås, "Saving a forest and the rule of law: *Commission* v. *Poland*", 56 CML Rev. (2019), 541.