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**The European Union and shaping of its neighbourhood:
in pursuit of stability, security and prosperity**

by

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October 2018



Acknowledgments

First and foremost, I would like to thank my supervisors at the City Law School, Professor Sir Alan Dashwood QC and Professor Panos Koutrakos for their guidance, encouragement, constructive criticism, patience and support during the whole PhD process.

I am also grateful to all academic and administrative staff at the City Law School for their help and availability to discuss topics related to my thesis.

List of Abbreviations

AA	Association Agreement
CEPS	Centre for European Policy Studies
CLEER	Centre for the Law of EU External Relations
EA	Europe Agreement
EAEC	European Atomic Energy Community
EaP	Eastern Partnership
ECR	European Court Report
ECSC	European Coal and Steel Community
EEAS	European Union External Action
EEC	European Economic Community
ENP	European Neighbourhood Policy
EP	European Parliament
EUI	European University Institute
OJ	Official Journal of the European Union
PCA	Partnership and Cooperation Agreement
SAA	Stabilisation and Association Agreement
TEC	Treaty on Economic Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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Chapter I

Introduction

1. Background to the study

The prospect of the 2004 and 2007 enlargements brought a new dimension to the EU relations with its neighbours. The EU recognised that there was a need to consider an introduction of new mechanisms of rapprochement. The European Neighbourhood Policy (ENP) emerged out of this need not only to implement the EU's Security Strategy,¹ but also to develop a new formula that would address emerging issues and provide a way of engagement that would be attractive enough as an alternative to EU membership. The challenges facing the policy got even bigger when the pool of neighbours covered by the policy was confirmed.² The ENP stretches to cover EU relations with the Eastern neighbours as well as relations with the Southern neighbours. This extensive geographic scope would indicate that the ENP's offer ought to be differentiated to address the diversity of needs and aspirations of these neighbours. There are tools specifically designed for the ENP (eg Action Plans), but the policy also draws on the EU enlargement methodology and instruments. The influence of the latter is particularly visible in the prominent role given to the principle of conditionality. Nevertheless, what works well as an enlargement tool does not necessarily need to be effective for the ENP. This point is in many ways linked to the diversity of neighbours covered by this policy. There are countries aspiring to persuade the EU that they should be offered a prospect of EU membership or, at least, a valuable alternative to it. However, there are others which are not keen on pursuing a close integration model.

Therefore, the EU and its Member States have committed themselves to various initiatives to address the above challenges and to make the ENP more effective in order to achieve a better

¹ European Council, *A Secure Europe in A Better World*, European Security Strategy, Brussels, 12 December 2003.

² The ENP partners are: Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Occupied Palestinian Territory, Syria, Tunisia and Ukraine.

form of engagement with the neighbourhood. These are regional initiatives, namely the Eastern Partnership and the Union for Mediterranean, as well as the Partnership for Democracy and Shared Prosperity that were introduced to give recognition to the specific needs of the neighbours. In recent years, starting in 2015, the process of a complex review the ENP has taken place. It is an attempt to revitalise and make this ‘umbrella’ policy relevant to the changing needs of the EU’s neighbourhood. Furthermore, the Treaty of Lisbon introduced Article 8 TEU that sets out a new legal framework for all EU policies towards its neighbourhood. All these efforts have been tested by a number of developments that tormented the neighbourhood, among them Georgia-Russia crisis in 2008, the Arab Spring of 2011, and more recently situation in Ukraine. These events put the vision of ‘a ring of friends’ to an ultimate test. Moreover, these events have a direct impact on the development of new instruments applied by the EU in its relations with the ENP countries. Therefore, a review of the ENP is apt in order to assess whether introduction of a new type of Association Agreements encompassing a deep and comprehensive free trade area to the spectrum of instruments used in relations with the neighbouring countries strengthens EU’s abilities to shape its neighbourhood. This thesis aims to contribute to the academic debate on the development of the EU’s ability to contribute to peace and prosperity in its neighbourhood in a manner that that would directly translate into its own security.

2. Research outline

The focus on the EU enlargement as the most successful policy of the EU has weakened the ability and readiness of the latter to develop viable alternatives. The ENP was launched when the EU reached its absorption capacity, and therefore is affected by its own weakness. It is a policy that adopted enlargement instruments without a careful review of their relevance to the relations with the ENP countries. The EU has been testing for over a decade the ENP formula to engage with a diverse group of its 16 neighbours covered by this policy. The scholarly writings on the ENP use

different approaches³ and frameworks.⁴ In the case of this thesis, the research starts with an overview of all EU neighbours. All neighbouring countries and territories (not only those covered by the ENP) have to be identified and key elements influencing their relations with the EU teased out. The types of relations and agreements concluded by the EU and a particular neighbour or a group of neighbours serve as a basis for determining the typology of EU neighbours. Furthermore, major challenges influencing developments of EU relations with its neighbours need to be identified. This part of the research provides a comprehensive and interdisciplinary assessment of EU relations with its neighbours that would contribute to the analysis of the new generation of Association Agreements, which follows later in the thesis. These agreements, recently introduced by the EU in its relations with the Eastern Partnership countries, constitute the centre point of this study, and as such need to be thoroughly analysed.

Furthermore, the current debate on the UK withdrawal from the EU must be included in the review of Article 8 TEU, which constitutes the specific neighbourhood provision of the Treaty. The author of the thesis approaches Article 8 TEU as a provision that should serve the EU relations with all its neighbours. The legal character of Article 8 TEU as well as the challenges that its introduction has brought are analysed in Ch III of the thesis. The new Association Agreements are analysed in order to address the question whether they form a measure to upgrade the EU relations with its neighbours. Furthermore, the analysis takes into account the context of the ENP and the potential lineages between the contractual relations and the policy. It is a multilateral

³ See eg an analysis of application of EU democratic values in the legal framework of the ENP towards Armenia, Azerbaijan and Georgia, N Ghazaryan, *The European Neighbourhood Policy and the democratic values of the EU* (Oxford and Portland, Hart Publishing, 2014).

⁴ Bart Van Vooren examines the ENP in the framework of EU external relations, see further B Van Vooren, *EU External Relations and the European Neighbourhood Policy. A Paradigm for Coherence* (London and New York, Routledge, 2012); G Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area, A New Legal Instrument for EU Integration without Membership* (Leiden-Boston, Brill Nijhoff, 2016).

framework based on existing and future treaties between the neighbouring countries and the European Union. Therefore, their role as an ENP instrument needs to be assessed. This requires a good understanding of ENP instruments and, to begin with, at first an overview of the ENP instruments *sensu stricto* needs to be conducted. Although the ENP and its implementation depend heavily on political and soft law instruments, the role of bilateral agreements needs to be fully acknowledged. This is an aspect of relations with the ENP neighbours that is explored by this study in order to contribute to the academic research on the ENP. There are a great number of informative and insightful analyses of the ENP instruments and an extensive body of scholarly writing on bilateral agreements. However, the author argues that the new generation of Association Agreements should also be examined outside of the ENP context. The agreements offer a number of suggestions that can strengthen models of European integration outside the EU and with no need for an umbrella policy such as the ENP. The aim here is to address the research questions formulated in Section 3 of this Chapter, and to present the thesis that would fill the gap by providing a comprehensive review of the new Association Agreements as instruments contributing to stability and prosperity of the EU's vicinity.

The author recognizes that the weakness of the ENP, security threats and the uncertain character of the future of the EU relations with the United Kingdom must necessarily be considered while identifying the best way forward for the EU relations with all its neighbours. There are a number of instruments that are taken into consideration. Apart from those mentioned above, namely the multilateral framework of the ENP and its instruments such as the Action Plans, the study covers regional initiatives that were established to help to achieve the objectives of the ENP, eg the Eastern Partnership.

The analysis of the new generation of Association Agreements is based on the review of the agreements that the EU concluded with Ukraine, Georgia and Moldova. Although the future

of these agreements heavily depends on the political developments in the region, their legal analysis stands a chance to contribute to the pressing academic debate on the EU membership alternatives. It may well be that the original idea to mirror the model presented to the eastern partners in relations with the southern ones will have to be revisited and amended, to open this form of relations to the countries such as the United Kingdom post withdrawal from the EU. Certainly, the potential of the new generation of Association Agreements cannot escape comparisons to agreements currently in force (Partnership and Cooperation Agreements and Euro-Med Agreements). It is also fitting to compare to other models outside the ENP framework, namely the EEA. In particular it serves as a point of important reference in the assessment of law approximation requirements to accepted by Georgia, Moldova and Ukraine. This new model of law approximation is also be compared with the mechanisms introduced in relations with the candidate countries, in particular the model envisaged in the Stabilisation and Association Agreements.

There is also a matter of the influence of current affairs upon development of EU relations with its neighbours that cannot go unrecorded. Although these elements may seem to be distant from a pure legal research exercise, in fact they enrich the legal analysis of relations between the EU, its Member States and neighbouring countries, and therefore ought to be taken into consideration.

3. Research questions

The thesis addresses the following research questions:

(1) Which elements of the evolving legal context of the new model of Association Agreements play an irreplaceable role in developing a sustainable method of shaping EU's neighbourhood?

(2) Does the shift towards application of strict conditionality within the framework of the new contractual relations (new generation of Association Agreements) be a way not only to deepen the integration of the neighbourhood, but also to formulate an alternative to EU membership?

(3) Does this new association model offer enough to encourage commitment of the ENP neighbours to the norms and values of the EU (Article 2 TEU) and their engagement in a complex law approximation process in exchange for the closer economic ties within a deep and comprehensive free trade area?

(4) Overall, does this new proposition make the establishment of an area of prosperity and stability (Article 8 TEU) feasible and attractive to non-ENP neighbours of the EU?

4. Structure of the thesis

The structure of the thesis is provided below:

Chapter I: Introduction

- Background to the study;
- Research questions;
- Methodology.

Chapter II: A review of EU neighbours – historical, geopolitical and legal challenges

This chapter sets the scene to address the above research questions listed in Section 3, and therefore it aims to provide an insight into how the EU's neighbourhood has changed over time due to the successive enlargements of the Union. The enlargement process and the levels of interest in the European integration in respective neighbouring countries directly shape EU's membership composition and character of engagements between the EU and its neighbours. In this section of the thesis, historical and geopolitical approaches are used in order to form a point of reference for the remaining sections of this work. They also contribute to the creation of a comprehensive understanding of factors that shape legal relations between the EU and its neighbours.

Chapter III: The European Neighbourhood Policy: multilateral framework and its instruments

This chapter identifies and assesses the effectiveness of the instruments applied by the EU to implement this policy. This part of the thesis is not offering a comprehensive review of the ENP. Instead, it identifies the features that can assist with the review of the new generation of Association Agreements.

Chapter IV: Article 8 of the Treaty on European Union: vague symbolism or precipitous constitutionalisation of EU policies towards its neighbours?

Article 8 TEU is a novelty introduced by the Treaty of Lisbon that some scholars regard as the constitutionalisation measure of the EU policies towards its neighbours. The chapter examines the origins of this provision, and a strong influence that the ENP had over its formulation. It also provides an analysis of each element of the provision in question, including direct application of the values of the EU as a conditionality tool. There is also an assessment of Article 8 TEU ambitious objectives, as well as an attempt to address its place among common provisions of the Treaty on European Union. Furthermore, the chapter looks at its impact on the ENP and beyond. It also reviews Article 8 TEU and its potential as a legal basis for conclusion of agreements that the EU (and its Member State) can conclude to meet the objectives laid in Article 8(1) TEU.

Chapter V: New generation of Association Agreements

This chapter focuses on the developments leading to conclusion of the new generation Association Agreements as well as their key features. It assesses whether these Association Agreements are complementary to the ENP and its objectives (the approach applied here is to review these agreements as ENP tools *sensu lato*), and whether the political will to upgrade relations with the ENP countries can translate into a new legal framework that will make law approximation its core element enabling an introduction of a deep and comprehensive free trade area for each partner.

The mechanism of conditionality applied in these agreements are compared with the political conditionality used within the framework of the ENP, and the conditionality mechanism used in the enlargement process. This approach seeks to establish whether strict conditionality can be achieved in relations with countries that are not offered a prospect of EU membership.

Chapter VI: Assessment of law approximation envisaged in the new Association Agreements

This chapter closely looks at the model of law approximation envisaged in the new Association Agreements. It examines the notion of law approximation, compares to other models (models of approximation and law application).

Chapter VII: Conclusions

The final part of the thesis offers the overall findings of the study.

5. Literature review

5.1. Introduction

The coverage of the EU relations with its neighbours in the scholarly writing is extensive, and therefore a purposive representative approach is applied here. While the majority of selected works is in the area of EU law, wherever necessary, studies from other fields are taken into account to provide a better understanding of factors that have direct influence on the legal dimension of EU relations with its neighbours. The main focus is on the role played by bilateral agreements in order to facilitate answers to the research questions presented in Section 3.

Special attention is given to the interaction between law, soft law and political instruments applied within the framework of the European Neighbourhood Policy (ENP). The taxonomy chosen for this review is formulated accordingly to support the research outcome. The findings of this review are organised on a thematic bases that serves the principal research hypothesis, namely that, while the effectiveness of the ENP is diminishing, the bilateral relations between the EU (its Member States) and the neighbouring countries must find the best way forward.

It needs to be emphasised that this is not an exhaustive review of the EU relations with its neighbours. It only highlights the issues that needed to be taken into consideration throughout the process of writing the thesis and should be viewed as a sign posting tool.

5.2. *The European Neighbourhood Policy and its context*

5.2.1. *The European Neighbourhood Policy: a historical perspective*

A historical analysis of developments that led to the creation of the ENP, enables a better understanding of the current state of play. It helps to identify factors that influenced the formulation of this policy, its modifications and additions. It also accommodates identification of the aims that the ENP it supposed to serve. There are a number of publications authored by, *inter alia*, Christophe Hillion⁵, Marise Cremona⁶ and Bart Van Vooren,⁷ that provide a valuable source of information that ought to be taken into account. Marise Cremona examined the ENP as a [new] development in the EU's external action, noted that it should be regarded as 'a specific implementation of the Security Strategy'⁸ and provided an overview of the policy's objectives as well instruments and methodologies. Furthermore, an article by Aaron Magen ought to be noted for its added value to the interdisciplinary approach.⁹ He presented an insightful account of the assessment of the ENP made by international law and international relations scholars. The publication authored by Bart Van Vooren provides a more up to date account of the ENP developments.¹⁰

⁵ See eg C Hillion 'Mapping-Out the New Contractual Relations between the European Union and Its Neighbours: Learning from the EU-Ukraine 'Enhanced Agreement'' (2007) 12 *European Foreign Affairs Review* 169; C Hillion and M Cremona 'L'Union fait la force? Potential and limits of the European Neighbourhood Policy as an integrated EU foreign and security policy' (Florence, European University Institute, EUI Working Paper, Law No 39, 2006).

⁶ See eg M Cremona, 'The European Neighbourhood Policy. More than Partnership?', in M Cremona (ed), *Developments in EU External Relations Law* (Oxford, Oxford University Press, 2008) 244.

⁷ Van Vooren, *EU External Relations Law and the European Neighbourhood Policy...* (n 4).

⁸ Cremona, 'The European Neighbourhood Policy. More than Partnership?' (n 6).

⁹ A Magen, 'The Shadow of Enlargement: Can the European Union Neighbourhood Policy Achieve Compliance?' (2006) 12(2) *Columbia Journal of European Law* 383.

¹⁰ B Van Vooren, 'The European Union as an international actor and progressive experimentation in its

5.2.2. *The European Neighbourhood policy in the context of EU external relations*

Bart Van Vooren offers a thorough review of the ENP within the framework of EU external relations¹¹ as well as a case study on the use of soft law in EU external relations.¹² This is a valuable contribution, in particular the assessment of the legal effect of the ENP action plans and their relations to the Partnership and Cooperation Agreements as well as the Association Agreements. These are used as a point of reference in Ch V of the thesis, where the institutional framework of the new generation of Association Agreements is assessed. Bart Van Vooren examined the ENP as ‘paradigmatic for coherent external action on the basis of a fragmented legal framework.’¹³ He also provided a review of the joint ownership imposed by the ENP understood as ‘an expression of that commitment to multilateralism.’¹⁴ It is regrettable that his account of the ENP in the broad context of EU external relations did not offer an interpretation of Article 8 TEU.

neighbourhood’ in P Koutrakos (ed) *European Foreign Policy: Legal and Political Perspectives* (Cheltenham, Edward Elgar Publishing, 2011) 147. He also offers an insight into the failure of the ENP’s geographic comprehensiveness.

¹¹ Van Vooren, *EU External Relations Law and the European Neighbourhood Policy...* (n 4).

¹² B Van Vooren, ‘A Case Study of ‘Soft Law’ in EU External Relations: The European Neighbourhood Policy’ (2009) 34 *European Law Review* 696.

¹³ Van Vooren, *EU External Relations Law and the European Neighbourhood Policy...* (n 4) 4.

¹⁴ *ibid* 256.

5.2.3. *The European Neighbourhood Policy: a comprehensive approach?*

The diversity of the ENP partners can be regarded as a challenge to provide a well-balanced and informed account of developments towards all ENP partners. The following publications need to be acknowledged. Firstly, Steven Blockmans and Adam Lazowski¹⁵ managed to provide a comprehensive anthology of EU relations with its neighbours. This volume includes all geographical neighbours and serves as a resourceful account of the EU engagement with its neighbouring countries and territories. Nevertheless, due to the character of this book, there are certain shortcomings. In the case of the ENP countries the analysis of their bilateral relations with the EU does not include sufficient coverage of the role played by the ENP instruments.¹⁶ There is also an obvious limitation of this work as it was published in 2006. Nevertheless, it offers a great historical value and presents the only comprehensive legal appraisal of EU relations with its neighbours to date.

Secondly, an edited volume by Richard G Whitman and Stefan Wolff (eds)¹⁷ also needs to be noted. It gives a more up to date account of EU relations with the ENP partners. It also looks at the interaction between the ENP and transatlantic relations as well as EU relations with Russia, which form a value added of this volume. This publication offers a review of the normative power

¹⁵ S Blockmans and A Lazowski (eds), *The European Union and Its Neighbours: A Legal Appraisal of the EU's Policies of Stabilisation, Partnership and Integration* (The Hague, TMC Asser Press, 2006).

¹⁶ A Labedzka, 'The Southern Caucasus' in S Blockmans and A Lazowski (eds), *The European Union and Its Neighbours: A Legal Appraisal of the EU's Policies of Stabilisation, Partnership and Integration*, (The Hague, TMC Asser Press, 2006) 575.

¹⁷ R G Whitman and S Wolff (eds), *The European Neighbourhood Policy in Perspective. Context, Implementation and Impact* (London, Palgrave Macmillan, 2012).

approach to the assessment of the ENP.¹⁸ Overall, this book gives a comprehensive review of the ENP, however due to its multidisciplinary character it does not provide an insightful legal analysis of bilateral relations within the ENP framework.

A comprehensive legal analysis of the developments of the EU relations with its neighbours would form a valuable addition to the scholarly writing on the ENP.

5.3. *Article 8 TEU*

The introduction of the neighbourhood provision to the Treaty on European Union was not given much of attention in the general commentaries on the Treaty of Lisbon.¹⁹ However there are a number of valuable contributions focusing solely on Article 8 TEU. In particular an article by Peter Van Elsuwege and Roman Petrov²⁰ ought to be noted for its insightful value. Nevertheless, their work as well as publications by Christophe Hillon²¹ do not offer a sufficient account of the role played by this provision in the negotiations of the new generation of Association Agreements

¹⁸ I Manners, 'As you like it European Union Normative Power in the European Neighbourhood Policy' in R G Whitman and S Wolff (eds), *The European Neighbourhood Policy in Perspective. Context, Implementation and Impact*, (London, Palgrave Macmillan, 2012) 29.

¹⁹ See eg P Craig, *The Lisbon Treaty. Law, Politics, and Treaty Reform* (Oxford, Oxford University Press, 2010); J-C Piris, *The Lisbon Treaty. A Legal and Political Analysis* (Cambridge, Cambridge University Press, 2010).

²⁰ P Van Elsuwege and R Petrov, 'Article 8: Towards a New Generation of Agreements with the Neighbouring Countries of the European Union?' (2011) 36 *European Law Review* 688.

²¹ C Hillon, 'Anatomy of EU norm export towards the neighbourhood. The impact of Article 8 TEU' in R Petrov and P Van Elsuwege (eds), *The Application of EU Law in the Eastern Neighbourhood of the EU. Towards a Common Regulatory Space?* (London and New York, Routledge, 2014) 13; C Hillon 'The EU neighbourhood competence under article 8 TEU' (Stockholm, Swedish Institute for European Policy Studies, Policy Paper No 69, 2013).

with Georgia, Moldova and Ukraine. In the case of the latter the work of Alan Mayhew²² requires recognition. Furthermore, these publications on Article 8 TEU do not provide a comprehensive review of this provision that would go beyond the ENP framework. Although the link between the ENP and Article 8 TEU provision is clear, there are issues that are still unexplored. There is no review of Article 8 TEU as one of the TEU common provisions, the principle of good neighbourliness is not discussed in depth, and the relationship between this principle and the principle of loyal cooperation deserves to be analysed as well. Furthermore, in the light of the UK withdrawal from the EU, the future of Article 8 TEU as a foundation of the future EU-UK relations should be investigated.

5.4. The European Neighbourhood Policy and the enlargements of the EU

The work on the ENP cannot be conducted without taking into consideration scholarly writings on EU enlargement. After all, the ENP was modelled on enlargement and uses a number of instruments originally designed to address the widening of the EU. It is worth noting a book by Allan F Tatham²³ for its comprehensive approach. His work offers not only a historical account of successive enlargements but also a review of the legal harmonisation and institutional requirements imposed upon candidate countries. His analysis is valuable for Ch VI of this study, where the model of legal approximation envisaged in the new generation of Association Agreements is discussed.

²² See eg A Mayhew, 'Negotiations on an Association Agreement between the European Union and Ukraine' (Wider Europe, Working Paper 8, 2010).

²³ A F Tatham, *Enlargement of the European Union* (The Hague, Kluwer Law International, 2009).

5.5. Typology of agreements: the EU and its neighbours

The above-mentioned comprehensive review of the legal instruments, in particular the new generation of Association Agreements, requires a thorough understanding of the agreements concluded by the EU with its neighbours. There are a number of insightful legal analyses of the agreements concluded by the EU with third countries. Among them is Marc Maresceau,²⁴ who offers a valuable account of the mixed agreements. Furthermore, publications devoted to the agreements concluded with a particular neighbour are vital for this review. For example, a publication by Christophe Hillion²⁵ provides a useful account of contractual relations with Russia and Ukraine and also offers a helpful legal review of the Partnership and Cooperation Agreements. His work is to be taken into account when the review of the Association Agreements with Georgia, Moldova and Ukraine is conducted. There is also a comprehensive study of the EU-Ukraine Association Agreement authored by Guillaume Van der Loo.²⁶

²⁴ M Maresceau, 'A Typology of Mixed Bilateral Agreements', in C Hillion, P Koutrakos (eds), *Mixed Agreements Revisited. The EU and its Member States in the World* (Oxford-Portland, Hart Publishing, 2010) 11.

²⁵ C Hillion, 'The evolving system of European Union external relations as evidenced in the EU Partnerships with Russia and Ukraine' (PhD Thesis, University of Leiden, 2005).

²⁶ Van der Loo (n 4).

5.6. Conditionality

The interdependence between internal reforms, socio-economic transformation and democratisation of the EU neighbouring partners and the enhancement of the relations between the EU and its ENP partners forms one of the main characteristics of the ENP. Nevertheless, the concept of conditionality is not new, as it had been developed, long before the ENP, for the purposes of the pre-accession policy. Dimitry Kochenov's account of the failure of the application of conditionality in the fields of democracy and the rule of law towards candidates for EU membership gives a useful basis to assess the role of conditionality in the relations with the ENP countries.²⁷ It is yet another reminder that borrowing from enlargement may not be a successful method for developing a policy towards the EU's neighbourhood. Furthermore, it was not just the concept but also all shortcomings, such as a deficit of clear benchmarks and low thresholds that were transferred to the ENP. Therefore, the application of conditionality as an ENP tool, raises a number of questions. First of all, it is a matter of making the engagement with the EU attractive within the ENP context. There are no clear incentives, however, conditionality is imposed on the ENP partners. Although differentiation in approach to the ENP countries may be considered a positive way to address the diverse pool of the ENP states, it leaves the matter of compliance assessment and consistency open.

The review of matters related to conditionality within the ENP framework, cannot be discussed without a reference to the EU values. As noted by Marise Cremona, the role played by

²⁷ Dimitry Kochenov provides a 6 point scale of deficiency of the conditionality, see further D Kochenov, *EU Enlargement and the Failure of Conditionality. Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Alphen aan den Rijn, Kluwer Law International, 2008) in particular at 300-310.

values in strengthening ‘the Union’s identity, its self-perception and self-projection’²⁸ has been applied extensively in EU external relations. The evolution of application of values in external relations was marked by the Laeken Declaration.²⁹ The Treaty of Lisbon provided for constitutionalisation of the EU’s determination to promote its values³⁰ and international law. Further characterisation of the role values ought to play in relations with neighbours is given in Article 8 TEU. This provision sets the aim of establishing an area of prosperity and good neighbourliness, founded on EU values. However, it should be emphasised it has been clear from the inception of the ENP that these values and their export play a vital role within the ENP’s framework.³¹ The promotion of EU norms and standards to its neighbours, insistence on the neighbours’ respect for the fundamental rights advocated by the EU developed into shared values which evolved even further to constitute an essential condition of gradual enhancement of the relations. Moreover, shared values also form an indispensable part of contractual relations between the EU and its neighbours. Shift towards promotion of common values, and not only EU values, was observed in 2008 when a review of implementation of the European Security Strategy was completed.

²⁸ M Cremona, ‘Values in EU Foreign Policy’ in M Evans and P Koutrakos (eds), *Beyond the Established Legal Orders* (Oxford and Portland, Hart Publishing, 2011) 275.

²⁹ Laeken Declaration on the future of the European Union, Annex I to the Presidency Conclusions, Laeken, 14-15 December 2001.

³⁰ S Weatherill, *Law and Values in the European Union* (Oxford, Oxford University Press, 2016); E Herlin-Karnell, ‘EU values and the shaping of the international legal context in D Kochenov and F Amtenbrink, *The European Union’s Shaping of the International Legal Order* (Cambridge, Cambridge University Press, 2014) 89.

³¹ Cremona, ‘The European Neighbourhood Policy. More than Partnership?’ (n 6) 256.

5.7. Law approximation

Chapter VI of the thesis offers a review of the model of law approximation envisaged in the Association Agreements concluded with Georgia, Moldova and Ukraine.³² This assessment benefits from an analysis of existing models employed in numerous agreements concluded by the EU with its neighbours; therefore a number of publications on law approximation were reviewed. These included work by Roman Petrov and Paul Kalinichenko³³ providing a thorough review of the Europeanisation of the Russian and Ukrainian legal systems. Furthermore, an insight into legislative techniques is required to conduct the review comprehensively. The work on Ch 6 benefits from findings of Helen Xanthaki on legal transplants.³⁴

5.8. Conclusions

This review proves that there is an extensive body of literature on the EU relations with its neighbours. There are also many publications discussing various agreements concluded by the EU (sometimes jointly with the Member States) and its neighbours. However, it would be beneficial to provide a comprehensive review of the new generation of Association Agreements within the framework of the ENP. This assessment is supported by a comparative analysis of these

³² The signing of the agreement will depend of the political developments in the respective countries and may be subject to change. However, the draft texts of these agreements are available and can be assessed.

³³ R Petrov and P Kalinichenko, 'The Europeanization of third country judiciaries through the application of the EU acquis: the cases of Russia and the Ukraine' (2011) 60(2) *International & Comparative Law Quarterly* 325.

³⁴ H Xanthaki, 'Legal Transplant in Legislation: Defusing the trap' (2008) 57(3) *International & Comparative Law Quarterly* 659.

agreements and the agreements concluded in the past with other ENP countries as well as with non-ENP neighbours, eg the EEA Agreement. This approach facilitates a comprehensive analysis of the new agreements that will contribute to the research on the agreements concluded by the EU with the third countries. Furthermore, the study, in particular sections on law approximation designed for the Eastern Partnership countries, could contribute to the current academic debate on the effectiveness of this model of an upgrade of the EU relations with its neighbours. Finally, this thesis also aims to assess how the model offered to the three Eastern Partnership countries could be adopted to the needs of other EU neighbours.

6. Methodology

To address the research questions identified in Section 3, a document desk review is being conducted. The initial mapping of resources that should be taken into consideration to support work on this dissertation identified a number of factors that has shaped the way this review is being organised. One cannot say that there is a dearth of research material on the EU relations with its neighbours. The leading method of this exercise is the legal research understood as a process of reviewing and analysing the following sources of information:

- Legislation;
- Case law;
- Legal literature.

In addition, a policy review is selected as a complementary tool, and therefore these sources of information are also taken into consideration:

- Policy documents;
- Statements, speeches and press releases;
- Policy briefs and working papers by leading think tanks in the field of European studies.

This approach helps to establish a comprehensive view on the developments of the EU relations with its neighbours. The specific nature of these relations justifies application of this interdisciplinary method. This area of law is heavily influenced by historical and political factors, and therefore the legal analysis benefits from the support of other areas of studies, in particular international relations and political science. Furthermore, understanding of the key economic

principles is necessary for the analysis of the economic co-operation, in particular the new offer of the Deep and Comprehensive Free Trade Area.

Furthermore, the comparative method is applied to look at the ENP as a policy that was modeled on enlargement. In particular it also serves the parts of the research devoted to review of the new generation of Association Agreements against other agreements concluded with third countries and the principle of conditionality. The new generation of association model is also assessed against agreements concluded with the neighbours outside the ENP, in particular the European Economic Area.

Chapter II

A diverse pool of EU neighbours – historical, geopolitical and legal challenges

1. Introduction

In 2013 Croatia - a Western Balkan state touched by the atrocities of turbulent decomposition of the Social Federal Republic of Yugoslavia - became to date the latest member of the European Union marking another turn of contemporary European history.³⁵ The European Union with its impressive deepening and widening mechanisms³⁶ and against current crisis still dictates the dynamics of international relations on the European continent and beyond. As noted by Ian Manners, 'EU matters at least as much as what it does, in terms of impact on others.'³⁷ Indeed the EU's impact goes beyond the EU relations with third countries and often transforms relations among those outside the EU.

This chapter aims to provide a brief outline of the evolution of the EU relations with its neighbours and to identify the issues that influence the dynamics of these relations. Bearing in mind the limitations imposed by the character of a single chapter, it is a precarious task; nevertheless it is necessary one to take on. The geographical proximity and political significance of the neighbours for the development of the EU external relations needs to be addressed. To facilitate this exercise, relations with the neighbouring countries will be reviewed and grouped by levels and models of their integration with the EU. There are, however, issues specific to each country that may influence their relations with the EU and others, and these are highlighted to

³⁵ P Maldini and D Pauković (eds), *Croatia and the European Union. Challenges and Developments* (London and New York, Routledge, 2017).

³⁶ As summarised by Allan F Tatham: 'widening and deepening have reinforced each other and can be regarded as mutual preconditions for the other's successful achievement,' Tatham, *Enlargement of the European Union* (n 23) 3.

³⁷ I Manners, 'Normative Power Europe: A Contradiction of Terms?' (2002) 40(2) *Journal of Common Market Studies* 238.

draw the full picture of the EU relations with its neighbours. Indeed the author decided to include all neighbours of the EU in order to examine the scale of the EU influence and to go beyond the dominating approach in the EU studies devoted to a particular category of EU neighbours. In her view, drafting a panoramic spectrum of relations with EU neighbours serves the remaining chapters of this thesis and facilitates a better formulation of answers to the research question of this study.

This chapter, being complementary to the rest of this work, escapes the discipline of a strict legal analysis. Instead, it draws on other fields of research, particularly history, political science and international relations. In doing so, it aims to provide a more comprehensive account of the context within which the legal dimension of the analysis operates, hence strengthening.

Overall, this part of the thesis cannot escape the additional challenge of identifying the definition of neighbour applied by the EU. Article 8 of the Treaty on European Union identifies neighbouring countries as those with which an area of prosperity and good neighbourliness should be established. The evaluation of the relations among European states is faced with two rather paramount issues: the geography of the continent and geographic position of each European state. This statement immediately leads to questions on the delimitation of the continent's borders and the impact of the geographic scope of the European integration. The second factor, closely linked to the first one, is the history of the nations of the European continent and their relations not only among themselves but also with their former colonies³⁸ and countries from other parts of the world.

³⁸ Impact of Member States with their colonies and former colonies on the development of external relations of the EU cannot be unnoticed. Roots of conditionality and politicised aid relations can be easily linked to these relations. See M Broberg, 'The European Union's Legal Ties with Its Former Colonies. When Old Love Never Dies' (Copenhagen, Danish Institute of International Studies, Working Paper,

In many ways the concept of ‘neighbour’ is ambiguous. ‘In the Judeo-Christian tradition, one’s neighbour is someone to care for and even love, a neighbour is also someone inherently other.’³⁹ According to the English language dictionary, a neighbour is a tangible and visible entity but also an entity that can cast a shadow. The shadow can be interpreted as an influence or a state of being that motivates action and such interpretation can serve the purpose of this chapter.⁴⁰

The analysis of the contemporary European Union cannot be completed without understanding of its history. Without a doubt, the World War II and the ensuing bipolar division of the world that dominated modern history for over four decades influence the dynamics of European integration. The European project was an attempt to establish a new order. The creation of the European Communities proved to be a successful attempt that introduced a new dimension of relations among states.⁴¹ It not only influenced relations among founding states, but it was equally important for the development of the European integration, as it attracted more and more states willing to join or at least secure close and special relationship with the EU.

Over the years the (Communities) Union transformed to reflect the world changes, and to reflect deepening of integration within EU borders, as well as transformation of the division (allocation) of competences. The EU moved from inward looking model⁴² of strictly limited

2011); R Adler-Nissen and U Pram Gad (eds), *European Integration and Post Colonial Sovereignty Games. The EU’s Overseas Countries and Territories* (London and New York, Routledge, 2013).

³⁹ Cremona, ‘The European Neighbourhood Policy. More than Partnership?’ (n 6) 253.

⁴⁰ See eg N Chaban, M Knodt, J Headley, ‘The EU and Its Eastern Neighbours – Perceptions and Strategic Dialogue in the Region’ (2018) 23(1) *European Foreign Affairs Review* 1.

⁴¹ J Pinder, *The Building of the European Union* (Oxford, Oxford University Press, 1998) 3.

⁴² C Hill, M Smith, *International Relations and the European Union* (2nd edn, Oxford, Oxford University Press, 2011) 9.

economic integration⁴³ focused on creation of a mechanism to manage and control Franco-German antagonism⁴⁴ to a multi-dimensional deep and comprehensive model. Progressive character of the EU influences its relations with the neighbours,⁴⁵ while deepening of internal EU integration equally influences evolution of relations with the neighbours. The latter influences introduction of new dimensions of external relations, forms of engagement with third countries.⁴⁶

A stable, secure and democratic neighbourhood has been the EU's objective from the very beginning of the integration process. The big challenge facing the EU is to find effective ways to set up relations with the neighbours that would strengthen stability across the continent, develop strong economic links and address particular issues facing the neighbours.

The analysis is organised in the following way: Section 2 is dedicated to enlargements, evolution of the process, widening geographical scope of the enlarged EU and issues emerging during the process. Section 3 discusses the EFTA-EEA model of integration. Section 4 deals with the EU relations with Liechtenstein, while the bilateral EU-Switzerland relations are discussed in Section 5. It is followed by highlights of the EU relations with the European microstates. Section

⁴³ 'Recognising that Europe can be built only through practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development,' Preamble of the Treaty establishing the European Coal and Steel Community, text available at <http://aei.pitt.edu/37145/1/ECSC_Treaty_1951.pdf> accessed 15 July 2018.

⁴⁴ 'Resolved to substitute for age-old rivalries the merging of their essential interests; to create, by establishing an economic community, the basis for a broader and deeper community among peoples long - divided by bloody conflicts; and to lay the foundations for institutions which will give direction to a destiny henceforward shared', Preamble of the Treaty establishing the European Coal and Steel Community.

⁴⁵ Hill, Smith (n 42) 15.

⁴⁶ Environmental Protection serves as a good example of the EU policy that has become a pivotal element of EU relations with its neighbours, eg EU-Ukraine Association Agreement.

7 reviews geopolitical challenges of the ENP states. The relations with the Russian Federation are discussed in Section 8, and the final Section (9) offers conclusions.

2. *Enlargement*

Enlargement of the European Union has become a core element of the EU's development. The impact of enlargement is diverse.⁴⁷ The successive enlargements and deepening of integration within the EU significantly changed the way EU borders are perceived. They are in constant flux that makes their perception softer.⁴⁸ New members change internal dynamics, bring their interests that influence external relations with new neighbours as the borders of the EU move.⁴⁹

The six founding Member States created an organization open to other European countries.⁵⁰ This openness has become a driving force of the integration of the European states. In over sixty years of existence, the (European Communities) European Union outgrew their own foundations but remain true to original values of founding fathers aiming at creation of an

⁴⁷ On impact of enlargement see, *inter alia*, A Dashwood, 'The Impact of Enlargement on the Union's Institutions', in C Hillion, *EU Enlargement. A legal Approach. Essays in European Law* (Oxford-Portland, Hart Publishing, 2004) 45; M Cremona, *Enlargement: A Successful Instrument of EU Foreign Policy. European Union Law for the Twenty-First Century* (Oxford-Portland, Hart Publishing, 2004); V Curzon Price, A Landau and R G Whitman, *The Enlargement of the European Union: Issues and Strategies* (London, Routledge, 1999); A F Tatham (n 23); A Ott and K Inglis (eds), *Handbook on European Enlargement* (The Hague, TMC Asser Press, 2002); C Preston, *Enlargement and Integration in the European Union* (London, Routledge, 1997); D Kochenov, *EU Enlargement and the Failure of Conditionality. Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (n 27).

⁴⁸ J Zielonka, *Europe as Empire* (Oxford, Oxford University Press, 2006) 143.

⁴⁹ M Comelli, E Greco and N Tocci, *From Boundry to Borderland: Transforming the Meaning of Borders in Europe Through the European Neighbourhood Policy* (Rome, Istituto Affari Internazionali, 2006).

⁵⁰ Originally the legal bases for accession to the EEC was the then art 237 TEC; now art 49 TEU, the ECSC – Article 98 ECSC, and the EAEC – Article 205 EAEC.

open and developing organization.⁵¹ The massive growth of membership of the (Communities) Union in itself contributes to historical changes of the way Europe is currently perceived. To date a large group of 22 countries joined the founding members becoming a proof that the EU is directly contributing to ‘the ending of the division of the European continent.’⁵² However, the question remains whether the EU is capable ‘to create firm bases for the construction of the future Europe’⁵³, and what role will the EU neighbours play.

Furthermore, the recent years brought a new dimension to the European integration process. The Treaty of Lisbon introduced Article 50 TEU, and based on the outcome of the 2016 referendum, the United Kingdom is testing the procedure of disintegration leading to its withdrawal from the EU.⁵⁴

The legal bases of enlargement evolved from the focus on economic dimension of integration⁵⁵ to current structure of the enlargement provision where importance of values and solidarity is acknowledged.⁵⁶ Although the provision refers to ‘any European State’, a definition of

⁵¹ Declaration of 9 May 1950 < <https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-204-en.pdf>> accessed 10 September 2018.

⁵² Third paragraph of the Preamble of the Treaty on European Union.

⁵³ *ibid.*

⁵⁴ See eg P Eeckhout and E Frantziou, ‘Brexit and Article 50 TEU: Constitutional Reading (London, UCL European Institute, Working Paper, 2016).

⁵⁵ ‘Any European State may request to accede to the present Treaty. It shall address its request to the Council, which shall act by unanimous vote after having obtained the opinion of the High Authority; the Council shall also determine the terms of accession, likewise acting unanimously,’ Art 98 ECSC.

⁵⁶ Any European State **which respects the values** referred to in Article 2 [**respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities**. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail]and is committed to promoting them may apply to become a member of the Union, art 49 TEU.

a European state is rather difficult to find and such attempts strengthens the heat of political debates especially in countries away from undeniable heart of Europe. The European Commission made an attempt in 1992 by providing the following description: ‘the term ‘European’ has not been officially defined. It combines geographical, historical and cultural elements which all contribute to the European identity. The shared experience of proximity, ideas, values, and historical interaction cannot be condensed into a simple formula, and is subject to review each succeeding generation.’⁵⁷

Article 49 TEU refers to ‘conditions of eligibility’. The European Council in Copenhagen agreed these in 1993 as follows:

- a) Political criteria: stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.
- b) Economic criteria: a functioning market economy and the capacity to cope with competition and market forces in the EU.
- c) Capacity to take on the obligations of membership including adherence to the objectives of political, economic and monetary union.
- d) Adoption of the entire body of European legislation and its effective implementation through appropriate administrative and judicial structures.⁵⁸

The Copenhagen criteria provide framework for accession processes in the acceding countries. These criteria have also been influencing the process of formulating instruments of the ENP (see further Ch III).

⁵⁷ ‘Europe and the Challenge of Enlargement’, *Bulletin of the European Communities*, Supplement 3/92, Brussels, 24 June 1992, 11.

⁵⁸ European Council, Conclusions of the Presidency, SN 180/1/93 REV 1, Copenhagen 21-22 June 1993.

The enlargement process is not only about the abilities of the candidate countries. It is also a matter of Union's own capacity, which was noted by the European Council in Copenhagen: "The Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in general interest of both the Union and the candidate countries."⁵⁹ The challenges of the EU's absorption capacity were visible as early as in the early 1990's to become clearly visible after 1995.⁶⁰ The aim of the principle is to ensure that the speed of the European integration process is not disturbed by the accession of new Member States. It can be regarded as a safety valve⁶¹ for the Member States as they can always delay enlargement on the grounds that the EU is not ready to absorb new members.⁶²

The review of analysis of the successive enlargements shows that each was considered to have a massive impact on the (Communities) Union.⁶³ Indeed, the geographical scope spread, population numbers grow, but with every enlargement new challenges are imposed on both – EU institutions and public administrations of new Member States. Each enlargement also carries

⁵⁹ *ibid.*

⁶⁰ K Inglis, 'Pre-accession and accession treaty legal practice: insights and lessons for the future', in H Kabaalioglu, A Ott and A F Tatham (eds), *EU and Turkey: Bridging the Differences* (Maastrich University and Yeditepe University, 2011) 8.

⁶¹ M B Christensen, *EU-Turkey relations and the functioning of the EU* (Copenhagen, Danish Institute for International Studies, 2009) 5.

⁶² See eg M Emerson (ed), 'Just what is this absorption capacity of the EU?' (Brussels, Centre for European Policy Studies, CEPS Policy Brief No 113, 2006).

⁶³ For example from a vast pool of descriptions on 1981 and 1986 enlargements: 'The European Community is confronted with [...] fundamental challenges, E Grabitz and B Langeheine, *Legal problems related to a proposed "Two Tier System" of integration within the European Community*' (1981) 18 *Common Market Law Review* 33; 2004 enlargement: [it] changed the nature of the European Union profoundly, E Brimmer and S Fröhlich (eds), *The Strategic Implications of European Union Enlargement, Centre for Transatlantic Relations* (Washington, The John Hopkins University, 2005) vi.

massive political and historical weight, each enlargement increases Union's diversity and heterogeneity.

It is worth noting that when the United Kingdom (along with Denmark and Ireland) joined the Communities in 1973 a number of issues were highlighted. Not only the United Kingdom revisited its policy towards Europe under a strong influence of international developments: progressing decolonization, the 1956 Suez crisis, American eagerness for the UK to join as well as clear bilateral US-Soviet dominance on the international scene. Not less important were the internal developments within the Communities that were strengthening the international impact that the UK was longing for. Lastly, and particularly relevant to the current debate on the future relations of the UK with the EU, it needs to be highlighted that the accession to the then Communities directly contributed to the stability and peace in the United Kingdom and Ireland. The UK-Irish relations improved and the peace process in Northern Ireland was positively influenced by the accession process.⁶⁴

2004 marked the biggest of the EU enlargements to date when eight central and eastern European countries along with Malta and Cyprus joined the EU. The membership of the central and eastern European countries is, on one hand, regarded as a contribution to a peaceful conclusion of the east-west divide. The accession process for this group of the countries started in late 80's of the XX century. The EU provided support for reforms of these countries. 'Big bang' enlargement holds geostrategic significance. However, the accession of these countries also

⁶⁴ See eg P Hainsworth, 'Northern Ireland and the European Union' in A Aughey and D Morrow (eds), *Northern Ireland Politics* (London and New York, Longman, 1996) 129.

contributed to the enlargement fatigue⁶⁵ and urged the EU to rapidly develop a policy that would prevent accession of other eastern European countries (see further Ch IV).

To date the (Communities) Union gradually expanded to cover vast areas of the continent. The impact of the changing EU membership on relations with the neighbours remaining outside of the EU is profound. Furthermore, each Member State has complex relations with not only other Member States but also countries (neighbours) outside the EU. These relationships often influence the way the EU policies are developing. An example of the Polish and Swedish initiative on the Eastern Partnership serves as a good example to support this argument⁶⁶ (see further Ch III).

2.1. Turkey

The reasons behind Turkey's drive to take an active part in the process of the European integration were motivated by the matters that shaped by country's foreign policy after the Second World War: the Soviet threat as well as the Turkey-Greece relations.⁶⁷ The country's size, growing population, economic developments and religious character cannot go unnoticed. Turkey's quest to join the EU also contributes to the lively discussion on borders of Europe, its identity and character.

⁶⁵ See eg J O'Brennan, 'On the Slow Train to Nowhere? The European Union, 'Enlargement Fatigue', and the Western Balkans' (2014) 19(2) *European Foreign Affairs Review* 221.

⁶⁶ Polish-Swedish proposal on the Eastern Partnership was presented to the EU General Affairs and External Relations Council in May 2008 and launched in 2009, L Delcour, *Shaping the Post-Soviet Space? EU Policies and Approached to Region-Building* (Farnham, Ashgate Publishing, 2011) 83.

⁶⁷ Ç Özen, 'Neo-functionalism and the Change of Dynamics of Turkey-EU Relations' (1998) III (3) *Journal of International Affairs* 39.

Turkey relations with the EU can be used as a study on how a lengthy process of balancing on the edge between inclusion and exclusion of the country in the process of European integration has the power to influence beyond the EU-Turkey relations. The beginnings of the EC/EU – Turkey relations prove that the relationship is diverse and fluctuating. The conclusion of Ankara Agreement⁶⁸ was ahead of its time and beyond the then status of Turkish internal structure and governance. The Agreement not only aimed at promotion of ‘the continuous and balanced strengthening of trade and economic relations’ by establishing a customs union between Turkey and EC but more importantly it was meant to facilitate the accession of Turkey to the EEC at a later stage (Article 28). Due to a number of political developments in the 1970’s and 1980’s implementation of the Association Agreement was put on hold. It was revived in 1986 and a year later Turkey formally applied for the European Communities membership. Two years later the Commission came to a conclusion that negotiations with Turkey should not start due to a number of economic and political reasons. In the case of the latter the Commission specifically named the rule of law as well as the respect and protection of minorities.⁶⁹ This is an undoubtful proof that the political criteria (conditionality) had been applied long before the Copenhagen criteria were formulated.⁷⁰ Despite the negative opinion, Turkey continued to implement reforms and managed to meet necessary requirements to enter into a customs union.⁷¹ Not all of Turkey’s efforts to

⁶⁸ Agreement establishing an Association between the European Economic Community and Turkey, English version, [1977] OJ L361/29.

⁶⁹ ‘Although there have been developments in recent years in the human rights situation and in respect for the identity of minorities, these have not yet reached the level required in a democracy’, European Commission, ‘Opinion on Turkey’s request for accession to the Community’, Brussels, 20 December 1989, SEC (89) 2290 final, 7.

⁷⁰ European Council, SN 180/1/93 REV 1, Copenhagen, 21-22 June 1993.

⁷¹ Article 5 of the Ankara Agreement states: The final stage shall be based on the customs union and shall entail closer coordination of the economic policies of the Contracting Parties. Rules for implementing the final phase of Customs Union were laid down in the Decision 1/95 of the EC-Turkey Association Council on implementing the final phase of the Customs Union (94/142/EC) [1996] OJ L 35/1.

convince the EU to commence accession negotiations were welcomed by the EC/EU. Turkey threatened to veto accession of the central and eastern European countries to NATO as a tool to gain positive opinion and decision to start their accession negotiations with the EU, however such attempts were met by strong disapproval of the EU officials.⁷² The fact that Turkey was not invited along with the central and eastern European countries to commence accession negotiations added to tensions and resulted in suspension of political dialogue for two years.⁷³ In 1999, the European Council (Helsinki) granted Turkey the status of a candidate country.⁷⁴ At the same time the principle of differentiation was adopted. It meant that each candidate's length of negotiations depended on its level of readiness for accession. The principle was applied to Turkey, as it could not be grouped with other candidates. This rule also meant that the EU did not have to commit to a particular timeframe, and therefore could keep Turkey 'on the accession track without making specific commitments.'⁷⁵ The decision to open negotiations was taken in 2004. The EU's Member States were divided and disagreements associated this step. It was reflected in the move to suggest permanent safeguards on full labour mobility after Turkey's accession to the EU. This marked a clear shift from the previous enlargements when transition periods were introduced, however

⁷² M A Smith and Graham Timmins, *Uncertain Europe, Building a new European security order?* (London, Routledge, 2001) 269.

⁷³ N Rogers, *A Practitioner's Guide to the EC-Turkey Association Agreement* (The Hague, Kluwer Law International, 2000) 2.

⁷⁴ European Council, Helsinki, 10-11 December 1999. The reasons behind the shift in the EU's position can be identified outside the EU-Turkey integration process. Without a doubt the Kosovo crisis and EU eagerness to give international security a more prominent place on the EU agenda played a role. So did the adaptation of a more friendly approach towards Turkey in Member States, namely Greece and Germany. Improvement of Turkey-Greece relations also played an important role. See eg B Rumelili, 'Transforming Conflicts on EU Borders: the Case of Greek-Turkish Relations' (2007) 45(1) *Journal of Common Market Studies* 118.

⁷⁵ Christensen (n 61) 4; M Müftüler-Bac and L McLaren, 'Enlargement Preferences and Policy-Making in the European Union: Impact on Turkey' (2003) 25(1) *Journal of European Integration* 17.

never before the possibility of permanent safeguards was raised.⁷⁶ The membership negotiations with Turkey started in 2005.⁷⁷ Turkish negotiation framework consists of Copenhagen criteria but also three criteria designed specifically for Turkey:

- Turkey's unequivocal commitment to good neighbourly relations with Greece and Armenia, and its undertaking to resolve any outstanding border disputes⁷⁸ 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.
- the fulfilment of Turkey's obligations under the Association Agreement and its Additional Protocol extending the Association Agreement to all new EU Member States, in particular those pertaining to the EU-Turkey customs union, as well as the implementation of the Accession Partnership.⁷⁹

In 2006 the Council suspended eight negotiation chapters (Free movement of goods, Rights of establishment and freedom to provide services, Financial services, Agriculture and rural development, Fisheries, Transport Policy, Customs Union, External relations) due to the Turkish

⁷⁶ Tatham (n 23) at 146-155.

⁷⁷ European Commission, 'Recommendation on Turkey's progress towards accession' COM (2004) 656 final, Brussels, 6 October 2004.

⁷⁸ Namely Greek-Turkish Aegean territorial issues.; Rumelili (n 74) 120.

⁷⁹ Negotiation Framework, Luxembourg, 3 October 2005
<http://ec.europa.eu/enlargement/pdf/turkey/st20002_05_tr_framedoc_en.pdf> accessed 10 September 2018.

failure to apply to the Additional Protocol of the Ankara Agreement to Cyprus. The negotiations are progressing but at a very slow pace and the process lacks momentum. ‘So far, negotiations have been opened in thirteen chapters (Science and research; Enterprise and industry; Statistics; Financial control; Trans-European networks; Consumer and health protection; Intellectual property law; Company law; Information society and media; Free movement of capital; Taxation; Environment; and Food safety, veterinary and phytosanitary policy), one of which (Science and research) was provisionally closed.’⁸⁰

The impact of the Turkish European ambitions and reforms oriented and assisted by the EU, combined with the economic and demographic expansion of the country, as well as its geostrategic position (especially in the illegal migration management) make Turkey an increasingly important partner of the EU. It would be a costly strategic oversight not to pay attention to the strengthening of the EU – Turkey relations. With the weakening of Turkey’s interest in the EU membership,⁸¹ the EU is faced with a massive strategic challenge: how to appeal to Turkey again? Without a doubt Turkey’s membership would be a guarantor of progressing democratization and Europeanization of the Turkish society. However after decades of shifts from inclusion to exclusion, the internal debate whether the Turkish society would be better off within the EU remains inconclusive. A hypothetical scenario of Turkey’s membership in the near future raises more questions than answers, nevertheless allows identification of the key high risks. Turkish membership would gravely change the EU, how it is perceived and how the identity of the organization has been

⁸⁰ European Commission, ‘Turkey 2012 Progress Report. Enlargement Strategy and Main Challenges’ COM (2012) 600 final, Brussels, 10 October 2012, 5. See further the most recent report where the key political concerns are identified, European Commission, ‘Turkey 2018 Report’ SWD (2018) 153 final, Strasbourg, 17 April 2018.

⁸¹ S Ülgen, ‘Avoiding a Divorce. A Virtual EU Membership for Turkey (Brussels, Carnegie Europe, The Carnegie Papers, 2012); The Future of EU enlargement. European Union Commission Report, 10th Report of Session 2012-13, HL Paper 129, House of Lords, London, 6 March 2013.

shaped. The westernized Turkey would join the 'Christian club' and therefore relations with the Muslim world would change.⁸² Turkish external borders would become EU borders, in fact they would become Schengen borders. This move would bring the EU into direct neighbourhood of Syria, Iraq and Iran. Turkey's geostrategic position would be enhanced but the questions whether the EU would be capable of handling such a shift of its position in the world. Unfortunately, any alternatives to the Turkish membership do not go beyond political declaration on privileged partnership and therefore it weakens EU negotiating position even further.

2.2. *Western Balkans*

EU relations with countries of the region are a case providing evidence to support the argument that external elements stimulate or in fact complicate the formulation of policy towards the region.

Post 1989 reunification of Europe suffered a tremendous test in the South Eastern region of the continent. The Western Balkans, similar as Turkey, have been exposed to increasing lack of precision of political conditionality.⁸³ The Western Balkans countries had to meet the political preconditions prior to signing the SAAs. Never before in the enlargement process, the pre-contractual conditionality had not been as strictly executed as in case of countries of the region. In addition, the EU has emphasized the criteria of the good neighbourly relations and good neighbourliness in case of the region. Interestingly, this requirement had been introduced long before Article 8 TEU was adopted (see further Ch IV).

⁸² 'Merkel Raises Turks' Hope Of European Union Entry' *New York Times* (New York, 24 February 2013).

⁸³ Annex to the Council Conclusions of 29 April 1997 provides details of the principles of conditionality governing the development of the EU relations with countries of South East Europe.

One has to agree that the European Union has the power of attraction.⁸⁴ However, the position towards the countries of the region holds the risk that the policy of stabilization and association leading to membership of the EU could in fact turn into a fiasco. A failure could undermine the stability of the EU as a whole and affect the security of the whole continent.⁸⁵ Relations among the states of that region remain tense. Numerous disputes, even if temporarily resolved can easily be revived as the radical political forces remain alerted. The main risk is that once these countries will be in the EU, the EU will lack robust measures to suppress escalation of conflicts.⁸⁶ Ironically, the EU enlargement fatigue as well as the euro crisis could be an advantage to the EU policies towards the countries of the region. The longer their accession negotiations will last, the better the stabilization process can be embedded. Nevertheless, there is of course a risk of following the Turkish scenario. However, there are economic and geostrategic factors such as the size of these countries that also need to be considered. To date the enlargement has been a mechanism that helps not only to achieve the economic prosperity but also security and stability. In the case of the Western Balkans it is particularly clear that these elements are particularly interdependent.

3. EFTA EEA

The dynamics of the developments of both EFTA/EEA have been strongly influenced by the launch and deepening of European integration within the EEC/EC/EU. In fact an assertion that creation of the EFTA would not have been possible without the EEC could not be easily

⁸⁴ S Blockmans, *Tough Love. The European Union's Relations with the Western Balkans* (The Hague, TMC Asser Press, 2007) 5.

⁸⁵ H Vytiska, 'Hahn on Western Balkans: Exporting stability instead of importing instability' (Berlin, Euractive, 31 July 2018).

⁸⁶ Once the countries will become EU members use of the CFSP will not be possible.

dismissed.⁸⁷ The creation of EFTA is regarded as another attempt to suppress creation of division lines in Europe.⁸⁸ Unfortunately the French-British differences made it impossible, and therefore countries outside the EEC engaged in negotiations leading to conclusion of the Convention establishing the European Free Trade Association in 1960.⁸⁹ The development of cooperation between the EFTA countries⁹⁰ evolved in the shadow of integration in the framework of the then European Communities. The first EC enlargement changed the dynamics of relations between the two groups when the EFTA countries, namely – the United Kingdom and Denmark (and Ireland - not a member of EFTA) joined the then Communities.⁹¹ Prior to their accession to the Communities, the issue of relations between the EC and EFTA countries were discussed.⁹² Both the United Kingdom and Denmark were keen to maintain their trade relations with the EFTA countries, and therefore solutions to abolish the customs duties and other barriers to trade were considered. As a result set of agreements was negotiated and concluded in 1972 and 1973 between the EC and EFTA countries.⁹³ These free trade agreements had similar structure and aims [slightly

⁸⁷ J Pelkmans and P Böhler, *The EEA Review and Liechtenstein 's Integration Strategy* (Brussels, Centre for European Policy Studies, 2013) 137.

⁸⁸ It was the then predecessor of Organisation of European Cooperation and Development (OECD) – Organisation for European Economic Cooperation (OEEC) that strongly advocated in favour of creating a free trade area in Western Europe.

⁸⁹ It was also the matter of approaches to integration. Trade liberalization based on intergovernmental 'politically driven' cooperation instead of multinational model of the EC was strongly advocated by the United Kingdom.

⁹⁰ EFTA members: Austria (withdrew in 1995), Sweden (withdrew in 1995), Portugal (withdrew in 1986), Denmark (withdrew in 1973), Switzerland, United Kingdom (withdrew in 1973), Norway, Finland (joined in 1986, withdrew in 1995), Iceland (joined in 1970), Liechtenstein became full member in 1991.

⁹¹ Since EFTA creation seven of its members became members of the EC/European Union.

⁹² E P Wellenstein, 'The free trade agreements between the enlarged European Communities and the EFTA countries' (1973) 10(2) *Common Market Law Review* 137.

⁹³ See eg Agreement between the European Economic Community and the Swiss Confederation, [1972] OJ L 300/189 (OJ English special edition: Series I Chapter [1972] L300/191); Agreement between the European Economic Community and the Republic of Iceland, [1972] OJ L 301/2 (English special edition:

different one with Finland] and their aims were achieved by 1983. The EC - EFTA negotiations on enhancement of their relations started in 1984 and it took a number of years and two rulings of CJEU⁹⁴ prior to the signing of the Agreement on the European Economic Area (EEA).⁹⁵ The EEA Agreement gives the EEA-EFTA countries access to internal market. It is intriguing how an idea to create a common economic space between the then twelve EU Member States and the then seven EFTA countries led to a framework in which the EEA-EFTA countries despite not being EU members are most integrated of all of the EU neighbours. In an effort to reinvigorate the EFTA cooperation the Vaduz Convention was signed in 2001 and entered into force the following year. Not only it entered into force in parallel to the EU-Switzerland Agreement, it also introduced a number of changes that mirrored the EEA mechanisms and solutions agreed for the purpose of the EU – Swiss relations. Namely, the rules and provisions on the free movement of persons, trade in services, movement of capital and protection of intellectual property were introduced to the EFTA framework. It is another example of how the EU model of integration has been adopted for the purposes of European non-EU countries.

Furthermore, the dual character of the EEA must be acknowledged. On the one hand, it plays a very effective pre-accession role. In case of Sweden, Finland, Austria and more recently, although with no membership *finalité*, Iceland,⁹⁶ the EEA membership provides a way to prepare the countries for their smooth transition into membership of the EU. It can be argued that the

Series I Volume [1972] L301/4.); Agreement between the European Economic Community and the Kingdom of Norway [1973] OJ L171/2.

⁹⁴ *Opinion 1/91*, ECR [1991] I-6079; *Opinion 1/92*, ECR [1992] I-2821.

⁹⁵ Agreement on the European Economic Area [1994] OJ L1/3.

⁹⁶ In case of Iceland the accession process may be delayed or even suspended due to change on the country's political scene after parliamentary elections on 27 April 2013 which brought victory to two Eurosceptic parties: Independence Party and Progressive Party < <http://www.bbc.co.uk/news/world-europe-22320282>> accessed 10 September 2018; < <http://euobserver.com/foreign/119969>> accessed 10 September 2018.

EEA model is an alternative to the EU membership that has not been explored sufficiently during previous enlargements and its advantages have not been promoted enough to make them appealing to countries contemplating the EU membership as their way forward in the process of integration. It is also a model of integration that would be beneficial to countries that are not considered as potential candidates for the EU membership.⁹⁷ The EEA model, especially in relation to the approximation of laws should have been promoted stronger in the case of the central and eastern European countries when they expressed their European ambitions.⁹⁸ The case of Iceland feeds the argument that the EEA countries are prepared for the potential EU membership and if one day they decide to accede, it would be a rather straightforward process subject to internal policies and desire of their societies to join the EU. However, they may be areas that may be problematic and difficult to negotiate. In the case of Iceland's accession negotiations that is Chapter 13 – Fisheries, which proves to be problematic.⁹⁹

Furthermore, the preparedness comes at a price. The EEA countries committed to a very ambitious obligations package with regards to application of EU law in their national legal

⁹⁷ The EEA repeatedly is presented as an alternative to neighbouring countries for consideration as a membership alternative. 'The long term goal [...] is to move towards an arrangement whereby the Union's relations with the neighbouring countries ultimately resemble the close political and economic links currently enjoyed with the European Economic Area; European Commission, 'Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours' COM (2003) 104 final, Brussels, 11 March 2003, 15.

⁹⁸ S Peers, 'An ever closer waiting room? The case for Eastern European accession to the European Economic Area' (1995) 32 Common Market Law Review 187.

⁹⁹ European Commission, 'Iceland 2012 Progress Report, Enlargement Strategy and Main Challenges 2012-2013' SWD (2012) 337 final, Brussels, 10 October 2012, 24.

orders.¹⁰⁰ The EEA-EFTA countries are obliged to comply not only with legislation on internal market and its four freedoms but also horizontal policies such as the consumer protection.¹⁰¹

It is equally interesting in the case of EEA countries and Switzerland, how countries often considered to be on the outside of the Europeanization, in fact are well integrated and their legislation is consistent with EU law. It is the countries willingness to adopt the complexity of EU legislation. The EEA objectives of importing the internal market *acquis* as whole can only be regarded as ambitious. The success of the EEA depends directly on the willingness of the EFTA members. It is this particular group of the European countries that are keen to pursue the European integration but without accepting the supranational model of integration of the EU.

¹⁰⁰ The homogeneity of the EEA legal system depends on dynamic incorporation of the EU *acquis* into the EEA which is first added to the Annexes of the EEA Agreement and later national legislations of the EEA countries need to adopt necessary acts to enable transposition of EU law into their respective legal systems. Since 1994 acts listed in Annexes summed up to seven thousands of EU legislation, Pelkmans and Böhler (n 87) at 48 and 72.

¹⁰¹ Eg Iceland and Norway participate in the European Commission's Consumer Program 2014-2020, see further <https://ec.europa.eu/info/departments/justice-and-consumers_en> accessed 10 September 2018.

4. *Liechtenstein*

The microstate of Liechtenstein deserves a separate section not only due to the complexity of its relations with the European Union but also because of its relations with Switzerland and Austria.

Liechtenstein is a constitutional and hereditary monarchy where direct democracy (popular initiatives and referenda) plays an important role.¹⁰² As noted by Marc Maresceau, Liechtenstein is the most integrated [of all small European states] with the EU.¹⁰³ Close relations between Liechtenstein and Switzerland need to be noted¹⁰⁴ as they underpin dynamics of Liechtenstein relations with the EU as well. Liechtenstein was an associated member of EFTA since its creation until 1991 when it became its full member. A year later Liechtenstein acceded to the European Economic Area Agreement and this way the country found itself within a very complex framework. On one had all agreements and special relations with Switzerland, on the other association with the EC/EU and beyond.¹⁰⁵ The complexity was strengthened when the EEA Agreement was rejected by the Swiss voters. To accommodate Liechtenstein EEA membership, countries signed an agreement in 1994 to amend the 1923 Customs Union in a way that allows Liechtenstein's membership in EEA.¹⁰⁶

¹⁰² M Maresceau, 'Very Small States and the European Union: the Case of Liechtenstein' in A Arnall, C Bernard, M Dougan and Eleanor Spaventa (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Oxford and Portland, Hart Publishing, 2011) 502.

¹⁰³ *ibid.*

¹⁰⁴ Customs Union between Switzerland and Liechtenstein was established in 1923, and therefore in 1972 Free Trade Agreement concluded between EEC and Switzerland also applied to Liechtenstein.

¹⁰⁵ Maresceau, 'Very Small States...' (n 102) 504.

¹⁰⁶ Decision of the EEA Council No 1/95 of 10 March 1995 on the entry into force of the Agreement on the European Economic Area for the Principality of Liechtenstein [1995] OJ L 86/58.

5. *Switzerland*

The bilateral relations between the EU and Switzerland are based on numerous agreements and are usually considered a form of association with the EU. There is single association agreement, instead a complex set of sectoral agreements. Trade relations are regulated by the Free Trade Agreement signed by the European Community and Switzerland in 1972.¹⁰⁷ The legal basis was the then Article 113 EEC (now Article 207 TFEU). It was followed by a number of mixed and exclusive competence agreements, including two groups of agreements: Bilateral I (1999)¹⁰⁸ and Bilateral II (2004)¹⁰⁹. These sets of agreements allow Switzerland to participate in parts of the

¹⁰⁷ Agreement between the European Economic Community and the Swiss Confederation [1972] OJ L 300/189.

¹⁰⁸ Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons [2002] OJ L 114/6 ; Agreement between the European Community and the Swiss Confederation on Air Transport [2002] OJ L 114/73; Agreement between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road [2002] OJ L114/91; Agreement between the European Community and the Swiss Confederation on trade in agricultural products [2002] OJ L114/132; Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment [2002] OJ L114/369; Agreement between the European Community and the Swiss Confederation on certain aspects of government procurement [2002] OJ L114/430 ; Agreement on scientific and technological co-operation between the European Community and the European Atomic Energy Community, of the one part, and the Swiss Confederation, of the other part [2007] OJ L189/26.

¹⁰⁹ Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis [2008] OJ L53/52; Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [2008] OJ L53/5; Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48 on taxation of savings income in the form of interest payments [2004] OJ L385/30; Co-operation Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, to counter fraud and all other illegal activities to the

internal market but also partly in the cooperation in criminal matters as well as CFSP. Some of the bilateral agreements require Switzerland to apply EU secondary legislation (for instance agreement on free movement of persons). This is the reason for considering Switzerland's to be similar to the EEA EFTA countries. Switzerland does not participate in the EU decision making but is consulted in the early phases of the EU decision making procedures.

6. Micro States (States of small territorial extension)

There is a group of independent¹¹⁰ European states that due to limited scale of their territory and population are put together in one group determined by their size. Nevertheless that is in many cases where their similarities end. There are five European microstates: Principality of Andorra,¹¹¹ Republic of San Marino,¹¹² the Principality of Monaco,¹¹³ and the Vatican City State and the Principality of Liechtenstein. The latter was discussed above. The process of European integration

detriment of their financial interests [2009] OJ L 46/8; Agreement between the European Community and the Swiss Confederation amending the Agreement between the European Economic Community and the Swiss Confederation of July 22, 1972 as regards the provisions applicable to processed agricultural products [2005] OJ L23/19; Agreement between the European Community and the Swiss Confederation concerning the participation of Switzerland in the European Environment Agency and the European Environment Information and Observation Network [2006] OJ L90/ 37; Agreement between the European Community and the Swiss Confederation on co-operation in the field of statistics [2006] OJ L90/2 ; Agreement between the European Community and the Swiss Confederation in the audio-visual field, establishing the terms and conditions for the participation of the Swiss Confederation in the Community Programmes Media Plus and Media Training [2006] OJ L90/23.

¹¹⁰ T Eccardt, *Secrets of the Seven Smallest Sates of Europe. Andorra, Liechtenstein, Luxembourg, Malta, San Marino and Vatican City* (New York, Hippocrene Books Inc., 2005) at 28-31.

¹¹¹ Andorra is a co-Principality. President of France and the Bishop of Urgell are its co-Princes.

¹¹² San Marino is a republic with close relationship with Italy.

¹¹³ Monaco is a constitutional monarchy with very close bilateral relations with France.

imposes a great challenge for microstates. Brief but informative summary of the EU relations with the microstates was provided by the European Council in 2010, when these were described as ‘extended but fragmented, with large parts of the *acquis* related to the internal market not introduced in their legislation and therefore not applicable.’¹¹⁴ Due to the nature of microstates and their limited capacity, membership in the European Union has not been an option for a number of years.¹¹⁵ The qualitative criteria such as population and territory indicate limited level of influence of microstates. However their qualitative assets combined with a special relationship with at least one Member State contribute significantly towards microstates ‘bargaining strength’.¹¹⁶ Although the group is diversified, countries identified by their size also have a lot in common.

6.1. Andorra, Monaco and San Marino

Their economies rely mostly on tourism and financial services. All have established relations with the EU. In general terms, the smaller the country, the more complex its relations with the EU are, and are governed by a number of agreements, fall under differentiated institutional framework.¹¹⁷ The pattern that can be observed is that the microstates commenced their relationship with EU

¹¹⁴ Council Conclusions on EU Relations with EFTA Countries, 3060th General Affairs Council meeting, Brussels 14 December 2010.

¹¹⁵ F Murray, ‘Micro-states (Andorra, Monaco, San Marino and the Vatican City)’ in S Blockmans and A Lazowski (eds), *The European Union and Its Neighbours. A legal appraisal of the EU’s policies of stabilisation, partnership and integration* (The Hague, TMC Asser Press, 2006) 185, at 187.

¹¹⁶ L Goetschel, ‘The Foreign and Security Policy Interests of Small States in Today’s Europe’ in L Goetschel (ed), *Small States Inside and Outside the European Union Interests and Policies* (Boston, Kluwer Academic Publishers, 1998) 16.

¹¹⁷ European Commission, ‘EU Relations with the Principality of Andorra, the Principality of Monaco and the Republic of San Marino. Options for Closer Integration with the EU,’ Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, COM (2012) 680 final, Brussels, 20 November 2012.

by concluding agreements on taxation of savings.¹¹⁸ These were followed by monetary agreements.¹¹⁹ These enable the microstates to have euro as their legal tender. They are obliged 'to adopt all appropriate measures, through direct transposition or possibly equivalent actions, with a view to implementing relevant EU legislation.'¹²⁰ It is worth to note that the microstates accepted the exclusive competence of the Court of Justice of the EU to settle any disputes between parties, which may arise from the application of these agreements.¹²¹ The microstates also concluded agreements enabling establishment of customs unions.¹²² All three are not part of Schengen area,

¹¹⁸ Agreement between the European Community and the Principality of Andorra providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments [2004] OJ L359/33; Agreement between the European Community and the Principality of Monaco providing for measures equivalent to those laid down in Council Directive 2003/48/EC [2005] OJ L19/55; Agreement between the European Community and the Republic of San Marino providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments. Memorandum of Understanding [2004] OJ L381/33. Parties are also in the process of negotiating anti-fraud and tax information exchange agreements.

¹¹⁹ Monetary Agreement between the European Union and the Principality of Andorra [2011] OJ C369/1; Monetary Agreement between the European Union and the Republic of San Marino [2012] OJ C121/5; Before the introduction of the euro, Italy and the Republic of San Marino had concluded bilateral agreements on monetary matters, and lastly the *Convenzione monetaria tra la Repubblica Italiana e la Repubblica di San Marino*, concluded on 21 December 1991; Monetary Agreement between the European Union and the Principality of Monaco [2012] OJ C310/1.

¹²⁰ For example Article 8 of the Monetary Agreement between the European Union and the Republic of San Marino.

¹²¹ *ibid* Article 10.

¹²² Agreement in the form of an Exchange of Letters between the European Economic Community and the Principality of Andorra of 28 June 1990 [1990] OJ L374/16; Cooperation Agreement between the European Community and the Principality of Andorra [2005] OJ L135/14; Protocol on veterinary matters supplementary to the agreement in the form of an exchange of letters between the European Economic Community and the Principality of Andorra [1997] OJ L148/16; art 3.2 of the Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [1992] OJ L302/1; Agreement between the European Community and the Principality of Monaco on the application of certain Community acts on the territory of the Principality of Monaco [2003] OJ L332/42; Agreement on Cooperation and Customs Union between the European Economic Community and the Republic of San

however the following solutions are in place:

- Andorra: there are border controls on borders with Spain and France. Andorran visa system is coordinated with Schengen requirements and Schengen visas are accepted by Andorra. Andorran citizens are allowed to use passport control counters for EU/EEA citizens at the external borders of the EU;
- Monaco: based on agreements concluded with France, the Schengen Agreement is applicable to Monaco. Controls at Monaco's external borders are carried out by French authorities while Monégasque residence permits are treated as equivalents to Schengen visas;
- San Marino: there is border control between San Marino and Italy.

In terms of microstates position in Europe, it must be noted that they see the deepening of their relationship with the EU as a way to strengthen their international position. A comprehensive review of the EU relations with the microstates commenced when three of the microsites – Andorra, San Marino and Monaco expressed their will to deepen its relationships with the European Union.¹²³ San Marino expressed the desire to consider various options of deepening their integration not dismissing an application for EU membership nor an EEA scenario as a second best option of European integration. In the near future a referendum might be held on EU membership. Andorra is regarded to be the most committed out of the three to deepening of its relations with the EU. Association model, preferably similar to the EEA remains Andorra's first choice. Monaco would like to obtain a better access to the Internal Market and at present is keen on negotiations of a comprehensive agreement. Assessed against San Marino and Andorra,

Marino [2002] OJ L 84/43. In addition EU-San Marino Joint Committee adopted the Omnibus Decision covering customs measures, and veterinary and phytosanitary matters [2010] OJ L156/13.

¹²³ [Presidency] Report to the Council, 'EU relations with the Principality of Andorra, the Republic of San Marino and the Principality of Monaco,' 11466/11, Brussels, 14 June 2011.

Monaco may seem the most reluctant to pursue a wide integration model. Such scepticism may be related to already close relations with France. In case a new agreement with the EU was negotiated, it would have to reflect this closeness and complexity with one of the EU Member States.¹²⁴

6.2. Vatican City State

Vatican City is the capital of the Roman Catholic Church.¹²⁵ Its independence was recognized in an agreement concluded with Italy in 1929. The Holy See, governing body of the Roman Catholic Church established its diplomatic relations with the European Communities in 1970.¹²⁶ The Holy See legal relations with the EU are limited to the monetary matters.¹²⁷ This is due to the fact that the Holy See is often represented by Italy in many aspects of international relations. Nevertheless, the Holy See is strongly involved in the spiritual matters of Europe and promotion of human rights.

¹²⁴ European Commission, 'EU Relations with the Principality of Andorra, the Principality of Monaco and the Republic of San Marino. Options for Closer Integration with the EU,' Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, COM (2012) 680 final at 8-10; Pelkmans and Böhler (n 87) at 85-87 and 101.

¹²⁵ For a clarification of terminology ('Holy See', 'Vatican', 'Vatican City') see K Martens, 'The Position of the Holy See and Vatican City State in International Relations' (2005-2006) 83 *University of Detroit Mercy Law Review* 729 at 730-731.

¹²⁶ It was a move implementing the Second Vatican Council decision of [late 1960's] to establish relations with international organisations aimed at promotion of peace and progress.

¹²⁷ Monetary Agreement between the Italian Republic, on behalf of the European Community, and the Vatican City State and, on its behalf, the Holy See [2001] OJ C299/1 was replaced with Monetary Agreement between the European Union and the Vatican City State [2010] OJ C28/13. The Agreements were concluded by the Holy See representing the Vatican City State. See further Martens (n 125).

The relations between the EU and the Vatican City are an expression of an active foreign policy of the Vatican City.¹²⁸ EU-Vatican City relations remain focused on issues on which the latter wants its voice to be heard. These are spiritual matters, dialogue between religions and cultures and human rights, especially freedom of belief, conflict prevention and fight with poverty. The Vatican City got actively involved in the debate on the Constitution for Europe and was a keen advocate of an explicit reference to the Christian roots¹²⁹, which in the end was not included in the text of the Treaty.¹³⁰

7. Neighbours covered by the European Neighbourhood Policy¹³¹

The European Neighbourhood Policy was launched in 2003¹³² to reinforce stability and security in the EU's neighbourhood. The policy emerged at the same time as the European Security Strategy¹³³ and can be regarded as 'a specific implementation of the strategy.'¹³⁴ The creation of ENP is also directly linked to enlargement, as on the fifth enlargement the EU need to address 'a fundamental conundrum besieging European foreign policy [...], ie, the fact that the EU cannot enlarge indefinitely, while at the same time wishes to apply, *mutatis mutandis*, lessons of

¹²⁸ Vatican City diplomacy can be assessed as active. It is required to manage formal diplomatic relations with 174 states. Vatican City is a member of international organisations, e.g. Organisation for Prohibition of Chemical Weapons, OSCE, World Intellectual Organisation (WIPO), and a permanent observer of the United Nations, Organisation of American States, WTO, WHO, UNESCO.

¹²⁹ J Shaw, 'Europe's constitutional future' (2005) Spring Public Law 132.

¹³⁰ Murray, 'Micro-states' (n 115) 204.

¹³¹ See further Ch III.

¹³² European Commission, 'Wider Europe' (n 99).

¹³³ European Council, *A Secure Europe in A Better World*, European Security Strategy (n 1).

¹³⁴ Cremona, 'The European Neighbourhood Policy. More than Partnership?' (n 6) 244.

enlargement, to the neighbours.¹³⁵ [T]he objective of the European Neighbourhood Policy (ENP) is to share the benefits of an enlarged EU with neighbouring countries in order to contribute to increased stability, security and prosperity of the European Union and its neighbours. The ENP offers the prospect of an increasingly close relationship, [...], involving a significant degree of economic integration and a deepening of political cooperation, with the aim of preventing the emergence of new dividing lines between the enlarged EU and its neighbours.[...] It will build on commitments to common values, including democracy, the rule of law, good governance and respect for human rights, and to the principles of market economy, free trade and sustainable development, as well as poverty reduction.¹³⁶

The ENP established a framework for privileged relations between the EU and its neighbours based on common values. This policy remains as ‘more than a partnership and less than the membership.’ The Council underlined that the ENP will bring added value, going beyond existing cooperation, both to partner countries and to the EU. To this end, it will be essential to maintain the coherence and unity of this policy, in its content, instruments and final goals.¹³⁷ The policy covers the Mediterranean countries (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, the Palestinian Authority, Syria and Tunisia) and Moldova, Ukraine, Belarus, Armenia, Azerbaijan and Georgia as of 2008 grouped within the Eastern Partnership framework. Creation of such diverse group caused criticism in countries that would like to have to have their European aspirations clearly distinguished and acknowledged. More tensions were added with the use of term ‘integration’ in the ENP documents has created a notion that a prospect of membership for countries covered by the policy doesn’t need to be definitely dismissed. These aspirations have been encouraged when negotiations of Association Agreements with Ukraine, Moldova, Armenia,

¹³⁵ Comelli, Greco and Tocci (n 49) 13.

¹³⁶ Council Conclusions 10189/04 (Presse 195), Luxembourg, 14 June 2004.

¹³⁷ *ibid.*

Georgia and Azerbaijan started.¹³⁸ In many ways the operating model of the ENP where regional and bilateral approaches are mixed is a way to address neighbours' aspirations but also to build a comprehensive policy.

The role of action plans needs to be noted. They are non-binding, agreed jointly with the neighbouring countries concerned. They have minimum duration of three years and are subject to renewal by mutual consent [...] They should be comprehensive but [...] clearly identify a number of key priorities.¹³⁹ The ENP Action Plans are described as examples of EU's 'soft power'. As described by Marise Cremona 'they are designed, by setting out the expectations of the EU, to operate as a strong incentive towards reform, and an 'external' set of targets which can be used to support government policy against domestic lobbies and vested interests.'¹⁴⁰

¹³⁸ When negotiations with the Southern Caucasus countries commenced in 2010 Commissioner Füle noted: 'These Association Agreements will lay a new legal foundation for our relations with Armenia, Azerbaijan and Georgia. The main objective of the Association Agreements is to achieve closer political association and gradual economic integration between the EU and these countries.' <http://europa.eu/rapid/press-release_IP-10-955_en.htm> accessed 10 September 2018.

¹³⁹ Council Conclusions (n 136).

¹⁴⁰ M Cremona, 'The European Neighbourhood Policy' in A Ott and E Vos (eds), *Fifty Years of European Integration* (The Hague, TMC Asser Press, 2009) 235.

7.1. Mediterranean

Europe and the Mediterranean¹⁴¹ have been closely linked since the days of the Roman Empire.¹⁴² Colonial links and ties still influence the current relations of the EU Member States and the EU with countries of the region.¹⁴³ Since the very beginning of the European integration process, the European factor has played an important role in the economic development of the region. A stable and secure Mediterranean is in the best interest of the EU, and therefore cooperation with the region has been a priority area in the European Union's external relations. Countries of the region not only play an important security role for the EU but they are also of economic importance. They provide European market with supplies of natural resources (gas, petroleum). The instruments aimed at supporting economic and social transition of partner countries, trade liberalisation and market access for both parties, and strengthening the internal security of the Union were in focus of multilateral approaches such as the Barcelona Process in 1995¹⁴⁴ and its

¹⁴¹ The Mediterranean region consists of the Northern (Turkey, Malta, Cyprus), Southern and Eastern Mediterranean (these include Maghreb countries: Morocco, Algeria, Tunisia and Libya; Mashreq countries: Egypt, Jordan, Lebanon, Syria and the Palestinian Authority). Cyprus, Malta and Turkey were covered by the EC policies towards the region until 2004 when Cyprus and Malta joined the EU and Turkey relations with the EU fall under accession negotiations framework. Countries of Northern Africa are also involved in the Africa and Europe Partnership.

¹⁴² K Pieters, 'The Mediterranean Countries' in S Blockmans, A Lazowski (eds), *The European Union and Its Neighbours. A legal appraisal of the EU's policies of stabilisation, partnership and integration* (The Hague, TMC Asser Press, 2006) 391, at 393.

¹⁴³ Algeria, Tunisia and Syria were occupied by France; Egypt, Cyprus, Gibraltar, Malta and Palestine by Britain and Libya by Italy.

¹⁴⁴ European Commission, 'The southern and eastern shores of the Mediterranean as well as the Middle East are geographical areas in relation to which the Union has strong interests both in terms of security and social stability', European Commission, 'Strengthening the Mediterranean Policy of the European Union: Establishing a Euro-Mediterranean Partnership,' COM (94) 427 final, Brussels, 19 October 1994, 2.

re-launch within a regional forum, the Union for the Mediterranean in 2008. Instruments of the European Neighbourhood Policy extended to countries of the region since 2004 complemented them.

The very first European policy for the region was formulated in 1976. The Global Mediterranean Policy¹⁴⁵ enabled access of manufactured goods from the Mediterranean to the European market. Despite efforts made, the policy had a little impact on economies of the region. The crisis of the European textile industry, lack of regional cooperation but also accession of Spain and Portugal to the European Communities in 1986 negatively influenced the economies of the region.¹⁴⁶ The Moroccan application for the EC membership can be regarded as a desperate measure to address the frustration at lack of effective EC-Mediterranean economic cooperation.¹⁴⁷

In 1992 a proposal to reinvigorate relations with the region through increasing development aid and extending trade preferences was presented by the Commission.¹⁴⁸ Reasons behind the need to introduce new policy framework for the region was not solely influenced by the EC-Mediterranean state of affairs. Changes in the Central and Eastern Europe, as well as drive

¹⁴⁵ F Bicchi, 'Actors and Factors in European Foreign Policy Making: Insights from the Mediterranean Case' (Florence, European University Institute, EUI Working Paper No 47, 2002) 4.

¹⁴⁶ See more P D Koliris, 'Global Mediterranean Policy Implications in View of the New EEC Enlargement, (1984) 35(3) Journal of Agricultural Economics 319.

¹⁴⁷ Pieters, 'The Mediterranean Countries' (n 142) 396. The application was rejected in an opinion of the Commission on the grounds that Morocco was not a European country.

¹⁴⁸ The Community has been obliged to take a new look at its role in the region [...], increase the Community's weight and influence for a more stable order in an ever more interdependent and therefore more vulnerable world [...] [New] policy needs a new concept to underpin the new approach to relations between the Community and its next-door neighbours to the South. [...] this new concept of Euro-Maghreb partnership will also have to have a practical impact in all the appropriate fields, European Commission, Communication on the future of the relations between the Community and the Maghreb countries, SEC (1992) 401 final, Brussels, 30 April 1992.

from common to internal market and creation of the World Trade Organisation also played an important role. Two years later a proposal for a partnership that initiated the Barcelona Process for the Maghreb, Mashreq and the Middle East¹⁴⁹ was formulated to address not only the economic matters but also security issues that were emanating from the region. The Barcelona Declaration not only addressed the security issues but it also provided a new context for the developing CFSP in the post-Cold War and post-Maastricht era. The EU was fully aware that the changes of the world order will affect the region and as a result a number of risks will affect the security and stability of the EU and its Member States. The political instability, economic as well as religious tensions were identified as elements that a new EU policy towards the region should tackle. The formula used towards countries of the region was the same as that applied towards the central and eastern European countries. The market economy and prosperity were considered as tools providing a basis for democratization and embedding of rule of law. Economic development, closer economic relations with the EU through trade agreements, as well as financial assistance have been identified as tools of the Mediterranean policy of the EU.

The Barcelona Declaration¹⁵⁰ was adopted in 1995 and launched the Euro-Mediterranean Partnership aimed at establishment of common area of peace and stability, shared prosperity, including free trade area,¹⁵¹ as well as partnership in social, cultural and human affairs. The gradual

¹⁴⁹ Originally the partnership was aimed at Algeria, Egypt, Morocco, Israel, Jordan, Lebanon, the Palestinian Authority, Syria, Tunisia, Turkey, Cyprus and Malta.

¹⁵⁰ Final Declaration of the Barcelona Euro-Mediterranean Ministerial Conference of 27 and 28 November 1995 and its work programme < http://www.eeas.europa.eu/euromed/docs/bd_en.pdf > accessed 10 September 2018.

¹⁵¹ Cooperation will focus on practical measures to facilitate the establishment of free trade as well as its consequences, including: i) harmonizing rules and procedures in the customs field, with a view in particular to the progressive introduction of cumulation of origin; in the meantime, favourable consideration will be given, where appropriate, to finding ad hoc solutions in particular cases; ii) harmonization of standards, including meetings arranged by the European Standards Organisations; iii) elimination of unwarranted

establishment of the free trade area requires a bilateral vertical liberalization with the EC but also horizontal trade liberalization among the Mediterranean countries.¹⁵² The Association Agreements were concluded to enable vertical liberalization. To date the EC/EU concluded eight Association Agreements with the Mediterranean partners.¹⁵³ Despite the strong encouragement from the EU,

technical barriers to trade in agricultural products and adoption of relevant measures related to plant health and veterinary rules as well as other legislation on foodstuffs; iv) cooperation among statistics organizations with a view to providing reliable data on a harmonized basis; v) possibilities for regional and subregional cooperation (without prejudice to initiatives taken in other existing fora).

¹⁵² Pieters, 'The Mediterranean Countries' (n 142) 399.

¹⁵³ Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2000] OJ L70/2; Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part [2006] OJ L143/2; Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part [2005] OJ L265/2; Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part [2004] OJ L304/39; Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part [2002] OJ L129/3; Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part [1997] OJ L187/3; Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, [2000] OJ L147/3; Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part [1998] OJ L97/2. They replaced first generation cooperation agreements: Agreement between the Member States of the European Coal and Steel Community and the People's Democratic Republic of Algeria [1978] OJ L263/2; Agreement between the Member States of the European Coal and Steel Community and the Republic of Tunisia, [1978] OJ L265/119; Cooperation Agreement between the European Economic Community and the Arab Republic of Egypt, [1978] OJ L266/2; Cooperation Agreement between the European Economic Community and the Hashemite Kingdom of Jordan, [1978] OJ L268/2; Cooperation Agreement between the European Economic Community and the Lebanese Republic, [1978] OJ L267/2; Cooperation Agreement between the European Economic Community and the Kingdom of Morocco, [1978] OJ

the horizontal liberalization has not been developing sufficiently enough.

The Euro-Mediterranean Partnership faced a great challenge when it became an integral part of the European Neighbourhood Policy. Initially, the inclusion of the Mediterranean countries in the ENP caused some confusion and was perceived as dilution of the EU relations with countries of the region. Especially the Arab Mediterranean neighbours expressed their concerns that ENP could undermine the regional framework offered by Euro-Mediterranean Partnership.¹⁵⁴

The challenges such as mass migration, potential massive flow of refugees, fundamentalist extremism and organized crime were identified as those that the EU needed to address methodologically. The direct threat of stability of Southern Member States, especially Spain, France and Italy showed that the idea of neighbours as those ‘casting a shadow’ has been spreading beyond continental Europe. The perception of neighbours across the Mediterranean Sea changed and they were not considered as distant colonies as they used to be; their influence on European security is much greater, and impact of conflict between countries of the region playing a threat to regional and international stability.¹⁵⁵ Since the establishment of the Barcelona Process new risks have been added and now include also terrorism. This element has enhanced the EU’s efforts to improve measures that would enable better control of migration flows.

L264/2; The only remaining in force first generation cooperation agreement is the one concluded with Syria in 1977, Cooperation Agreement between the European Economic Community and the Syrian Arab Republic, [1978] OJ L269/2. In case of Libya negotiations of a framework agreement started in 2008 but were suspended by the EU in 2011.

¹⁵⁴ Comelli, Greco and Tocci (n 49) 16.

¹⁵⁵ Presence of Syrian troops in Lebanon, occupation of Southern Lebanon by Israeli forces; tensions on border between Algeria and Morocco; and the Israeli-Palestinian conflict.

Despite human rights and democracy clauses in the Association Agreements that can be regarded as form of political conditionality, violation of human rights in one of the countries of the region had never been used to suspend bilateral relations.¹⁵⁶ Jan Wouters and Sanderijn Duquet argue that ‘the implementation deficit is due to security concerns of the EU [...]. Instability in the region is to be avoided at all cost.’¹⁵⁷

In case of Mediterranean countries the action plans are based on the Association Agreements, but at the same time have a broader scope to meet the political expectations associated with the ENP. The action plans similarly to the Association Agreements contain section on human rights as well as internal security. Nevertheless their implementation varies and is not consistently persuaded.¹⁵⁸

The political developments in the region, which commenced in December 2010, brought new challenges for the EU and its policy towards this group of neighbours. The initial reactions to the uprising showed reluctance, indecisiveness. The first forms of support were formulated 2011 and fall within the framework of existing mechanisms of the ENP, Euro-Mediterranean Partnership and Union for Mediterranean.

The Partnership for Democracy and Shared Prosperity with the Southern Mediterranean confirmed the EU’s concerns with security in the region.¹⁵⁹ Sections on migration flows, border

¹⁵⁶ J Wouters and S Duquet, ‘The Arab uprisings and the European Union: in search of a comprehensive strategy’ in G Fernández Arribas, K Pieters and T Takács (eds), *The European Union’s Relations with the Southern-Mediterranean in the Aftermath of the Arab Spring*, (The Hague, CLEER Working Papers 2013/3) 39.

¹⁵⁷ *ibid.*

¹⁵⁸ *ibid.*

¹⁵⁹ High Representative and the European Commission, Joint Communication ‘A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean’ COM (2011) 200 final, Brussels, 8

security but also emphasise on economic stability, access to single market as a stabilization tool.³M mechanism: Money, Markets and Mobility.

In May 2011 A New Response to a Changing Neighbourhood was published. It was the result of the strategic review of the ENP that commenced prior to the Arab Spring.¹⁶⁰

In September 2011 SPRING programme was launched.¹⁶¹ A strategic financial instrument offering support for democratic transformation, institution building and economic growth. The Barcelona process is regarded as an ambitious agenda and was often assessed critically, even called a failure.¹⁶² The mechanisms to revitalize the process were formulated by 2008 when the Union for the Mediterranean was launched.¹⁶³ This political concept is regarded as a micromanagement project based model, while the ENP action plans are regarded as differentiated bilateralism.¹⁶⁴

March 2011.

¹⁶⁰ Joint Communication by the High Representative of the Union For Foreign Affairs and Security Policy and the European Commission, 'A New Response to a Changing Neighbourhood, a review of European Neighbourhood Policy' COM (2011) 303, Brussels, 25 May 2011.

¹⁶¹ 'EU response to the Arab Spring: new package of support for North Africa and Middle East', Press Release, Brussels, 27 September 2011, available at <http://europa.eu/rapid/press-release_IP-11-1083_en.htm> accessed 10 September 2018. See also Commission Implementing Decision of 9 March 2012 amending Decision C(2011) 6828 adopting the Programme of Support to the Association Agreement and the Transition Process for Tunisia under the SPRING programme, to be financed under Article 19 08 01 01 of the general budget of the European Union, Brussels, 9 March 2012, C(2012)1439 – PE/2012/111.

¹⁶² R A Del Sarto and T Schumacher, 'From EMP to ENP: What's at stake with the European Neighbourhood Policy towards the Southern Mediterranean?' (2005) 10 European Foreign Affairs Review 170.

¹⁶³ The initiative was presented by then French President Nicolas Sarkozy. See further M Emerson, 'Making sense of Sarkozy's Union for the Mediterranean' (Brussels, Centre for European Policy Studies, CEPS Policy Brief No 155, 2008).

¹⁶⁴ N Skoutaris, 'Euro-Med, ENP, and UfM: Fostering region-building and promoting interregionalism' in G Fernández Arribas, K Pieters and T Takács (eds) (n 156) 83.

Overall all initiatives provide instruments but a lack of a comprehensive strategy is clear. The policy towards the region is delimited by security threats and fears, especially sensed by Southern Member States.

The region remains unstable (both politically and economically), unpredictable and explosive. The events of the Arab Spring triggered yet another review of the EU policy towards the Mediterranean. The methods and tools of support for transition to democracy are now based on the more aid for more democracy conditionality within the ENP framework.¹⁶⁵ The next stage would be the conversion of the free trade agreements into the new generation of the deep and comprehensive agreements. Nevertheless, first political and security reforms must take place to consider further changes of the EU relations with its Mediterranean neighbours.

7.2. Eastern European countries

The initiative, launched in 2009, aimed at reinvigoration of relations with the Eastern neighbours: Belarus, Moldova, Ukraine, Armenia, Azerbaijan and Georgia. It was considered as ‘a more ambitious partnership, based on commitments to the principles of international law and to fundamental values, including democracy, the rule of law and the respect for human rights and fundamental freedoms; complementary to existing bilateral contractual relations, to create the necessary conditions to accelerate political association and further economic integration between the European Union and interested partner countries, and promote stability and multilateral

¹⁶⁵ S Blockmans, ‘The ENP and ‘more for more’ conditionality: plus que ça change ...’ in G Fernández Arribas, K Pieters and T Takács (eds) (n 156) 53.

confidence building'.¹⁶⁶

Over the past decade Eastern Partnership (EaP) countries have been becoming closer neighbours of the EU. 2004 enlargement brought Belarus and Ukraine to immediate neighbourhood of the EU. With the Bulgaria and Romania accession, EU got a maritime border with Georgia. In case of Turkey accession, the EU will get a direct land border with all the countries of the Caucasus. Despite the uncertainty regarding the Turkish accession, the distant neighbours such as Armenia and Azerbaijan are becoming closer political neighbours of the EU. Extension of the ENP confirmed their – especially Ukraine, Moldova and Georgia's – European aspirations.

There are a number of issues that are common for all or most of the EaP countries. In political terms all EaP countries appeared as a result of the dissolution of the Soviet Union and many difficulties inherited from the Soviet era are affecting their economic development, frail democracy and strategic uncertainty. Their relations with Russia and development of the exploitation of energy resources make their foreign policies, including relations with the EU, particularly difficult. Russia perceives the region as its sphere of influence. Its involvement in Abkhazia and South Ossetia adds to tensions between Russia and Georgia, so does Russia's role in Transnistria.

There are also matters specific to each country. Armenia has no natural energy resources and depends of Russia's supply. Country economic situation remains strongly influenced by the Nagorno-Karabakh conflict. Azerbaijan has a strong advantage of natural resources. Georgia has

¹⁶⁶ Council of the European Union, Joint Declaration of the Eastern Partnership Summit, 8435/09 (Presse 78), Prague, 7 May 2009.

limited natural resources and cannot rely on them but takes advantage from its geographical position that makes it an attractive transfer country.

EU's policy towards the region was formulated along the events of dissolution of the Soviet Union. The Partnership and Cooperation Agreements (PCAs) were concluded with all three countries in 1996.¹⁶⁷ They provide basis for cooperation, framework for the political dialogue, support efforts of all three countries to develop their economies and complete transition to market economies and promote trade and investment. Article 3 of all three PCAs makes the cooperation among countries of the Southern Caucasus essential for their prosperity which can be achieved only through regional conflict resolution as a precondition of closer ties with European structures.

In case of the PCAs with the Southern Caucasus at the time of conclusion there was not scope to offer these countries a prospect of a free trade area. Instead they were offered the most favoured nation treatment to serve their economic relations with the EU.

¹⁶⁷ Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Armenia, of the other part [1999] OJ L239/3; Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part, [1999] OJ L246/3; Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Georgia, of the other part [1999] OJ L295/3.

7.2.1. Conflicts

Promotion of security is especially challenging in the countries tormented by conflicts. Violent or frozen conflicts threaten regional stability. Conflicts can lead to extremism, terrorism and state failure; provide opportunities for organized crime.¹⁶⁸ 2004 and 2007 enlargements brought the European Union closer to conflicts. Equally it is argued that, the new Member States brought a better understanding and knowledge of conflict resolution and therefore can actively contribute to the strengthening of EU response to the conflicts in its neighbourhood.

Relics of the Soviet era – frozen conflicts over Transnistria¹⁶⁹ in Moldova, Nagorno-Karabakh¹⁷⁰ in Azerbaijan and the two conflicts in Georgia: over Abkhazia¹⁷¹ and South Ossetia¹⁷²

¹⁶⁸ The integration of acceding states increases our security but also brings the EU closer to troubled areas. Our task is to promote a ring of well governed countries to the East of the European Union and on the borders of the Mediterranean with whom we can enjoy close and cooperative relations, European Council, *A Secure Europe in A Better World*, European Security Strategy (n 1).

¹⁶⁹ Transnistria is a heavily industrialised area lying between the Dnestr River (left bank) and Ukraine, Transnistria has its unofficial capital in Tiraspol. Transnistria seceded from Moldova in 1990 with open support from Russia. After a short war with Moldova in 1992, a ceasefire was signed.

¹⁷⁰ Nagorno-Karabakh is a region populated by Armenians in the western part of Azerbaijan. In early 1990's Armenians of Nagorno-Karabakh with support from Armenia took control of the region and beyond, ending up with control of almost 20 per cent of Azerbaijan's territory. As result high numbers of both Azeris and Armenians have been displaced adding to a big issue for the whole Southern Caucasus region – internally displaced persons.

¹⁷¹ Georgia's decision to proclaim its independence in 1991 triggered Abkhazia's decision to reinstate the 1925 Constitution which granted Abkhazia the status of an independent state united with Georgia on the basis of a union treaty. The conflict escalated at the same time as the one in South Ossetia deepening the crisis in Georgia. Abkhazia received support from Chechen fighters and Russia.

¹⁷² South Ossetia inhabited by a majority population of Ossetians declared its desire to be united with North Ossetia, a republic in Russian Federation in 1989. Since then the tensions has been growing with escalation

impose a great risk to stability. In many ways regional conflicts negatively influence political and economic transition of countries affected by these conflicts and make their regional cooperation difficult. Regional conflicts also provide opportunities for spread of organised crime. An example of Transnistria which is well positioned to as a source and a transit point for the smuggling of illegal goods, including arms smuggling as well as human trafficking, towards EU Member States.

The EU acknowledged the importance of contributing to their peaceful resolution. It is important in regional stability terms but also influences impact of the EU as an international actor. First EU efforts took form of humanitarian aid and were followed by more structured support once the PCA entered into force. The importance of conflict resolution was noted in the EU's Security Strategy in 2003. 'Violent or frozen conflicts, which also persist on our borders, threaten regional stability. They destroy human lives and social and physical infrastructures; they threaten minorities, fundamental freedoms and human rights. Conflict can lead to extremism, terrorism and state failure; it provides opportunities for organised crime. Regional insecurity can fuel the demand for WMD. The most practical way to tackle the often elusive new threats will sometimes be to deal with the older problems of regional conflicts [...] [The EU] We should now take a stronger and more active interest in the problems of the Southern Caucasus, which will in due course also be a neighbouring region.'¹⁷³

In 2008 report on the implementation of the EU Security Strategy noted difficult situation in Georgia where Abkhazia and South Ossetia conflicts escalated, leading to an armed conflict between Russia and Georgia in August 2008.¹⁷⁴ The EU led the international response, through

of fights that caused the exodus of Ossetians moving to North Ossetia and Georgians to other parts of Georgia. 1992 brought a ceasefire but the situation remain tense.

¹⁷³ European Council, *A Secure Europe in A Better World*, European Security Strategy (n 1) at 4 and 8.

¹⁷⁴ Georgia and Russia clashed in a five-day war in August 2008 after Georgian troops attempted to assert

mediation between the parties, humanitarian assistance, a civilian monitoring mission, and financial support.¹⁷⁵ Some argue that the EU's commitment to conflict resolution in the neighbouring countries brought clear results. As noted by Richard G Whitman and Stefan Wolff 'the EU's impact on the conflicts in Georgia and between Georgia and Russia was negligible until August 2008, at which point remarkably swift and decisive action resulted in a ceasefire agreement and the withdrawal of Russian troops to their positions prior to the war, before a relative lack of follow-through appeared to relegate the EU back to the side-lines, even though it has now become the sole international actor on the ground in Georgia.'¹⁷⁶

The Arab Spring upheavals region enhanced the need for the EU to review its role as a promoter of human rights, democracy, rule of law, and its contribution to reforming institutions in partner countries.¹⁷⁷ That is especially crucial to strengthening EU's normative power role.¹⁷⁸

full control over the South Ossetia, in contravention of a 1992 ceasefire agreement. It triggered Russian recognition of South Ossetia's and Abkhazia's independence on 26 August 2008.

¹⁷⁵ EEAS Strategic Planning, 'Report on the Implementation of the European Security Strategy. Providing Security in a Changing World' S407/08, Brussels, 11 December 2008.

¹⁷⁶ R G Whitman and S Wolff, 'The EU as a conflict manager? The case of Georgia and its implications' (2010) 86 *International Affairs* 88.

¹⁷⁷ J Wouters and S Duquet, 'The Arab uprisings and the European Union: in search of a comprehensive strategy, in G. Fernández Arribas, K. Pieters and T. Takács (eds) (n 156) 39.

¹⁷⁸ Manners (n 37) 235-251; H Sjursen, 'The European Union as a 'normative' power: how can this be?' (2006) 13(2) *Journal of European Public Policy* 235; M Pace, 'The Construction of the European Union Normative Power' (2007) 45(5) *Journal of Common Market Studies* 1041.

8. *Russia*

Norman Davies noted that ‘for more than five hundred years the cardinal problem in defining Europe has centred on the inclusion or exclusion of Russia.’¹⁷⁹ Specific character of the European continent does not help in terms of clear and unambiguous delimitation of borders of the continent. Nevertheless Russia is a very important neighbour of the EU.¹⁸⁰ A neighbour like no other. Territorial and population scale, strategic weight and energy products provider - these are no less but a vital elements of the EU external relations. The element that in the best interests of both – the EU and Russia - should be a partner. Currently in political terms, the EU-Russia relations are a game of interests. The EU side would like to secure reliable energy supplies from its eastern neighbour, while the neighbour challenges the EU with actions questioning its norms and values, and therefore weakening EU’s normative power stance. In the recent years Russia clearly formulated its neighbouring policy aiming at strengthening its influence in its neighbourhood.¹⁸¹ This factor of the Russian foreign policy is a direct competitor of the EU and its external policies. It is particularly visible when one looks at how EU’s and Russia’s relations with Ukraine compete.¹⁸² Nevertheless, both sides need one another and therefore it is a matter of balancing the needs.

¹⁷⁹ N Davies, *Europe. A history* (Oxford, Oxford University Press, 1996) 10.

¹⁸⁰ ‘A stable, democratic and prosperous Russia, firmly anchored in a united Europe free of new dividing lines, is essential to lasting peace on the continent’ Common Strategy of the European Union on Russia, 1999/41/CFSP, [1999] OJ L157/1.

¹⁸¹ R Dragneva and K Wolczuk (eds), *Eurasian Economic integration. Law, Policy and Politics* (Cheltenham, Elgar Publishing, 2013).

¹⁸² R Dragneva and K Wolczuk, ‘Russia, the Eurasian Customs Union and the EU: cooperation, stagnation or rivalry?’ (London, Chatham House, 2012).

The EU-Russia complex relations are relatively young. Demise of the Soviet Union in the early 1990's made the Russian Federation the main beneficiary of its strategic legacy¹⁸³ and influenced high expectations of this new independent state. Not only was initially the matter of formulation of the relations between the EU and Russia but also the matter how the prospect of the central and eastern European countries accession to the EU would be influenced by the relations with Russia and how these relations will affect the enlargement process.¹⁸⁴ In terms of the development of the legal relations with Russia a concept of Partnership and Cooperation Agreement (PCA) was developed.¹⁸⁵ The PCA with Russia was concluded in 1994.¹⁸⁶ The scope of the PCA is wide and covers different dimensions of the Union and as described by Christophe Hillion 'in many ways typifies the development of a complex system of EU external relations.'¹⁸⁷ The PCA was initially concluded for a period of ten years and is currently renewed on annual basis.

The PCA does not envisage a prospect of EU membership and instead offers 'a gradual rapprochement between Russia and a wider area of cooperation in Europe and neighbouring

¹⁸³ C Hillion, 'Russian Federation' in S Blockmans and A Lazowski (eds), *The European Union and Its Neighbours. A legal appraisal of the EU's policies of stabilisation, partnership and integration* (The Hague, TMC Asser Press, 2006) 465.

¹⁸⁴ A Mayhew, *Recreating Europe. The European Union's Policy towards Central and Eastern Europe* (Cambridge, Cambridge University Press, 1998) 35.

¹⁸⁵ PCAs were regarded as an alternative of Europe Agreements that were offered to the Central and Eastern European countries. PCAs were concluded with all Newly Independent States with exception of Tajikistan.

¹⁸⁶ Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part [1997] OJ L327/3. It entered into force in 1997. An Interim Agreement on trade and trade-related matters between the European Community, the European Coal and Steel Community and the European Atomic Energy Community, of the one part, and the Russian Federation, of the other part was signed in 1995 [1995] OJ L247/2.

¹⁸⁷ Hillion, 'Russian Federation' (n 183) 466.

regions.¹⁸⁸ Yet the PCA has ambitious aims including political dialogue with supporting institutional framework allowing the development of close relations, promotion of trade and investment, strengthening of political and economic freedoms, support for Russia to consolidate democracy and develop its economy, provide basis for economic, social, financial and cultural cooperation and creation of the necessary conditions for establishment of a free trade area.

Forms of cooperation envisaged in the PCA strongly rely on dialogue, including dialogue on political and security matters in Europe, justice and home affairs and energy. This political dimension of the EU-Russia relations can be regarded as a compensation for limited ways the legal relations could develop.

There are a number of political and security matters that make the dialogue particularly difficult. In security terms, these include ‘frozen conflicts’ of Transnistria, South Ossetia, Abkhazia, Nagorno-Karabakh as well as Chechnya. In political terms it has been until 2000’s Russia’s lack of vision of their policy towards the EU, and on EU side repeated attempts to apply tools of external policy used towards other neighbours in relations with Russia. The latter was not successful as it has triggered Russia’s reluctance towards the EU. In terms of global politics it is also a matter of positioning of both parties, their aspirations and in the Russian case reaction towards third parties.

In 1999 an attempt was made to strengthen the partnership with Russia. The European Council adopted Common Strategy of the European Union on Russia confirming focus on democracy, rule of law, country’s integration with the European economic and social area,

¹⁸⁸ Christophe Hillion noted that ‘this formulation prefigures the Wider Europe/ENP towards the neighbours of the enlarged Union,’ see further (n 183) at 469.

cooperation on security and common challenges, with an emphasis put on energy.¹⁸⁹ The fact that the very first common strategy of the EU was formulated on its position towards Russia could be interpreted at the time as a way to give the relations with Russia an appropriate recognition.¹⁹⁰ The Common Strategy on Russia can also be interpreted as move towards placing the EU's policy towards Russia in the larger, global scale. Indeed it was an integral part of the formulation of the EU policy towards its largest neighbour on the brink of eastern enlargement and formulation of the ENP. However, there is not much historical data that would allow to identify the strategy as prominent and having impact on the EU-Russia relations. It is argued that not only Russia was unable to develop a comprehensive policy towards the EU, the escalation of the Chechen conflict soon after the launch of the strategy, rouble crisis and inconsistent policy of the then president Yeltsin as well as progressing moves towards the EU and NATO enlargements may explain Russia's less than propitious reaction.¹⁹¹

The preparation towards 2004 enlargement were accompanied by a number of tensions in the EU-Russia relations. It was noted in Agenda 2000 that steps to minimize the risk of raising new barriers as a result of enlargement need to be taken by the EU and opportunities arising from the process should be fully exploited.¹⁹² However, only a small section was dedicated to Russia what can be explained in then weakness of Russia and already complex structure of the enlargement process.¹⁹³ Nevertheless issues of Kaliningrad and minorities in the Baltic States

¹⁸⁹ Common Strategy of the European Union on Russia (n 180).

¹⁹⁰ C Hillion, 'Institutional aspects of the partnerships between the European Union and the Newly Independent States of the former Soviet Union: case studies of Russia and Ukraine' (2000) 37 *Common Market Law Review* 1212.

¹⁹¹ M Maresceau, 'EU Enlargement and Common Strategies on Russia and Ukraine' in Christophe Hillion (ed), *EU Enlargement. Essays in European Law* (Oxford and Oregon, Hart Publishing, 2004) 184.

¹⁹² European Commission, 'Agenda 2000. The Challenge of Enlargement' COM (97) 2000, Vol II, Brussels, 15 July 1997.

¹⁹³ Maresceau, 'EU Enlargement and Common Strategies on Russia and Ukraine' (n 191) 191.

affected the enlargement process and for a long time and made the signing of the PCA Protocol difficult.¹⁹⁴

The Russian attitude shifted with the change of administration in 2000. By then impact of enlargement had been assessed to make relations with the EU a key element of the Russia foreign policy concept.¹⁹⁵ A new approach to bilateral relations was formulated at the EU-Russia summit of 2003 when concept of four common spaces was introduced, and energy dialogue became an integral part of this new concept. They were defined within the PCA framework and reflected the post enlargement environment and were hoped to provide the bilateral relations with new impetus. Creation of common European economic ¹⁹⁶ space, common space of freedom, security and justice, common space of external security and common space on research and education was launched though adaptation of road maps for each space in 2005. The establishment of spaces, including common economic space defined as an open and integrated market between the EU and Russia, where obstacles in economic activity and creation of opportunities regarding the cross-border trade in goods, services and capital will be eliminated, would require approximation of legislative, as an essential element in order to promote trade and investment between the EU and Russia.¹⁹⁷

¹⁹⁴ Hillion, 'Russian Federation' (n 183) 488.

¹⁹⁵ Maresceau, 'EU Enlargement and Common Strategies on Russia and Ukraine' (n 191) 203.

¹⁹⁶ The term 'European' was dropped by the time road maps were adopted in 2005.

¹⁹⁷ Hillion, 'Russian Federation' (n 183) 493; C Hillion, 'The evolving system of European Union external relations as evidenced in the EU Partnerships with Russia and Ukraine' (n 25) 213.

8.1. Russia and the ENP

Originally Russia was considered as a neighbour that will be covered by the then newly drafted ENP. However, in the process of drafting ENP Strategy [published in May 2004] geographic scope of the policy was changed – Southern Caucasus countries were included while Russia was excluded. The latter criticized unbalanced character of the ENP pointing out that the EU would dominate the relations within the ENP giving EU neighbours limited scope for action.¹⁹⁸ The EU accepted Russia's will to develop EU-Russia relations on bilateral basis.

Russia's reactions towards the development of the ENP and its instruments were modest and the project was not considered as a threat. The situation changed when initiatives aiming at strengthening the links with eastern neighbours started to formulate, and what was then the idea that formed the bases of the Eastern Partnership. The initiative was launched in 2009 'to create the necessary conditions to accelerate political association and further economic integration between the European Union and interested partner countries. The significant strengthening of EU policy with regard to the partner countries will be brought about through the development of a specific Eastern dimension of the European Neighbourhood Policy.'¹⁹⁹ Not only the Partnership was initiated by Poland, came soon after Russia conflict with Georgia, but it appealed to Russia's traditional allies in the region who saw the initiative as a way to weak the dependency from Russia and also to strengthen their cooperation with the EU.

¹⁹⁸ Comelli, Greco and Tocci (n 49) 9.

¹⁹⁹ Council of the European Union, Joint Declaration of the Prague Eastern Partnership Summit, (n 166) 6.

The political consensus was reached in 2005 to start negotiations of a new agreement that would reflect changes in the relations of the partners and form legal basis of the EU-Russia relations in XXI century. The negotiation process started in 2008. However, no substantive compromise has been achieved in relation to trade and energy - two most crucial areas of the EU-Russia relations. It is a matter of bargaining and balancing between Russia's eagerness to get full access to internal market while the EU wishes to persuade Russia to ratify the Energy Charter Treaty and Energy Charter Protocol²⁰⁰ which in EU's position would enhance EU energy security. To date Russia refused to sign it and therefore progress on making Energy Charter principle a core element of the new agreement can only be described as dilatory.

8.2. Energy

Energy plays a prominent role in the modern activities, often becomes a persuasive tool in the international relations and affects situation of states. The EU heavily depends on supplies of energy from the third countries. Despite geographical convenience between the EU and Russia, energy strongly influences developments between these two parties. Prominence of the energy and its impact on the EU-Russia relations was recognized from the very beginning of negotiating legal basis of the relations between parties. Article 64 of the PCA is dedicated to the energy and interesting contain reference to the European Energy Charter which is fact is a matter of lengthy

²⁰⁰ Council and Commission Decision of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects [1998] OJ L69/1. Russia was one of the signatories but has not ratified it to date and repeatedly calls for a new energy agreement that would have a global character. In Russia's views the Energy Charter constitutes main tool of the EU's energy policy.

disputes and negotiations between parties.²⁰¹ It outlines objectives of the cooperation in the field putting improvement of the quality and security of energy supply; improvement in management and regulation and modernization of energy infrastructure at the centre. Although the provision contain of all necessary elements of sustainable energy cooperation its implementation has not been successful. What the PCA provision does not offer is a reference to diversification of energy supplies, and therefore can be interpreted as a confirmation of Russia as a primary supplier of energy for the EU.²⁰²

In addition to already complex institutional framework of the EU-Russia relations it was agreed at the EU-Russia summit in 2000 to establish energy dialogue ‘which will enable progress to be made in the definition of an EU-Russia energy partnership and arrangements for.’ The overall objective of the energy partnership is to enhance the energy security of the European continent by binding Russia and the EU into a closer relationship in which all issues of mutual concern in the energy sector can be addressed while, at the same time, ensuring that the policies of opening and integrating energy markets are pursued.²⁰³

The improvement of Russia’s economy in early 2000’s and strengthening of Putin’s administration had an impact of changes in Russia’s attitude towards the EU. The EU had to respond to allegation that there are EU and Member States import limits of consumption of energy

²⁰¹ Article 65(1) PCA states: Cooperation shall take place within the principles of the market economy and European Economy Charter, against a background of the progressive integration of the energy market in Europe, EU-Russia PCA.

²⁰² S de Jong and J Wouters, ‘European Energy Security Governance: Key Challenges and Opportunities in EU-Russia Energy Relations’ (Leuven, Leuven Centre for Global Governance Studies, Working Paper No 65, 2011) 8.

²⁰³ T Romanova, ‘Energy Dialogue from Strategic Partnership to the Regional Level of the Northern Dimension’ in P Aalto (ed), *The EU-Russia Energy Dialogue. Europe’s Future Energy Security* (Ashgate, Aldershot, 2008) 64.

resources coming from Russia and to claims that access to EU's electricity and natural gases would be limited for Russian suppliers.²⁰⁴ The 2004 enlargement deepened the interdependence of the EU and Russia. However Russia's suspension of social and economic reforms, lack of implementation of legislation, corruption but growing political pugnacity against EU's insistence on law enforcement made the relations difficult. The state of relations got even more difficult with the developments in Ukraine, which affected relations between EU and Russia, and since the first Russia-Ukraine energy dispute the EU-Russia trade in energy has been increasingly politicized. The uncertainty of transit negotiations mobilized EU efforts to enhance steps towards formulation of a European energy policy enabling diversification of sources and supplies that would contribute to energy security of the continent.²⁰⁵ The tensions between the EU-Russia deepened accelerated by Polish and Lithuanian vetoes to opening of negotiations of a new agreement, nevertheless the efforts were made to find ways to identify grounds for compromise. The Early Warning Mechanism in the case of energy interruptions agreed in 2007 can be regarded as a rare positive result of this period in the EU-Russia relations.²⁰⁶

2008 brought a change in Russian administration that was welcomed by the EU and therefore the new agreement negotiations were opened but the same year the Russia-Georgia war started which impose further uncertainty and threat to the European energy security. EU's support for Ukraine's accession to the Energy Community Treaty triggered Russia's reaction resulting in 2009 gas cut offs. The state of affairs between Russia and Ukraine with the return of pro-Russian Yanukovich in 2010 presidential elections. Also in 2010 the EU-Russia summit brought a launch

²⁰⁴ de Jong and Wouters (n 202) 11.

²⁰⁵ European Commission, 'External energy relations – from principles to action' COM (2006) 560 final, Brussels, 12 October 2006.

²⁰⁶ de Jong and Wouters (n 202) 17.

of Partnership for Modernisation,²⁰⁷ and the Commission issued Energy Strategy towards 2020, which identifies four priority corridors in the electricity sector.²⁰⁸ None of them involves Russia.

9. Conclusions

The EU has developed a variety of legal and political instruments to serve its relations with the neighbours. These measures serve European integration outside of the EU borders. Some of them prepare the neighbouring countries for accession. Others, in particular the EEA model, serve as a platform of a successful Europeanisation without EU membership. They also effectively contribute to the stability in the EU's vicinity. The same cannot be said about the neighbours that are not willing to accept that the EU would like to set the tone of the relations based on the developments of EU law and EU values. There are also significant challenges in the area of security that make the EU's position increasingly difficult and the normative power is losing its appeal. Nevertheless, the EU is in need of good alternatives to EU membership as the European Union cannot expand *ad infinitum*.²⁰⁹ Therefore benefits of methods of engagement not leading to membership are the objective that the EU should turn into its priority. This chapter looked the variety models of European integration. Their complexity adds to the 'diversity [that] has evidently provided one of [Europe's] most enduring characteristics.'²¹⁰ These specific forms of engagement should also be reviewed in the broader context of the stability and security of the European continent. This is what the following chapter aims to bring. The development of the European

²⁰⁷ Joint Statement on the Partnership for Modernisation, EU-Russia Summit, 10546/10 (Presse 154) Rostov, 1 June 2010.

²⁰⁸ European Commission, 'Energy 2020 A Strategy for competitive, sustainable and secure energy' COM (2010) 639 final, Brussels, 10 November 2010.

²⁰⁹ E Landaburu, 'From Neighbourhood to Integration Policy. Are there concrete alternatives to enlargement?' (Brussels, Centre for European Policy Studies, CEPS Policy Brief No 95, 2006).

²¹⁰ Davies (n 179) 16.

Neighbourhood Policy (ENP) and its instrument need to be considered to seek answers regarding their role in achieving stability and prosperity in the EU's neighbourhood.

Chapter III

The European Neighbourhood Policy – a multilateral framework and its instruments

1. Introduction

The European Union continuously reforms and reviews its policies and their instruments with the aim of making itself 'more present in the world'.²¹¹ The European Neighbourhood Policy (ENP) may be considered to be one of them. It is gradually becoming, however, a rather problematic and ineffective apparatus that is failing to weather the storms caused by the historical events in the EU's vicinity and, by the same token, to contribute to building of EU's capacity of an international actor. The ENP was launched in 2003 to prevent the emergence of new dividing lines between the eastwardly enlarged EU and the diverse pool of its neighbours to the east²¹² and south.²¹³ The creation of this policy was driven by a need for an alternative to EU enlargement, however, from its inception has been - arguably - lacking vision, consistency and effectiveness.²¹⁴ Indeed, the fifth round of enlargement, which took place in 2004, forced the EU to address 'a fundamental conundrum besieging European foreign policy [...], the fact that the EU cannot enlarge indefinitely, while at the same time [it] wishes to apply, *mutatis mutandis*, lessons of enlargement, to the neighbours.'²¹⁵ Nevertheless, the policy's key feature of becoming something other than the

²¹¹ As inspired by the Presidency Conclusions, Laeken 14-15 December 2001.

²¹² Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine.

²¹³ Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, the Occupied Palestinian Territories, Syria and Tunisia.

²¹⁴ See eg D Kochenov, 'The ENP Conditionality: Pre-Accession Mistakes Repeated' in L Delcour and E Tulmets (eds) *Pioneer Europe? Testing EU Foreign Policy in the Neighbourhood* (Baden Baden, Nomos, 2008) 105; D Kochenov, 'The Eastern Partnership, the Union for the Mediterranean and the Remaining Need to Do Something with the ENP' (Birmingham, Centre for Russian, Central and East European Studies (CRCEES) Working Paper No WP 1, 2009); T A Börzel and V van Hüllen, 'One voice, one message, but conflicting goals: cohesiveness and consistency in the European Neighbourhood Policy' (2014) 21(7) *Journal of European Public Policy* 1033.

²¹⁵ M Comelli, E Greco and N Tocci, 'From Boundary to Borderland: Transforming the Meaning of Borders in Europe Through the European Neighbourhood Policy' 2007 (12) *European Foreign Affairs Review* 203; B Dimitrova, 'Remaking Europe's Borders through the European Neighbourhood Policy'

enlargement, instead of introducing an attractive alternative to enlargement, in many ways has affected its ability to help the EU to address the geostrategic challenges of its vicinity. This underlying weakness of the ENP, that is being a frail alternative designed to restrict EU's enlargement, has been further illustrated by indolent, if not careless, borrowing of enlargement instruments such as conditionality.²¹⁶ These instruments have not been adapted to the specific needs of each ENP partner country. Moreover, the application of conditionality within the ENP framework lacks the incentive that could stimulate reforms and law approximation. This is particularly relevant to the eastern neighbours. There is no doubt that the application of the same methods of engagement to the diverse pool of countries and territories covered by the policy strongly influences conspicuous inability of the ENP to become a constructive and compelling method of engagement with the neighbourhood.

The offering of the academic literature on the ENP is voluminous²¹⁷ and therefore it is fitting to state here that this chapter's focus is only on the selected elements of the Policy that help

(Brussels, Centre for European Policy Studies, CEPS Working Document No 327, Brussels, 2010; A Henrikson, 'Facing across Borders: The Diplomacy of Bon Voisinage' (2012) 21(2) *International Political Science Review* 124.

²¹⁶ See eg R Janse, 'The evolution of the political criteria for accession to the European Community, 1957–1973' (2018) 24 *European Law Journal* 57; P Balázs, 'Enlargement Conditionality of the European Union and Future Prospects' in I Govaere, E Lannon, P Van Elsuwege, S Adam (eds), *The European Union in the World. Essays in Honour of Marc Maresceau* (Leiden-Boston, Martinus Nijhoff Publishers, 2014) 523; D Kochenov, 'Overestimating Conditionality' in I Govaere, E Lannon, P Van Elsuwege, S Adam (eds), *The European Union in the World. Essays in Honour of Marc Maresceau* (Leiden-Boston, Martinus Nijhoff Publishers, 2014) 541; D Kochenov and E Basheska, 'The European Neighbourhood Policy's value conditionality: from enlargements to post-Crimea' in S Poli (ed) *The European Neighbourhood Policy – Values and Principles* (London and New York, Routledge, 2016) 145.

²¹⁷ See eg L Delcour and E Tulmets (eds), *Pioneer Europe?: Testing EU foreign policy in the neighbourhood* (Baden Baden, Nomos, 2008); R G Whitman and S Wolff (eds), *The European Neighbourhood Policy in perspective* (n 17); E Korosteleva, *The European Union and its eastern neighbours: towards a more ambitious partnership?* (London and New York, Routledge, 2012); B Van Vooren, *EU External Relations Law and the European Neighbourhood Policy*.

to formulate answers to the research questions that this thesis addresses. The chapter aims to critically review this currently multifaceted policy and its ineffectiveness in order to identify its key weaknesses and unsuccessful reforms. It will be argued that the criticism of the ENP is justified and the only way for the EU to contribute to the stability of its neighbourhood can be achieved on bilateral basis framed by agreements concluded by the EU, its Member States and the ENP partner countries.

The analysis is organised in the following way. The next section (Section 2) provides an overview of the ENP's development. The aim of this exercise is to highlight the considerable dissonance between the ambitious language of EU policy papers and everyday ENP practice. Section 3 examines the regional dimensions of this Policy. Section 4 offers a review of the ENP instruments by focusing on ENP action plans and association agendas. Section 5 discusses conditionality, and conclusions are presented in Section 6.

2. Evolution of the European Neighbourhood Policy

The groundwork leading to the largest EU enlargement to date required new ways of engagement with those of EU neighbours that would not be given the opportunity of EU membership. The objective of the European Neighbourhood Policy was formulated in ambitious terms to share the benefits of an enlarged EU with neighbouring countries in order to contribute to increased stability, security and prosperity of the European Union and its neighbours. The ENP aspires to offer the prospect of an increasingly close relationship. It has been built on commitment to

A paradigm for coherence (n 4); E Lannon, *The European Neighbourhood Policy's Challenges* (Brussels, Peter Lang, 2012); N Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU* (n 3); S Gstöhl (ed), *The European Neighbourhood Policy in a Comparative Perspective. Models, challenges, lessons* (London and New York, Routledge, 2016).

common values, including democracy, the rule of law, good governance and respect for human rights, and to the principles of market economy, free trade and sustainable development.²¹⁸

The motivation behind the launch of a policy to become an enlargement alternative is the main source of its weakness. Being a non-enlargement policy with the direct transplant of the enlargement policy methodology could not lead to a new, effective scheme of engagement with the neighbourhood. Moreover, the new policy was designed to serve EU engagement with some but not all EU neighbours. Partner countries and territories covered by the ENP are offered the option of privileged relations based on their commitment to common values.²¹⁹ Firstly, it needs to be observed that the language used by the EU indicates that the relations with the ENP countries are special. However, setting the political dimension of the verbiage aside, the legal state of affairs between the EU and its neighbours suggests otherwise. Secondly, this value-driven approach is causing problems, which are elaborated on in section 5 of this chapter. Furthermore, not only is the prospect of privileged relations not clearly defined, but this Policy also fails to provide a robust basis for further development of EU relations with its neighbours. The vague language describing the options on offer²²⁰ could not translate into an attractive long-term form of engagement, which partner countries would willingly accept and adhere to. This factor is particularly relevant to those countries covered by the ENP, such as Ukraine and Georgia, that have been expressing their EU membership ambitions. It would be difficult to argue that at the time of the inception of the ENP this clear dividing line between the enlargement process and the ENP was justified. After all, this

²¹⁸ Council Conclusions (n 136).

²¹⁹ N Ghazaryan, 'The fluid concept of 'EU values' in the neighbourhood: a change of paradigm from East to South?' in S Poli (ed) *The European Neighbourhood Policy – Values and Principles* (London and New York, Routledge) 11.

²²⁰ [The ENP strategy paper] 'considers how to strengthen the framework for the Union's relations with those neighbouring countries that do not currently have the perspective of membership of the EU, European Commission, 'Wider Europe' (n 99) 4.

Policy was launched to prevent the emergence of new dividing lines between the enlarged EU and its neighbours. Furthermore, this focus on creating an alternative to enlargement has been poorly implemented and, in equal measure, prevented the ENP from meeting the needs of those neighbours that are not interested in accession to the EU. This indisputable lack of balance of this Policy in its initial phase has been addressed through reviews, amendments of its institutional structure and introduction of regional dimensions. It is worth highlighting two most recent attempts of reviving the failing ENP in the light of evolving events that directly affect stability of the neighbourhood (see the section below).

2.1. A New Response to a Changing Neighbourhood

In May 2011, a Communication entitled *A New Response to a Changing Neighbourhood* was published.²²¹ It was the result of the strategic review of the ENP that had commenced prior to the Arab Spring,²²² but was strongly influenced by events in the EU's south vicinity. This review confirmed a strong attachment to the conditionality and to an incentive-based approach, also known as the principle of more-for-more.²²³ The role of values, primarily, human rights,

²²¹ Council Conclusions (n 136).

²²² Joint Communication by the High Representative of the Union for Foreign Affairs and Security Policy and the European Commission, 'A New Response to a Changing Neighbourhood, a review of European Neighbourhood Policy' (n 160).

²²³ 'The more and the faster a country progresses in its internal reforms, the more support it will get from the EU. This enhanced support will come in various forms, including increased funding for social and economic development, larger programmes for comprehensive institution-building (CIB), greater market access, increased EIB financing in support of investments; and greater facilitation of mobility. These preferential commitments will be tailored to the needs of each country and to the regional context. They will recognise that meaningful reform comes with significant upfront costs. It will take the reform track record of partners during the 2010-12 period (based on the annual progress reports) into account when deciding on country financial allocations for 2014 and beyond. For countries where reform has not taken place, the EU will reconsider or even reduce funding,' *ibid* 3.

democracy and the rule of law remained unchanged despite problems with their implementation in the EU's neighbourhood.²²⁴ The review also recognised the importance of a higher level of differentiation 'allowing each partner country to develop its links with the EU as far as its own aspirations, needs and capacities allow.'²²⁵ Furthermore, it led to the strengthening of the two (eastern and southern) regional dimensions. This is a clear indication that the ENP was reduced to become an umbrella policy, a framework for tailor-made relations reflecting the needs and ambitions of each neighbour.²²⁶ The overall aim of the new approach has hardly changed²²⁷ until now and remains focused on political association and economic integration, greater mobility of people, and the growing engagement of civil society organisations in partner countries. However, any progress in these areas could only be made through contractual bilateral relations. Furthermore, the contribution of the Policy to achieving these goals has been far from satisfactory.

The implementation of this new response has not been a great success. A review of individual country reports as well as a review of a follow-up Communication: Neighbourhood at the Crossroads: Implementation of the European Neighbourhood Policy,²²⁸ published in 2013, offers a rather grim picture. The neighbourhood was tormented by instability (for example,

²²⁴ D Kochenov and E Basheska, The European Neighbourhood Policy's value conditionality: from enlargements to post-Crimea in Sara Poli (ed) *The European Neighbourhood Policy – Values and Principles* (London and New York, Routledge, 2016) 151.

²²⁵ Joint Communication by the High Representative of the Union for Foreign Affairs and Security Policy and the European Commission, 'A New Response to a Changing Neighbourhood, a review of European Neighbourhood Policy' (n 160) 2.

²²⁶ *ibid* 19.

²²⁷ European Parliament at al, 'Report on the Implementation of the European Neighbourhood Policy Review' JOIN (2017) 18 final, Brussels, 18 May 2017.

²²⁸ European Parliament at al, 'Neighbourhood at the Crossroads: Implementation of the European Neighbourhood Policy in 2013' JOIN(2014) 12 final, Brussels, 27 March 2014.

Libya²²⁹), while finding examples of the application of common values (for example, in Egypt²³⁰) was problematic. The events to the east, where Russia has been playing an increasingly violent role, leave the EU with an expanding list of challenges. Moreover, changes to the Policy need to go deeper to enable the EU to retain its international actorness and the title of a normative power.²³¹

2.2. Towards a new European Neighbourhood Policy

The most recent review of the ENP started in the autumn 2014. This latest attempt to revive the Policy is driven by the following principles: differentiation, inclusiveness, flexibility, better use of financial instruments, and increased visibility and ownership.²³² Towards a New European Neighbourhood Policy, Joint Consultation Paper published in March 2015, provided the basis for the consultations on the future of EU relations with its neighbours. Despite the language of joint ownership, known from the inception of ENP, this particular review was the first in which the partners were given an opportunity to voice their needs, requirements and aspirations. The focus

²²⁹ M Natorski, 'Epistemic (un)certainly in times of crisis: The role of coherence as a social convention in the European Neighbourhood Policy after the Arab Spring' (2016) 22(3) *European Journal of International Relations* 646.

²³⁰ M Comelli, 'Dynamics and Evolution of the EU-Egypt Relationship within the ENP Framework' (Rome, Istituto Affari Internazionali, IAI 10/02, 2010) 6; European Commission, 'Implementation of the European Neighbourhood Policy in 2010 Progress Country Report: Egypt' SEC(2011) 647, Brussels, 25 May 2011, 3.

²³¹ I Manners, 'Normative Power Europe: A Contradiction of Terms?' (n 37) 235; S Lavenex, F Schimmelfennig, 'EU rules beyond EU borders: theorizing external governance in European politics' (2009) 16(6) *Journal of European Public Policy* 791; S Lavenex, 'EU external governance in "Wider Europe"' (2004) 11(4) *Journal of European Public Policy* 680.

²³² See further < http://europa.eu/rapid/press-release_STATEMENT-15-3204_en.htm > accessed 10 September 2018.

of this review was on five areas of common interest: trade and economic development; connectivity; security; governance; migration and mobility.

This review was conducted based on the acknowledgment that the neighbourhood is currently less stable than it had been in the past. The EU also accepted that the offers that had been made to the neighbouring countries had not recognised the needs of differentiated engagement in which the partners are interested. This position is a good departure point for a further review of how this multilateral policy can serve individual needs and what role should be given to the regional dimensions of this policy. Indeed, the consultation paper contains EU self-criticism regarding the formulation of the Policy's objectives. It states that 'the EU needs to define more clearly its own aims and interests, while promoting the values on which it is based.'²³³ This self-reflection should serve as a turning point of strategic importance that requires the EU to carefully review how it wishes to achieve the establishment of an area of security and stability in its neighbourhood.

Finally, the shortcomings of the ENP were recognised. There should be one neighbourhood policy accommodating countries currently not covered by the ENP, eg Switzerland and in the near future former EU members such as the United Kingdom. This is a matter of a broader approach that would enable the EU to have a better understanding of factors that influence its immediate neighbours and their engagement with the EU, but more importantly would also enable the EU to monitor the emergence of issues that can destabilise its neighbours under the influence of other regional players. This 'bigger picture' would serve the EU better and would also enable it to engage deeper with its vicinity. This is not only the question on extending

²³³ European Commission and High Representative for Foreign Affairs and Security Policy, 'Towards a new European Neighbourhood Policy' JOIN (2015) 6 final, Brussels, 4 March 2015, 3.

the policy to the neighbours' of EU neighbours but also how the EU should deal with the changing dynamic within the EU itself. The withdrawal of the United Kingdom from the EU will lead to the introduction of a new 'neighbour' (or even 'neighbours' if Scotland departs from the United Kingdom), and the future relations with the EU should go beyond the new economic ties with the single market.²³⁴ It is essential to keep the common values and legal standards as an integral part of the future EU-UK relations. After all, the common heritage should not be affected by the withdrawal decision.²³⁵ This should be a consolidating factor contributing to the strengthening of European integration in the post-EU membership times.

Overall, there is a clear indication that the European Commission focuses on improving the ENP's role²³⁶ and to make it 'closely integrated into an overall Foreign Policy with a comprehensive approach using all instruments both of the EU and of Member States.'²³⁷ This is an element that has been neglected in the past, although it is worth recalling that the ENP emerged at the same time as the European Security Strategy²³⁸ and can be regarded as 'a specific implementation of the strategy'.²³⁹ Nevertheless, the links of the ENP with the Strategy have not been clearly presented and perhaps the Commission, and the European External Action Service, have failed to see the ENP as an integral part of the Strategy. Some of the challenges that impede

²³⁴ European Parliament, 'Future trade relations between the EU and the UK: options after Brexit' PE 603.866, Brussels, 16 March 2018.

²³⁵ Draft resolution to wind up the debate on the framework of the future EU-UK relationship, European Parliament, Brussels, 7 March 2018, available at <<http://www.europarl.europa.eu/resources/library/media/20180307RES99232/20180307RES99232.pdf>> accessed 10 September 2018.

²³⁶ European Commission and High Representative, 'Towards a new European Neighbourhood Policy' (n 233).

²³⁷ *ibid* 3.

²³⁸ European Council, *A Secure Europe in a Better World*, European Security Strategy (n 1).

²³⁹ Cremona, 'The European Neighbourhood Policy. More than Partnership?' (n 6) 244.

a successful implementation of the Policy could be resolved by a coordination mechanism of the ENP and foreign policies of the Member States.²⁴⁰

3. Regional dimensions of the European Neighbourhood Policy

Shortly after its inception, it became apparent that the ENP could not cover all the needs of the EU's diverse neighbours and therefore new regional fora for co-operation were brought into the spectrum of ENP instruments. Practice proved that the amalgamation of southern and eastern neighbours under one policy umbrella was not an optimal solution. Put differently, the one-size fits all approach had to be reconsidered in order to save and strengthen the failing European Neighbourhood Policy. This drive led to the emergence of the Eastern Partnership and the Union for Mediterranean. The latter eventually developed into the Partnership for Democracy and Shared Prosperity with the Southern Mediterranean. These are analysed in turn.

²⁴⁰ 'Towards a New European Neighbourhood Policy – ECDPM Contribution to the EU Consultation' (Maastricht, European Centre for Development Policy Management, 2015), available at <<http://ecdpm.org/wp-content/uploads/ECDPM-contribution-to-the-ENP-review-consultation.pdf>> accessed 10 September 2018.

3.1. Eastern Partnership

Nariné Ghazaryan observed that the European Commission envisaged the Eastern Partnership (EaP)²⁴¹ as a step change in comparison with the ENP, and amounted to a recognition of the Europeanness of eastern partners.²⁴² Indeed, this initiative, aimed at reinvigorating relations with eastern neighbours (Belarus, Moldova, Ukraine, Armenia, Azerbaijan and Georgia), was launched in 2009 as ‘a more ambitious partnership, based on commitments to the principles of international law and to fundamental values, including democracy, the rule of law and the respect for human rights and fundamental freedoms; complementary to existing bilateral contractual relations, to create the necessary conditions to accelerate political association and further economic integration between the European Union and interested partner countries, and promote stability and multilateral confidence building’.²⁴³

There are a number of factors that are common to all or most of the EaP countries. In political terms, all EaP countries emerged as a result of the dissolution of the Soviet Union, and many of the difficulties inherited from the Soviet era have affected their development to date. Their relations with Russia and the development of the exploitation of energy resources make their foreign policies, including relations with the EU, particularly difficult. Russia perceives this region

²⁴¹ Over the past decade, EaP countries have become closer neighbours of the EU. The 2004 enlargement brought Belarus and Ukraine into the immediate neighbourhood of the EU. With Bulgarian and Romanian accession, the EU obtained a maritime border with Georgia. In the event of Turkish accession, the EU will get a direct land border with all the countries of the region. Despite the uncertainty regarding Turkish accession, distant neighbours such as Armenia and Azerbaijan are becoming closer political neighbours of the EU. The extension of the ENP confirmed their European aspirations, especially Ukraine, Moldova and Georgia.

²⁴² Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU: A Legal Analysis* (n 3) 85.

²⁴³ Council of the European Union, Joint Declaration of the Eastern Partnership Summit, (n 166).

as its sphere of influence.²⁴⁴ A good example is its involvement in Abkhazia and South Ossetia, which considerably adds to tensions between Russia and Georgia. The same is true of Russia's role in Transnistria with regard to Moldova-EU relations. The annexation of Crimea, as well as Russian involvement in unrest in Eastern Ukraine, puts the EU's role in the neighbourhood to the ultimate test and in many ways has encouraged the EU to respond quickly to the changing dynamics in its neighbourhood.²⁴⁵ This geostrategic element is not given sufficient attention in either the ENP or EaP dimension. The role of the latter in strategic terms remains weak. The Partnership operates only with political tools such as joint declarations.²⁴⁶ These documents are unable to actively contribute to improving relations with the main neighbours' neighbour, that is the Russian Federation. While they confirm the EU's support for Georgian and Ukrainian territorial integrity, what they offer could not make the EaP a viable contribution to stability in the region.²⁴⁷

²⁴⁴ R Alcaro and E Alessandri, 'Engaging Russia: Prospects for a Long-Term European Security Compact' (2010) 15 *European Foreign Affairs Review* 191; A V Papava, 'The Eurasianism of Russian Anti-Westernism and the Concept of 'Central Caucaso-Asia' (2013) 51(6) *Russian Politics and Law* 45.

²⁴⁵ M Emerson, 'The EU-Ukraine-Russia Sanctions Triangle' (Brussels, Centre for European Policy Studies, CEPS Commentary, 2014).

²⁴⁶ See eg Joint Declaration of the Eastern Partnership Summit 14821/17, Brussels, 24 November 2017, available at < <https://www.consilium.europa.eu/media/31758/final-statement-st14821en17.pdf>> accessed 10 September 2018.

²⁴⁷ See e.g. the Joint Declaration of the Eastern Partnership Summit, Riga 21-22 May 2015 <<http://www.consilium.europa.eu/en/meetings/international-summit/2015/05/21-22/>> accessed 10 September 2018.

3.2. *Union for the Mediterranean*

The Mediterranean²⁴⁸ dimension of the ENP constitutes another weak addition to the ENP *instrumentarium*.²⁴⁹ The extension of this eastern-focused measure to the EU's southern neighbours undermined the ENP and the overall position of the EU towards its southern neighbours.

The remains of colonial links and ties still influence the current relations of EU Member States and the EU with countries of the region.²⁵⁰ A stable and secure Mediterranean is in the best interest of the EU, and therefore co-operation with this region has been a priority for the European Union's external relations.²⁵¹ The challenges such as the Arab Spring and the ongoing migrant crisis indicate that any developments that may lead to a direct security threat for the EU are carefully monitored. The EU response, however, has been extensively criticised.²⁵² The countries

²⁴⁸ The Mediterranean region consists of the Northern (Turkey, Malta, Cyprus), Southern and Eastern Mediterranean (these include the Maghreb countries: Morocco, Algeria, Tunisia and Libya; the Mashreq countries: Egypt, Jordan, Lebanon, Syria and the Palestinian Authority). Cyprus, Malta and Turkey were covered by EC policies towards the region until 2004, when Cyprus and Malta joined the EU, while Turkish relations with the EU fall under the pre-accession policy. The countries of North Africa are also involved in the Africa and Europe Partnership.

²⁴⁹ Pieters, 'The Mediterranean Countries' (n 142) 393.

²⁵⁰ Algeria, Tunisia and Syria were occupied by France; Egypt, Cyprus, Gibraltar, Malta and Palestine by the United Kingdom, and Libya by Italy.

²⁵¹ European Parliament at al, 'Implementation of the European Neighbourhood Policy Partnership for Democracy and Shared Prosperity with the Southern Mediterranean Partners Report (Implementation of the European Neighbourhood Policy in 2014)' SWD(2015) 75 final, Brussels, 25 March 2015.

²⁵² A Dandashly, 'The EU Response to Regime Change in the Wake of the Arab Revolt: Differential Implementation, (2014) 37 *Journal of European Integration* 37; E Burke, 'Running into the sand? The EU's faltering response to the Arab revolutions' (London, Centre for European Reform, 2013); S Grigonis, 'EU in the face of migrant crisis: Reasons for ineffective human rights protection' (2016) 2 *International Comparative Jurisprudence* 93.

of the region are equally important to the EU for economic reasons.²⁵³ The Mediterranean partners provide the European market with supplies of natural resources, primarily gas and petroleum. Instruments aimed at supporting the economic and social transition of partner countries, trade liberalisation and market access for both parties, and strengthening the internal security of the

²⁵³ The very first European policy for the region was formulated in 1976. The Global Mediterranean Policy (F Bicchì, *Actors and Factors in European Foreign Policy Making: Insights from the Mediterranean Case* (Florence, European University Institute, EUI Working Paper RSC No 47, 2002) 4) enabled manufactured goods from the Mediterranean to access the European market. Despite the efforts made, the policy had little impact on the economies of the region. The crisis of the European textile industry, a lack of regional co-operation, but also the accession of Spain and Portugal to the European Communities in 1986 negatively influenced the economies of the region (see further P D Koliris, 'Global Mediterranean Policy Implications in View of the New EEC Enlargement' (1984) 35(3) *Journal of Agricultural Economics* 319).

The Moroccan application for EC membership can be regarded as a desperate measure to address frustration at the lack of effective EC-Mediterranean economic co-operation (Pieters, 'The Mediterranean Countries' (n 142) 396. The application was rejected in an opinion of the Commission on the grounds that Morocco was not a European country).

Union were the focus of multilateral approaches²⁵⁴ such as the Barcelona Process in 1995²⁵⁵ and

²⁵⁴ In 1992, a proposal to reinvigorate relations with the region through increasing development aid and extending trade preferences was presented by the Commission ('The Community has been obliged to take a new look at its role in the region [...], increase the Community's weight and influence for a more stable order in an ever more interdependent and therefore more vulnerable world [...] [The new] policy needs a new concept to underpin the new approach to relations between the Community and its next-door neighbours to the South. [...] this new concept of Euro-Maghreb partnership will also have to have a practical impact in all the appropriate fields.' Commission Communication on the future of relations between the Community and the Maghreb countries, SEC (1992) 401 final, Brussels, 30 April 1992). The reasons behind the need to introduce a new policy framework for the region were not solely influenced by the EC-Mediterranean state of affairs. Changes in Central and Eastern Europe, as well as the drive to create the Internal Market and the establishment of the World Trade Organisation also played an important role. The fact that developments in the eastern neighbourhood influenced the development of policy towards the EU's southern neighbours indicates yet again that the proposals were not made with the specific needs of the region and its countries and territories in mind. In 1994, a proposal for a partnership that initiated the Barcelona Process for the Maghreb, Mashreq and the Middle East (originally, the partnership was aimed at Algeria, Egypt, Morocco, Israel, Jordan, Lebanon, the Palestinian Authority, Syria, Tunisia, Turkey, Cyprus and Malta) was formulated to address economic matters and the security issues that were emanating from the region. The Barcelona Declaration not only addressed security issues but also provided a new context for the development of the Common Foreign and Security Policy (CFSP) in the post-Cold War and post-Maastricht era. The EU was fully aware that changes in the world order would affect the region and as a result a number of risks would affect the security and stability of the EU and its Member States. Political instability, economic and religious tensions were identified as the elements that a new EU policy towards the region should tackle. Yet again, the formula used towards the countries of the region was the same as that applied towards Central and Eastern European countries. The market economy and prosperity were seen as means to provide the basis for democratisation and embedding the rule of law. Economic development, closer economic relations with the EU through trade agreements, and financial assistance were identified as the tools of the EU Mediterranean policy. The Barcelona Declaration (Final Declaration of the Barcelona Euro-Mediterranean Ministerial Conference of 27 and 28 November 1995 and its work programme, available at <http://www.eeas.europa.eu/euromed/docs/bd_en.pdf> accessed 10 September 2018) was adopted in 1995 and launched the Euro-Mediterranean Partnership aimed at establishing a common area of peace and stability, shared prosperity, including a free trade area (Cooperation will focus on practical measures to facilitate the establishment of free trade as well as its consequences, including: i) harmonizing rules and procedures in the customs field, with a view in particular to the progressive introduction of cumulation of origin; in the meantime, favourable consideration will be given, where appropriate, to finding ad hoc solutions in particular cases; ii) harmonization of standards, including

its re-launch within a regional forum, the Union for the Mediterranean in 2008.

The Euro-Mediterranean Partnership faced a great challenge when it became an integral part of the European Neighbourhood Policy. Initially, the inclusion of the Mediterranean countries in the ENP caused some confusion and was perceived as a dilution of EU relations with the countries of the region. In particular, the Arab Mediterranean neighbours expressed their concerns that the ENP could undermine the regional framework offered by the Euro-Mediterranean Partnership.²⁵⁶ Although mass migration, massive flow of refugees, fundamentalist extremism and organised crime were identified as issues that the EU needed to address, the adopted measures²⁵⁷ proved to be weak and not capable of dealing with the scale and impact of the developments of the EU's neighbours stability but also its very own internal stability. The direct threat to the stability of southern Member States, especially Spain, France and Italy, showed that the idea of neighbours 'casting a shadow' had spread beyond continental Europe. The perception of the EU's neighbours across the Mediterranean Sea changed and they are no longer considered as distant colonies, as

meetings arranged by the European Standards Organisations; iii) elimination of unwarranted technical barriers to trade in agricultural products and adoption of relevant measures related to plan health and veterinary rules as well as other legislation on foodstuffs; iv) cooperation among statistics organizations with a view to providing reliable data on a harmonized basis; v) possibilities for regional and sub-regional cooperation (without prejudice to initiatives taken in other existing fora) as well as a partnership in social, cultural and human affairs. The gradual establishment of the free trade area required bilateral vertical liberalisation with the EU but also horizontal trade liberalisation among the Mediterranean countries (Pieters 'The Mediterranean Countries' (n 142) 399).

²⁵⁵ 'The southern and eastern shores of the Mediterranean as well as the Middle East are geographical areas in relation to which the Union has strong interests both in terms of security and social stability,' European Commission, 'Strengthening the Mediterranean Policy of the European Union: Establishing a Euro-Mediterranean Partnership'(n 144) 2.

²⁵⁶ Comelli, Greco and Tocci, 'From Boundary to Borderland: Transforming the Meaning of Borders in Europe Through the European Neighbourhood Policy' (n 256) 212.

²⁵⁷ See for eg the reform of the Common European Asylum System, Outcome of the Council meeting, Justice and Home Affairs, 3662nd Council meeting, Luxembourg, 4-5 June 2018.

they used to be. Their influence on European security is now much greater, and the impact of conflict between countries in the region poses a threat to regional and international stability.²⁵⁸ Since the establishment of the Barcelona Process new risks have been added and now also include terrorism. This element failed to enhance the EU's efforts to improve measures that would enable better control of migration flows.

3.3. Partnership for Democracy and Shared Prosperity

One of the biggest test for both the ENP and its Mediterranean dimension came in 2010. Political developments in the region from December 2010 onwards brought new challenges to the EU and its policy towards this group of neighbours. The initial reactions to the uprisings showed reluctance and indecisiveness.²⁵⁹ Forms of support were formulated in 2011 and fell within the framework of the existing mechanisms of the ENP, Euro-Mediterranean Partnership and Union for the Mediterranean. The newly rebranded regional dimension of the ENP, now called the Partnership for Democracy and Shared Prosperity with the Southern Mediterranean, confirmed the EU's concerns with security in the region.²⁶⁰ In particular, migration flows, border security, an emphasis on economic stability, and access to the single market as stabilisation tools were identified and supported with the so-called 3M mechanism: money, markets and mobility. Despite these changes, their effectiveness remains questionable.²⁶¹

²⁵⁸ The presence of Syrian troops in Lebanon, the occupation of Southern Lebanon by Israeli forces; tensions on the border between Algeria and Morocco; and the Israeli-Palestinian conflict.

²⁵⁹ Fernández Arribas, Pieters and Takács (eds), *The European Union relations with the Southern-Mediterranean in the aftermath of the Arab Spring* (n 156).

²⁶⁰ European Commission, High Representative, Joint Communication 'A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean' (n 159).

²⁶¹ In September 2011, the SPRING programme - a strategic financial instrument offering support for

4. Instruments of the European Neighbourhood Policy

The European Union employs a number of instruments to achieve the ENP objectives. From its inception in 2003, the Policy was meant to be based around the then existing agreements between the then EC and its neighbouring countries. Thus, from the start the ENP per se was meant to be centred around a political *instrumentarium* developed by the EU itself or jointly with its partners. At the same time, the policy papers published by the European Commission over the years suggested the development of new contractual links with countries in the EU's vicinity. This, so far, has materialised with three Association Agreements with Ukraine, Georgia and Moldova. Altogether, the ENP instruments may be divided into two main groups: ENP instruments *sensu stricto* and ENP instruments *sensu largo*. The first group encompasses the political tools developed solely for the purposes of the ENP, including Action Plans and Association Agendas. It also comprises financial programmes created to support reforms in the neighbouring countries (ENI). The second category, that is ENP instruments *sensu largo*, covers all the above and also international treaties concluded between the European Union and its neighbouring states. The latter function independently of the ENP, however, they were developed - for rather obvious reasons - with that Policy in the background. This section of the chapter focuses solely on ENP instruments *sensu stricto*, while the Association Agreements - constituting representative examples of ENP instruments *sensu largo*.

democratic transformation, institution building and economic growth - was launched ('EU response to the Arab Spring: new package of support for North Africa and Middle East', Press Release, Brussels, 27 September 2011, available at <http://europa.eu/rapid/press-release_IP-11-1083_en.htm> accessed 10 September 2018. See also Commission Implementing Decision of 09 March 2012 amending Decision C(2011) 6828 adopting the Programme of Support to the Association Agreement and the Transition Process for Tunisia under the SPRING programme, to be financed under).

4.1. Action Plans and Association Agendas

Action Plans were envisaged in the original ENP policy papers as non-binding instruments negotiated by the European Union with the ENP partners. The aim of Action Plans is to set out multifaceted reforms for the neighbouring countries as and provide a platform for their implementation. Since they are agreed jointly with the countries concerned, the European Union often stresses their ‘joint-ownership’. This, arguably, is a rather misleading proposition as they envisage reforms in the neighbouring countries reflecting political conditionality developed by the European Union. Sieglinde Gstöhl argues that since the ENP countries do not participate in the decision making process dedicated to the development of the meaning of the common values, it effectively ‘hampers the internationalisation of norms in ENP countries.’²⁶² She also observes that the principle of joint ownership is in conflict with political conditionality, in particular since the more-for-more approach has been introduced.²⁶³ A different approach is put forward by Peter van Elsuwege and Olga Burlyuk, where the principle of joint ownership should not be disconnected from differentiation (conditionality in its more-for-more model).²⁶⁴ The latter view reflects the significance of effective conditionality.

To this end, these Action Plans have been developed as tools for a one-way road processes. It is worth noting that the Action Plans have a questionable legal status and, as agreed in the

²⁶² S Gstöhl, ‘The contestation of values in the European Neighbourhood Policy: challenges of capacity, consistency and competition’ in S Poli (ed) *The European Neighbourhood Policy – Values and Principles* (London and New York, Routledge, 2016) 70.

²⁶³ *ibid* 75.

²⁶⁴ P Van Elsuwege and O Burlyuk, ‘Exporting the rule of law to the EU’s eastern neighbours: reconciling coherence and differentiation’ in S Poli (ed) *The European Neighbourhood Policy – Values and Principles* (London and New York, Routledge, 2016) 174.

literature, they are examples of EU's 'soft power'.²⁶⁵ As argued by Marise Cremona 'they are designed, by setting out the expectations of the EU, to operate as a strong incentive towards reform, and an 'external' set of targets which can be used to support government policy against domestic lobbies and vested interests.'²⁶⁶ There are a number of political and legal reasons why the Action Plans have been developed as non-binding instruments. For instance, in some of the agreements between the EU and its neighbouring countries, joint institutions do not have decision-making powers. Hence, the bilateral framework lacks (or at the material time lacked) institutions that could proceed with their formal adoption as bilateral legal acts. Furthermore, the Action Plans have been developed in the pre-Lisbon era, when the European Union was still based on three pillars, each providing for different procedural and institutional frameworks. In that legal environment, the adoption of Action Plans as legal agreements would have translated on the EU side into complex institutional deals and, potentially, institutional struggles if not battles.

Action Plans have been designed as living instruments. They are adopted for a minimum duration of three years and are subject to renewal by mutual consent. They are envisaged to be comprehensive but clearly identify[ing] a number of key priorities.²⁶⁷ In the context of Eastern Partnership, the Action Plans are being replaced – in case of countries that concluded the Association Agreements – with Association Agendas.²⁶⁸

²⁶⁵ It is interesting to note that in the context of Pre-accession Policy the European Union used European/Accession Partnerships, which were annexed to Council Decisions and thus were unilateral binding instruments adopted by the European Union but setting the reform agendas for the neighbouring countries. European/Accession Partnerships were phased out in the last years and replaced with revised model of annual country reports and screening reports for countries that commenced the accession negotiations.

²⁶⁶ M Cremona, 'The European Neighbourhood Policy' (n 140) 235.

²⁶⁷ Council Conclusions (n 136).

²⁶⁸ See eg <https://eeas.europa.eu/sites/eeas/files/eu_ukr_ass_agenda_24jun2013.pdf > accessed 10 September 2018.

4.2. *European Neighbourhood Instrument*

The ambitious aim to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterized by close and peaceful relations based on cooperation, requires financial support to encourage partner countries to engage and undertake costly reforms and commit to law approximation. The European Neighbourhood and Partnership Instrument (ENPI) was created to succeed two regional streams of funding on offer, namely MEDA and Tacis.²⁶⁹ It was in operation from 2007-2014 when it was replaced by the European Neighbourhood Instrument (ENI) established by Regulation 232/2014.²⁷⁰ ENI is one of the instruments providing direct support for the European Union's external policies.

This Regulation is the only legally binding instrument among ENP instruments *sensu stricto*. It raises the following challenges. First, it forms a legal basis for the support of the implementation of political initiatives that have shaped the ENP, namely the Eastern Partnership as well as the Partnership for Democracy and Shared Prosperity and the Union for the Mediterranean. However, the Regulation also enables financial support of regional cooperation throughout the neighbourhood, *inter alia*, in the framework of the Northern Dimension policy or the Black Sea Synergy, as well as, primarily in the case of cross-border cooperation, the external aspects of relevant macro-regional strategies. It is striking that the financial instrument should extend to cooperation with countries not covered by the ENP, a case in point being the Black Sea Synergy that facilitates cooperation between EaP countries with Russia and Turkey. The case of Russia

²⁶⁹ Regulation 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood Partnership Instrument [2006] OJ L310/1.

²⁷⁰ Regulation 232/2014 of the European Parliament and the Council of 11 March 2014 establishing a European Neighbourhood Instrument [2014] OJ L77/27.

raises questions as Regulation 232/2014 (para 7 of its Preamble) states that '[t]his Regulation acknowledges the specific status of the Russian Federation as both a Union neighbour and a strategic partner in the region.' This statement can be interpreted as the EU's decision to extend application of the ENP instruments to a non-ENP country through a back door since Russia expressed its willingness to be covered by this EU policy.²⁷¹

Second, the timeframe and underlying objectives of the Regulation raise criticism. It was adopted in 2014, based on the outcomes of the 2011 ENP review, and will be valid until 2020. However, the most recent review of the ENP was launched in 2015. This means that the Regulation contributes to the reinforcement of conditionality, differentiation and democratisation, while, in order to reflect the re-orientation of ENP, it should be supporting flexibility to promote stability.²⁷² This indicates lack of effective coordination of the policy changes.

Third, the developments in partner countries (such as in Tunisia or Egypt) prevent the strict application of criteria such as the deep democracy one (Article 9 of Regulation 232/2014). There is a high risk that inconsistency of individual assessments of the partner's performance may lead to application of double standards. It is impossible to disagree with Erwan Lannon, when he observes that EU is returning into the old model of EU-ENP countries relations based on the EU's own interest at stake, hence putting the focus on values aside and making the rhetoric of its own policy documents hypocritical.²⁷³

²⁷¹ J De Bardeleben, 'Revising the EU's European Neighborhood Policy: The Eastern Partnership and Russia' in R E Kanet (ed) *Russian Foreign Policy in the 21st Century* (London, Palgrave Macmillan, 2011) 246.

²⁷² E Lannon, 'More for More and Less for Less: from the Rhetoric to the Implementation of the European Neighbourhood Instrument in the Context of the 2015 ENP Review' [2015] *Mediterranean Yearbook* 221.

²⁷³ *ibid* 224.

5. Conditionality

The interdependence between internal reforms, socio-economic transformation and democratisation of the EU's neighbouring partners and the enhancement of relations between the EU and its partners form one of the main characteristics of the ENP. Nevertheless, the concept of conditionality is not new and, above all, its origins had been developed for enlargement purposes long before it was adopted in the ENP context.²⁷⁴

It is worth noting that conditionality is not an invention of EU institutions, but, instead, it is firmly anchored in the EU Founding Treaties. According to the general provisions of the Treaty on European Union, the Member States establish a Union 'founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States.'²⁷⁵

The conditionality principle forms the main pillar of the Accession Policy employed vis-à-vis candidate countries, currently the Western Balkans countries and Turkey.²⁷⁶ In this case values based conditionality is a part of clearly defined and assessed accession criteria: political, legal and economic.

²⁷⁴ K Inglis, 'Pre-Accession Strategy and the Accession Partnerships' in A Ott and K Inglis (eds), *European Enlargement Handbook* (The Hague, Asser Press, 2002) 103; D Kochenov, *EU Enlargement and the Failure of Conditionality. Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (n 27).

²⁷⁵ Article 2 TEU.

²⁷⁶ P Balázs, 'Enlargement Conditionality...' (n 216) 538; F Bieber (ed), *EU Conditionality in the Western Balkans* (London and New York, Routledge, 2017).

The review of the principle of conditionality in the area of the European Neighbourhood Policy proves²⁷⁷ that its mechanisms cannot be automatically transferred from one policy to another. In particular when the policies have such significantly different objectives and *finalité*. Furthermore they have significantly different anchors (Article 49 TEU vs Articles 8 and 10 TEU).²⁷⁸

The role played by values in strengthening ‘the Union’s identity, its self-perception and self-projection’²⁷⁹ has been applied in the EU’s external relations.²⁸⁰ The *instrumentarium* that the EU has developed in the area of external relations, in particular under the ENP umbrella, suggest that the values card can be used on case by case basis or rather selectively (eg the pressure put on Ukraine during Tymoshenko’s imprisonment, which delayed the conclusion of the EU-Ukraine Association Agreement²⁸¹); it can cause significant problems with translation of the values commitments into Action Plans and over time the EU accepted a rather pragmatic approach to

²⁷⁷ D Kochenov, ‘Overestimating Conditionality’ in I Govaere, E Lannon, P Van Elsuwege, S Adam (eds) *The European Union in the World. Essays in Honour of Marc Mareceau* (Leiden-Boston, Martinus Nijhoff Publishers, 2014) 541.

²⁷⁸ See further Ch IV.

²⁷⁹ M Cremona, ‘Values in EU Foreign Policy’ (n 28) 275.

²⁸⁰ The practice of adding human rights clauses to all international agreements concluded by the EU was institutionalised in 1995. European Commission, ‘Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries’ COM (95) 216 final, Brussels, 23 May 1995; B Van Vooren, R A Wessel *EU External Relations Law. Text, Cases and Materials* (Cambridge, Cambridge University Press, 2014) 327; P Leino, ‘European Universalism? – The EU and Human Rights Conditionality’ [2005] *Yearbook of European Law* 329. A review of conditionality applied in negotiations for the Global Agreement with Mexico is provided by M Szymanski, M E Smith, ‘Coherence and Conditionality in European Foreign Policy: Negotiating the EU–Mexico Global Agreement’ (2005) 43 *Journal of Common Market Studies* 171.

²⁸¹ <<https://www.reuters.com/article/us-ukraine-tymoshenko/eu-makes-new-bid-for-deal-on-ukraines-jailed-tymoshenko-idUSBRE99S0XP20131029>> accessed 1 June 2018.

the autocratic regimes in the ENP countries.²⁸²

The evolution of the application of values in external relations was marked by the Laeken Declaration: ‘The European Union's one boundary is democracy and human rights. The Union is open only to countries which uphold basic values such as free elections, respect for minorities and respect for the rule of law [...] the role [the EU] has to play is that of a power resolutely doing battle against all violence, all terror and all fanaticism.’²⁸³ The European Security Strategy reiterated the EU’s commitment to ‘an international order based on effective multilateralism’, which in regional terms translates as ‘[the] task to promote a ring of well governed countries to the East of the European Union and on the borders of the Mediterranean with whom we can enjoy close and cooperative relations.’²⁸⁴

The Treaty of Lisbon provided for the constitutionalisation of the EU’s determination to promote its values and international law. The EU expresses its commitment to ‘uphold and promote its values in its relations with the wider world.’²⁸⁵ Article 21 TEU provides further specification of values in external relations, stating that the EU’s international activities will be guided by principles reflecting the values that inspired its own creation, development and enlargement.²⁸⁶ Further characterisation of the role values ought to play in relations with neighbours is given in Article 8 TEU. This provision sets out the aim of establishing an area of

²⁸² G Bosse, ‘A Partnership with Dictatorship: Explaining the Paradigm Shift in European Union Policy towards Belarus’ (2012) 50(3) *Journal of Common Market Studies* 367.

²⁸³ Laeken Declaration on the future of the European Union, Laeken, 14-15 December 2001, *Bulletin of the European Union* No 12 (Luxembourg, 2001).

²⁸⁴ European Council, *A Secure Europe in a Better World*, European Security Strategy (n 1).

²⁸⁵ Article 3(5) TEU.

²⁸⁶ This is a clear reference to Articles 2-3 and 6 TEU, and also general principles of law deriving from the judgements of the Court of Justice of the EU.

prosperity and good neighbourliness founded on EU values. It has been clear from the inception of the ENP that these values and their export play a vital role within the ENP's framework.²⁸⁷ The promotion of EU norms and standards and an insistence on neighbours' respect for the fundamental rights advocated by the EU has developed even further to constitute an essential condition for the gradual enhancement of relations. Moreover, shared values also form an indispensable part of contractual relations between the EU and its neighbours. The shift towards the promotion of common values (to strengthen the notion of joint ownership), not only EU values, was observed in 2008 when a review of implementation of the European Security Strategy was completed.

The Report on Implementation of the European Security Strategy confirmed that relations with the neighbours covered by the ENP 'should be based on respect for common values, notably human rights, democracy, and the rule of law, and market economic principles as well as on common interests and objectives.'²⁸⁸ The EU in its 2011 Communication 'New Response to a Changing Neighbourhood' was explicit with regard to the application of conditionality: 'Increased EU support to its neighbours is conditional. It will depend on progress in building and consolidating democracy and respect for the rule of law.'²⁸⁹ The above mentioned report also confirms the more-for-more approach: 'The more and the faster a country progresses in its internal reforms, the more support it will get from the EU.'²⁹⁰ As noted by Peter Van Elsuwege and Roman

²⁸⁷ Cremona, 'The European Neighbourhood Policy. More than Partnership?' (n 6) 256; Cremona, 'Values in EU Foreign Policy' (n 28) 275.

²⁸⁸ Report on the Implementation of the European Security Strategy - Providing Security in a Changing World, S407/08, Brussels, 11 December 2008, 2.

²⁸⁹ Joint Communication by the High Representative of the Union for Foreign Affairs and Security Policy and the European Commission, 'A New Response to a Changing Neighbourhood, a review of European Neighbourhood Policy' (n 160) 3.

²⁹⁰ *ibid.*

Petrov: ‘Despite the rhetoric of joint ownership, it is obvious that the Union is the dominant party in a relationship that is characterised by a strict conditionality approach.’²⁹¹

The application of shared values²⁹² fulfils the ENP aim to use values as a conditionality tool. According to the European Commission: ‘The level of the EU’s ambition in developing links with each partner through the ENP will take into account the extent to which common values are effectively shared.’²⁹³ The Action Plans and the Association Agendas²⁹⁴ contain a number of priorities intended to strengthen the commitment to these values.²⁹⁵ Commitments are also sought on certain essential aspects of the EU’s external action, including, in particular, the fight against terrorism and the proliferation of weapons of mass destruction, as well as abidance by international law and efforts to achieve conflict resolution.²⁹⁶

²⁹¹ Van Elsuwege and Petrov, ‘Article 8...’ (n 20) 694.

²⁹² ‘The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination. The Union’s aim is to promote peace, its values and the well-being of its peoples. In its relations with the wider world, it aims at upholding and promoting these values,’ European Commission, ‘European Neighbourhood Policy. Strategy Paper’ COM (2004) 373 final, 12.

²⁹³ *ibid.*

²⁹⁴ Cremona, ‘The European Neighbourhood Policy’ (n 140) 235.

²⁹⁵ These include strengthening democracy and the rule of law, the reform of the judiciary and the fight against corruption and organised crime; respect for human rights and fundamental freedoms, including freedom of media and expression, rights of minorities and children, gender equality, trade union rights and other core labour standards, and fight against the practice of torture and prevention of ill-treatment; support for the development of civil society; and co-operation with the International Criminal Court.

²⁹⁶ See eg EU-Georgia Association Agenda 2017-2020, available at <https://cdn1-eeas.fpfis.tech.ec.europa.eu/cdn/farfuture/vPC8CCL_R7r6sb6dRefYxMUTHAWbkmfN321tPBtP4rk/mtime:1511177255/sites/eeas/files/annex_ii_-_eu-georgia_association_agenda_text.pdf> accessed 10 September 2018.

Despite the human rights and democracy clauses in the Association Agreements, which can be regarded as a form of political conditionality, violations of human rights have never been used to suspend bilateral relations.²⁹⁷ Jan Wouters and Sanderijn Duquet argue that ‘the implementation deficit is due to security concerns of the EU [...]. Instability [...] is to be avoided at all cost.’²⁹⁸

There is another aspect of the principle of conditionality that indicates that the EU is using it to discourage aspirations of the ENP countries, especially the EaP partners, regarding their future relations with the EU. These countries need to commit to time- and resources-consuming processes to import the norms. It is not, therefore, surprising that they often fail to deliver.²⁹⁹ If, however, a partner country is willing to commit to the values driven reforms, it can expect a reward. This incentive based approach and application of the more-for-more model is reinforced by the ENI Regulation. Nevertheless, there is another weakness of the existing system of financial assistance. Namely, the EU’s reluctance towards negative conditionality and suspension or reconsideration of support for the ENP partner countries.³⁰⁰

²⁹⁷ Wouters and Duquet, *The Arab uprisings and the European Union: in search of a comprehensive strategy*, in G. Fernández Arribas, K. Pieters and T. Takács (eds) (n 156) 39.

²⁹⁸ *ibid.*

²⁹⁹ T A Börzel, ‘When Europe Hits ... beyond Its Borders: Europeanization of the Near Abroad’ (2011) 9(4/5) *Comparative European Politics* 400.

³⁰⁰ S Poli, ‘Values, financial instruments and sanctions’ in S Poli (ed) *The European Neighbourhood Policy – Values and Principles* (London and New York, Routledge, 2016) 43.

6. Conclusions

The aim of this chapter was to present an overview of the European Neighbourhood Policy, its origins, regional dimensions, instruments and conditionality. It is clear that the ENP was developed as a very ambitious policy tool, which has failed to deliver. This is partly due to the inherent weaknesses of this Policy (instruments, methodology and objectives) and partly due to historical events, which were beyond EU's control. The Arab Spring and Russia's aggressive foreign policy exposed major weaknesses of the EU as a peace building endeavour using words of persuasion instead of military capacity. There may be no doubt, however, that the European Union needs a neighbourhood policy – a robust and realistic framework that is based on strong legal and political foundations, supported by financial instruments. This need was recognised during the works on the Constitution for Europe and then the Treaty of Lisbon. The introduction a neighbourhood treaty provision indicates that the EU relations with its neighbours need a different setting. In particular the legal basis. This is what Article 8 TEU can offer. The character of this new general provision of the Treaty on European Union is discussed in the following chapter. It needs to be noted that the ENP despite its weaknesses influenced the wording of Article 8 TEU. However, its potential is much greater than the policy that inspired its inception.

Chapter IV

**Article 8 of the Treaty on European Union:
vague symbolism or precipitous constitutionalisation
of EU policies towards its neighbours?**

1. Introduction

The Treaty of Lisbon introduced a number of reforms aimed at making the European Union stronger and ‘more present in the world’.³⁰¹ Among the new instruments is a new provision which, for the first time, provides a Treaty basis designed specifically for the European Union’s relations with its neighbours. This provision, namely Article 8 of the Treaty on European Union (TEU), not only reflects the ever-changing dynamics of EU policies towards its neighbourhood, but goes even farther. It imposes an obligation on the EU to develop a special relationship with its neighbours. The novel character of this provision, its conspicuous position under Title I of the Treaty on European Union, as well as its objectives, raise questions that this chapter seeks to explore.

The chapter aims to provide a comprehensive analysis of the genesis of Article 8 TEU, its geopolitical context, the ambitions of the supporters of the neighbourhood clause, as well as the negative assessment voiced by its critics. There is no doubt that the introduction of this provision brought a new dimension to the European Neighbourhood Policy (ENP). However, attempts to fully understand Article 8 TEU suggest that its scope goes well beyond the ENP framework. It also ought to be noted that since the entry into force of the Treaty of Lisbon this provision has been applied neither in a legal nor political context. In order to make this analysis more comprehensive and topical, the lack of application of Article 8 TEU is also duly assessed.

Overall, this chapter attempts to answer the following question: does Article 8 TEU amount to vague symbolism or does it constitute precipitous constitutionalisation of EU policies

³⁰¹ As inspired by the Presidency Conclusions, Laeken 14-15 December 2001.

towards its neighbours? However, it may well be that this provision is carefully worded and carries ambitious objectives to serve the whole spectrum of EU policies towards its neighbourhood, and not just the ENP. EU decision makers have not yet explored this possibility. Nevertheless, one should not overlook the fact that in the future the Court of Justice of the EU may play a guiding role in unlocking the potential of Article 8 TEU. The Court can shed new light on the contents of this provision, as well as on the agreements based on it. In order to address these matters, the chapter is structured as follows. Section 2 contains an insight into the history of the neighbourhood clause that was introduced by the European Convention in 2002. The amendments suggested by its members are thoroughly scrutinised in order to find justification for this new provision. This is followed by a summary of the evolution of the neighbourhood provision from the Treaty establishing a Constitution for Europe to the Lisbon Treaty. Article 8 TEU itself is unlocked in section 3. Each paragraph of the article and its wording are analysed and their interpretation assessed. Finally, section 4 provides conclusions based on selected interpretations of this provision. This section also looks into the impact of the non-application of Article 8 TEU since its entry into force in 2009, and the effect of non-application on the future of the provision.

2. The making of the neighbourhood provision: from 'loose but coherent framework' to Article 8 TEU

Drawing on the Schuman Declaration,³⁰² European integration can be seen as a 'long-term and transformative strategy for peace'.³⁰³ At the beginning of the 21st century, the transformation of

³⁰² The Declaration is available here < <https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-204-en.pdf> > accessed 10 September 2018.

³⁰³ J H H Weiler, 'The transformation of Europe' (1991) 100(8) *The Yale Law Journal* 2403, in particular at 2478.

Europe³⁰⁴ was still in progress. Over the years the Communities, and subsequently the Union, developed to reflect the changes in the outside world and the deepening of integration within the EU borders, as well as the transformation of the division of competences between the Member States and the EU. The Union moved from an inward looking model³⁰⁵ of strictly limited economic integration,³⁰⁶ focused on the creation of a mechanism to manage and control Franco-German antagonism,³⁰⁷ to a multi-dimensional comprehensive endeavour. Enlargement has become a core element of this blueprint. However, it was only when the commitment to enlarge eastwards was expressed at the meeting of the European Council in Copenhagen in 1993³⁰⁸ that the impact of enlargement was identified as a factor influencing EU processes as well as the bilateral relations of the Member States with potential new EU neighbours. At that time, only a few would raise the matter of addressing neighbourhood questions at the Union level.³⁰⁹ Alas, the Treaty of Nice did not deal with neighbourhood issues; it only started the reforms necessary to deal with the big questions of eastward enlargement(s). It has long been accepted that a stable, secure and

³⁰⁴ *ibid.*

³⁰⁵ C Hill, M Smith, *International Relations and the European Union* (Oxford, 2nd edn, Oxford University Press, 2011) 9.

³⁰⁶ ‘Recognising that Europe can be built only through practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development,’ Preamble to the Treaty establishing European Coal and Steel Community, available at < <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11951K:EN:PDF>> accessed 10 September 2018.

³⁰⁷ ‘Resolved to substitute for age-old rivalries the merging of their essential interests; to create, by establishing an economic community, the basis for a broader and deeper community among peoples long-divided by bloody conflicts; and to lay the foundations for institutions which will give direction to a destiny henceforward shared’, Preamble of the Treaty establishing European Coal and Steel Community, *ibid.*

³⁰⁸ Conclusions of the Presidency, European Council, SN 180/1/93 REV 1, Copenhagen, 21-22 June 1993.

³⁰⁹ However, the European Council (Helsinki, 10-11 December 1999) introduced a good neighbourliness criterion to the catalogue of accession conditions, available at < <https://www.consilium.europa.eu/media/21046/helsinki-european-council-presidency-conclusions.pdf>> accessed 10 September 2018.

democratic neighbourhood is the desired environment for the EU to grow,³¹⁰ but it was really the prospect of the 2004 and 2007 enlargements that brought a new dimension to EU relations with its neighbours. The EU recognised that in parallel to the ‘big bang’ enlargement, it needed to develop a policy that would provide an attractive formula for relations with its neighbourhood, address emerging issues and find a way of engagement that would be appealing enough to be identified as an attractive alternative to EU membership. The formulation of a neighbourhood policy³¹¹ fell into the framework of Convention activities.³¹² Work on a new provision to reflect the growing importance of relations with the EU neighbourhood were part of the ambitions voiced by Javier Solana (then the High Representative for the Common Foreign and Security Policy) and Christopher Patten (then the Commissioner for External Relations) in their ‘Wider Europe’³¹³ letter. They formulated the desire to respond to the needs arising from the newly created borders of the Union to fully exploit the opportunities created by enlargement to develop relations with EU neighbours and to establish a more coherent and durable basis for these relations.³¹⁴ These objectives were embedded in the work on a draft of a constitutional treaty. A preliminary draft of

³¹⁰ ‘Resolved by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts’, Preamble to the Treaty Establishing European Economic Community [1992] OJ C224/6.

³¹¹ The launch of the European Neighbourhood Policy in 2003 (European, Commission, ‘Wider Europe’ (n 99)) aimed at the reinforcement of stability and security in the EU’s neighbourhood. The policy emerged at the same time as the European Security Strategy (n 1) and can be regarded as ‘a specific implementation of the strategy’, Cremona, ‘The European Neighbourhood Policy. More than Partnership?’ (n 6) 244. See further Ch III.

³¹² The Convention on the Future of Europe, brought together by the European Council, ‘to consider the key issues arising for the Union’s future development and to try to identify various possible responses’ (Laeken Declaration on the future of the European Union, Annex I to the Presidency Conclusions, Laeken 14-15 December 2001, 24) commenced its work in February 2002.

³¹³ ‘Wider Europe’ – joint letter by Chris Patten and Javier Solana to the Danish minister of foreign affairs (Presidency of the EU), 8 August 2002, B Van Vooren, R Wessel, *EU External Relations Law* (n 280) 541.

³¹⁴ *ibid.*

the Constitutional Treaty, prepared by the Praesidium, was presented on 28 October 2002 and contained the following recommendation for a proposal of the neighbourhood provision:

This article could contain provisions defining a privileged relationship between the Union and its neighbouring States, in the event of a decision on the creation of such a relationship.³¹⁵

This rather brief outline gives a clear indication that there was a desire, or at least an aspiration, to set up a framework for a special relationship. It also suggests that there was a drive to create an ambitious single, if not uniform, relationship. Further, the way this mandate was presented encouraged questions on how this new provision would relate to already existing relations and agreements. More questions arise when all this is put in the context of the next phase of work on the provision in question. In the spring of 2003, the Convention was presented with a draft provision that was described as a 'loose but coherent framework bringing together the existing arrangements whereby the Union manages its relations through agreements with individual countries or group of countries'.³¹⁶ The description refers to existing relations, although the proposal itself was claimed to be free of a direct link to the existing set-up. It contained a suggestion to introduce into the future Treaty a separate title on the Union and its immediate environment. The wording of the first draft was as follows:

1. The Union shall develop a special relationship with its neighbouring States, aiming to establish an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation.
2. For this purpose, the Union may conclude and implement specific agreements with the countries concerned in accordance with Articles X on Part Two of the Constitution. These agreements may contain reciprocal rights and obligations as well as the possibility of

³¹⁵ Preliminary Draft Constitutional Treaty, Secretariat of the European Convention, CONV 369/02, Brussels 28 October 2002.

³¹⁶ Title IX: The Union and its immediate environment, Secretariat of the European Convention, CONV 649/03, Brussels, 2 April 2003.

undertaking activities jointly. Their implementation shall be the subject of periodic consultation.

The wording of paragraph 1 was a pure novelty, while paragraph 2 showed a striking resemblance to the then Article 310 TEC, on which it drew directly. However, this proposal went farther to recognise the importance of the implementation of agreements and regular meetings of all parties. The then Title IX, Article 42 attracted 31 amendments.³¹⁷ It is worth noting them, as they provide useful insight into how this new provision was perceived at the time of its creation. It is also worth revisiting some of the suggestions, bearing in mind the discussions currently being held on the development of the relations of the EU with its neighbourhood. A second look at the amendments in particular might be important as a means of contributing to academic debate on a potentially broad interpretation of Article 8 TEU.

One ought to start by acknowledging the arguments suggesting that the provision was unnecessary and therefore should be deleted.³¹⁸ The current constitutional framework of the EU provides support for such claims by strongly relying on Article 21 TEU in conjunction with Articles 2 and 3(1) TEU. Others did not dismiss the need to have an article devoted to relations between the EU and its neighbourhood, but suggested that it should be placed elsewhere, namely under Title VIII ‘to achieve a more coherent and integrated approach to the Union external action’.³¹⁹ This group of amendments raises a far more substantial question about the status of the

³¹⁷ Reactions to draft Article 42 (The Union and its immediate environment) - Analysis, Secretariat of the European Convention, CONV 671/03, Brussels 14 April 2003.

³¹⁸ The amendment proposed by J Voggenhuber, N MacCormick and E Lichtenberger suggested that ‘[t]here is no need for this provision. It is part of the external relations of the Union’, <<http://european-convention.eu.int/docs/Treaty/pdf/42/Art42Voggenhuber.pdf>> accessed 15 July 2018.

³¹⁹ An amendment proposed by H Hololei <<http://european-convention.eu.int/docs/treaty/pdf/4200/T9hololeiEN.pdf>>; an amendment submitted by T Tiilikainen,

EU relations with its neighbourhood. If they were to be considered merely as a new dimension of EU external relations with a particular group of countries, then indeed it would be most suitable for them to become a part of a title devoted to external action. However, if the rationale behind the neighbourhood policy and this new provision were to establish a far more comprehensive model, then a separate title for the neighbourhood provision seems more appropriate. Some members of the Convention wanted to split this provision into two by placing paragraph 1 in a single article on the principles and objectives of the EU, while paragraph 2 would better fit Part II of the Treaty.³²⁰ There were also proposals to relocate the provision to the section on the Common Foreign and Security Policy of the Treaty.³²¹ Apart from the location of this provision, other suggestions were made. There were amendments indicating that another paragraph should be introduced to provide reference to the role played by the Council of Europe in developing relations with the EU neighbours.³²² Overall, the above-mentioned amendments demonstrate a broad

A Pettomäki, K Kiljunen, M Vanhanen, R Korhonen <<http://european-convention.eu.int/docs/Treaty/pdf/42/art42TiilikainenEN.pdf>> accessed 15 July 2018.

³²⁰An amendment proposed by E Lopes and M Antunes <<http://european-convention.eu.int/docs/Treaty/pdf/42/Art42lopesEN.pdf>> accessed 15 July 2018.

³²¹ For example, an amendment by D Hübner <<http://european-convention.eu.int/docs/Treaty/pdf/42/ART42hubnerEN.pdf>> accessed 15 July 2018.

³²² ‘In developing such special relationships the Union shall make full use of the Council of Europe and other international organisations of which such States are members’, an amendment by E Brok and others <<http://european-convention.eu.int/docs/Treaty/pdf/42/Art42BROKEn.pdf>> accessed 15 July 2018. These proposals also encouraged the Parliamentary Assembly of the Council of Europe to take part in the discussion. It can also be said that they provoked an episode of rivalry between the Council of Europe and the EU. ‘Title IX of the preliminary draft constitutional treaty, entitled “The Union and its immediate environment”, suggests defining a privileged relationship between the European Union and its neighbouring states. In that case, the opportunity must not be lost to capitalise on the role that the Council of Europe would have to play in such a scheme, owing to its pan-European character and the fact that all its member states co-operate on an equal footing. The Convention on the Future of Europe should take this state of affairs into account and give priority to making full use of this institution, rather than setting up new bodies or other institutional arrangements, which would result in duplication of efforts and wasted resources’, point 9 of the Resolution 1314 (2003) of the Parliamentary Assembly of the Council of Europe

approach by the members of the Convention. It is clear that there was no uniform view on how competences in the execution of the neighbourhood policy (policies) should be divided, what role the policy (policies) should play, and who should play the leading role in its (their) execution.

Members of the Convention also raised issues related to the application of values and principles in relations with neighbours. There were a number of amendments requesting direct reference to the values of the Union,³²³ and to respect of international law and human rights to enhance consistency with the general objectives of the Union's external action.³²⁴ It seems that these modifications were suggested in order to strengthen the importance of the Union's values and the role they should play in external relations. There are no traces in the official documentation of the Convention's work that would suggest that members of the Convention wanted to consider and apply values as a powerful conditionality tool. Nevertheless, a notion was already developing that the new neighbourhood policy and mechanisms of cooperation would depend on the

'Contribution of the Council of Europe to the constitution-making process of the European Union'. When the amendment was not approved, the Parliamentary Assembly voiced its disappointment: 'The Assembly regrets, however, that the draft constitution does not refer explicitly to the Council of Europe in its Article I-56, on "The Union and its immediate environment", despite the amendments to this effect proposed by a number of Convention members. [...] The Assembly recalls that the Council of Europe is a pan-European Organisation, in which the representatives of forty-five European states can co-operate on an equal footing at parliamentary, governmental, local and regional levels, and that it plays a key role in building a Europe without dividing lines, in particular through its standard-setting work (with over 190 conventions) and its various monitoring mechanisms, of which the candidate countries for accession to the European Union are the prime beneficiaries, Resolution 1339 (2003) of the Parliamentary Assembly of the Council of Europe 'The Council of Europe and the Convention on the Future of Europe'.

³²³ For example, an amendment by C Muscardini <<http://european-convention.eu.int/docs/Treaty/pdf/42/Art42muscardini.pdf>> accessed 17 July 2018.

³²⁴ An amendment by M. Atalides <<http://european-convention.eu.int/docs/Treaty/pdf/42/art42AtalidesEN.pdf>> accessed 17 July 2018.

fulfilment of conditions formulated by the EU.³²⁵ This would suggest the growing importance of the conditionality mechanism in relations with the EU neighbourhood. It is also an indication of the asymmetric character of relations with neighbouring countries in the framework of the neighbourhood policy (European Neighbourhood Policy), see Ch III.

The debate on this provision was concluded by the Praesidium with a motion that there was broad support for the inclusion of such an article.³²⁶ In May 2003, members of the Convention received the text of Part One of the Treaty establishing the Constitution, revised in the spirit of the amendments received.³²⁷ In this version, the neighbourhood provision maintained its separate title and its wording was amended as follows:

TITLE VIII: THE UNION AND ITS IMMEDIATE ENVIRONMENT

Article I-56: The Union and its immediate environment

1. The Union shall develop a special relationship with neighbouring States, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.
2. For this purpose, the Union may conclude and implement specific agreements with the countries concerned in accordance with Article [...] of Part Three of the Constitution.

These agreements may contain reciprocal rights and obligations as well as the possibility

³²⁵ 'I want to see a "ring of friends" surrounding the Union [...]. This encircling band of friendly countries will be diverse. **The quality of our relation with them will largely depend on their performance** [*emphasis added*] and the political will on either side', R Prodi speech 02/619 A Wider Europe – A Proximity Policy as the key to stability, 'Peace, Security and Stability International Dialogue and the Role of the EU', Sixth ECSA World Conference, Jean Monnet Project, Brussels, 5-6 December 2002.

³²⁶ Summary Report of the Plenary Session – Brussels, 24 and 25 April 2003, Secretariat of the European Convention, CONV 696/03, Brussels, 30 April 2003.

³²⁷ Draft Constitution, Volume I – Revised text of Part One, Secretariat of the European Convention, CONV 724/03, Brussels, 26 May 2003.

of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.

The introduction of the values of the EU, as a foundation of ‘a neighbourhood area’, was a novelty. By this means, the application of conditionality in relations with the EU neighbours was legitimised. Although these proposals were not taken into account and did not influence the final text of the neighbourhood provision in the Treaty establishing a Constitution for Europe, they represent a valuable addition to the discussion on the potential application of Article 8 TEU in the future. The first amendment highlighted an interpretation leading to the application of this provision beyond the ENP framework. A proposal sponsored by Andrew Duff and others suggested that this provision should be transferred to Part III of the Treaty (Policies and Functioning of the Union). The authors of this amendment argued that if the provision was designed for countries such as Ukraine, it was not offering anything new, and therefore might as well be deleted. However, if it was to become a provision that could serve as ‘a safe home for a Member State that wishes to leave the Union’,³²⁸ it should be placed just before the then Article I-60 devoted to voluntary withdrawal from the Union.

Timothy Kirkhope voiced another approach to the neighbourhood provision.³²⁹ His proposal addressed the existing relations with the neighbouring countries by introducing an explicit reference to them. This opinion is particularly worth noting to recognise the role played by the Member States in the formulation, influencing and delivery of relations with the

³²⁸ An amendment submitted by A Duff, L Dini, P Helminger, R Lang, Lord MacLennan, <http://european-convention.eu.int/docs/Treaty/pdf/42/42_Art%20I%2056%20Duff%20EN.pdf> accessed 17 July 2018.

³²⁹ Contribution submitted by Mr Timothy Kirkhope, member of the Convention: ‘A simplifying Treaty for a European Community: a Conservative alternative to the Praesidium's Draft’, Secretariat of the European Convention, CONV 807/03, Brussels 16 June 2003.

neighbourhood. Further, the role of the Member States examined against the regional initiatives under the umbrella of the ENP, namely the Eastern Partnership and the Partnership for Democracy and Shared Prosperity/Union for Mediterranean, suggest that the Member States could become driving forces of regional initiatives fuelled by particular interests. Kirkhope suggested that the wording of paragraph 1 should recognise the value of the existing relationships between Member States and non-Member States:

1. The Community shall build upon such special relationships as already exist between Member States and non-Member States, in order to promote prosperity and close and peaceful relations based on cooperation.

These suggestions were not in any way incorporated in the final draft of the Treaty establishing a Constitution for Europe presented by the Convention to the Intergovernmental Conference in July 2003.³³⁰ In fact, the text of the neighbourhood provision remained unchanged since its presentation in May of that year. There were issues that led to further negotiations on the Treaty. These were finally concluded by the summer of 2004.³³¹ The final text of the Treaty establishing a Constitution for Europe was signed in December 2004.³³² The neighbourhood provision was contained in Article I-57, which found its home under Title VIII. Although a separate title for it was maintained, its wording was changed from ‘The Union and its immediate neighbourhood’ to ‘The Union and its neighbours’. The choice of ‘neighbours’ over ‘immediate neighbourhood’ may indicate that the latter was perceived as a factor narrowing the scope to countries with a direct sea and (or) land border with Member States, and therefore the provision

³³⁰ Draft Treaty establishing a Constitution for Europe, Secretariat of the European Convention, CONV 850/03, Brussels 18 July 2003 (The numbering of articles in the final draft was completed and the reference to the procedure to conclude agreements was made in Article I-56 (2) by identifying Article III-227).

³³¹ P Craig, *The Lisbon Treaty. Law, Politics, and Treaty Reform* (Oxford, Oxford University Press, 2010) at 93-95.

³³² [2004] OJ C310/38.

would not apply to countries which geographically remain outside the immediate environment of the Union.³³³ Besides, bearing in mind the dynamic character of the EU, the new title might provide more flexibility in relations that the EU might consider developing with its neighbours in the future. Paragraph 1 remained unchanged, while the wording of paragraph 2 was amended as follows:

2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.

The first striking difference between this text and its predecessor might suggest that it was given an editorial and linguistic makeover, given that the word ‘purposes’ was used, not a single purpose. However, this last minute amendment may also indicate something else. It may well be that a multiplicity of purposes emerges from the difficulty of achieving the objective laid down in paragraph 1, namely the creation of a single area (of prosperity). Another amendment that ought to be noted is the disappearance of the word ‘implementation’ from the first sentence of paragraph 2. That word remains in the said paragraph 2, but only in the context of periodic consultations. This may indicate a drive to simplify this provision. It seems clear that if there is a will to conclude an agreement, then its implementation follows naturally. The most significant change appeared in paragraph 2 which was stripped of a reference to the then Article III-227 (now Article 218 TFEU), which dealt with the conclusion of international agreements. This can be understood as an elimination of unnecessary duplication.

³³³ The title change seems to fall into the changes introduced to the geographical scope of the ENP, namely the extension of the policy to Armenia, Georgia and Azerbaijan, European Commission, ‘European Neighbourhood Policy – Strategy Paper’ (n 292) 7.

The negative outcomes of the constitutional referenda in France (29 May 2005) and the Netherlands (1 June 2005) brought about a crisis. This took a while to resolve and for a solution to be found that would ‘serve as the basis for further decisions on how to continue the reform process’.³³⁴ A period of reflection started in late June 2005 and extended to the following year. The first half of 2007 brought dynamic consultations, conducted by the German Presidency, that led to a much-awaited result. A decision was made to copy verbatim the then Article I-57 of the Constitutional Treaty into the EU Reform Treaty. However, this was no longer a provision with its own title. It was now presented under Title II containing common provisions. Negotiations on this new treaty were conducted amid political tension and on a very tight calendar.³³⁵ The Treaty of Lisbon stripped of a constitutional concept³³⁶ was signed on 13 December 2007 and entered into force on 1 December 2009. The Treaty ‘is considered necessary in order to help the enlarged Union to function more efficiently, more democratically and more effectively including in international affairs’.³³⁷ The new Article 8 of the Treaty on European Union contains the exact wording of the Constitutional Treaty Article I-57. The TEU provision no longer has a separate title dedicated to neighbourhood, but instead forms one of the Common Provisions (Title I):

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

³³⁴ European Council, Presidency Conclusions, 10633/1/06 REV 1, Brussels 15-16 June 2006, 17.

³³⁵ J-C Piris, *The Lisbon Treaty. A Legal and Political Analysis* (Cambridge, Cambridge University Press, 2010) 33.

³³⁶ For more on this stripping process to eliminate the connotation of a constitutional legal order typically and traditionally associated with the state, see J H H Weiler, ‘Prologue: global and pluralist constitutionalism – some doubts’ in G de Búrca and J H H Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge, Cambridge University Press, 2012) 9.

³³⁷ European Council, Presidency Conclusions, 17271/1/08 REV 1, Brussels, 11-12 December 2008, 1.

well as the possibility of undertaking activities jointly. The implementation shall be the subject of periodic consultation.³³⁸

This new provision, in many ways, looked like a positive, evolutionary development aimed at strengthening the ENP. However, a closer look at its wording, whereby it may be interpreted as a treaty basis for specific relations with neighbours, may lead to less enthusiasm and greater ambiguity.

3. The neighbourhood provision: unlocking Article 8 TEU³³⁹

This section provides an analysis of Article 8 TEU. It unlocks each section, decodes every word in order to grasp the meaning intended by the drafters, and examines the origins of the applied terms.

3.1. A common provision

Article 8 TEU forms one of the common provisions of the Treaty on European Union. This is a rather significant shift from the position given to its predecessor in the Treaty establishing a Constitution for Europe. There, the provision was located in the final section of Part I of the Treaty. It was followed by provisions under Title IX Union Membership (Article I-58 Conditions of eligibility and procedure for accession to the Union, Article I-59 Suspension of certain rights resulting from Union membership, Article I-60 Voluntary withdrawal from the Union). The initial

³³⁸ [2012] OJ C326/ 20.

³³⁹ The approach selected for this section is inspired by Marise Cremona's methodology applied in M. Cremona, 'The European Neighbourhood Policy: More than a Partnership?' (n 6) 244, at 249-263.

location of the neighbourhood provision could lead to its perception as an alternative to Union membership.³⁴⁰ If that was the intention, it remains unclear why this provision was stripped of its own title and relocated under the heading of Title I Common Provisions. The reasons behind that move are certainly not clear, and might be regarded as the result of a misstep.³⁴¹ Apart from as an alternative to EU membership, the new location of this provision can be interpreted as giving additional recognition to relations with neighbouring countries. Following this interpretation, one notices that not only was a Treaty provision devoted to relations with the neighbours introduced, but it was also given a prominent place among the common provisions of the Treaty on European Union. This interpretation was confirmed by Peter Van Elsuwege and Roman Petrov who pointed out the symbolic value of Article 8 TEU.³⁴² Others see the current location of the neighbourhood provision as a means to establish a very clear distinction between the enlargement process and relations with neighbouring countries.³⁴³ This approach could allow for an even more daring interpretation, which would see this provision as a barrier preventing further enlargements. Although there is some support for this view,³⁴⁴ it should not be regarded as a definitive and non-reversible option. After all, any European country committed to the values of the EU may apply for EU membership.³⁴⁵

³⁴⁰ This interpretation of the initial location and contents of the provision would be in agreement with discussions that were held on ways to develop alternatives to EU membership as ‘[the EU] cannot go on enlarging forever’, Romano Prodi, then President of the European Commission speech ‘A Wider Europe - A Proximity Policy as the key to stability. Peace, Security And Stability International Dialogue and the Role of the EU, Sixth ECSA-World Conference, Jean Monnet Project, Brussels, 5-6 December 2002.

³⁴¹ Hillion, ‘The EU neighbourhood competence under article 8 TEU’ (n 21) 2.

³⁴² Van Elsuwege and Petrov, ‘Article 8 TEU’ (n 20) 690.

³⁴³ D Hanf, ‘The ENP in the light of the new ‘neighbourhood clause’ (Article 8 TEU)’ (Bruges, Research Paper in Law, Cahiers Juridiques No 2, 2011) 7.

³⁴⁴ N Ghazaryan, ‘The evolution of the European neighbourhood policy and the consistent evolvment of its inconsistencies’ (2012) 7(1) Review of European and Russian Affairs 7.

³⁴⁵ Article 49 TEU provides that any European State which respects the values of the EU and is committed to promoting them may apply to become a member of the Union.

There is another angle: should Article 8 TEU be classified as an external action provision? Although it is certainly not placed under Title V (General provisions on the Union's external action and specific provisions on the Common Foreign and Security Policy), it nevertheless has the credentials to be a part of external relations. It can also be regarded as a *lex specialis* to Article 21 TEU.³⁴⁶ There are shortcomings when it comes to the location of Article 8 TEU. For instance, it is disconnected from the sections devoted to the institutional framework and decision-making mechanisms provided for external action in the TEU and TFEU. This in itself disadvantages the neighbourhood provision as well as the overall coherence of the external relations of the EU.³⁴⁷ However, there are other views on the location and thus the character of Article 8 TEU. Christophe Hillion argues that the location of the neighbourhood provision outside the CFSP chapter means that there is no need to make a distinction with regard to Article 8 TEU between the CFSP and non-CFSP powers of the EU. This leads the author to conclude that it can be regarded as a consolidation of the comprehensive character of the ENP. Furthermore, Hillion states that the location outside Title V TEU 'suggests that the neighbourhood competence is conceived as a policy with internal and external dimensions.'³⁴⁸ This is a bold interpretation of the position in the Treaty given to Article 8 TEU. Nevertheless, it also raises questions about the comprehensive character of EU relations with the neighbours currently not covered by the ENP umbrella. The example of relations with the Russian Federation may suggest that they are indeed

³⁴⁶ Bart Van Vooren finds Article 8 to mirror Article 21 TEU, B Van Vooren, R Wessel, *EU External Relations Law* (n 280) 537.

³⁴⁷ S Blockmans, 'Friend or foe? Reviewing EU relations with its neighbours post Lisbon' in P Koutrakos (ed), *The European Union's external relations a year after Lisbon* (The Hague, CLEER Working Papers 3, 2011) 116; C. Hillion, '*Tous pour un, un pour tous!* Coherence in the External Relations of the European Union' in M Cremona (ed), *Developments in EU External Relations Law* (Oxford, Oxford University Press, 2008) 10; B Van Vooren, *EU External Relations Law and the European Neighbourhood Policy. A Paradigm for Coherence* (n 4).

³⁴⁸ Hillion, 'The EU neighbourhood competence under Article 8 TEU' (n 21) 3.

comprehensive, although developed outside the ENP framework. Furthermore, Hillion's interpretation suggests that Article 8 TEU as a common provision confirms that the aims of the specific relations [developed on the basis of this provision] with neighbours are 'mainstreamed into other policies of the EU'.³⁴⁹ One could argue that indeed it can be interpreted this way, but at the same time other complex relations with third countries developed outside the ENP framework are also taken into account when other policies of the EU are developed.³⁵⁰

Overall, whether or not the allocation of Article 8 TEU under the heading of Common Provisions is accidental, it can be concluded that this allows for a more flexible application of this provision.

3.2. An obligation to develop a relationship (with neighbouring countries)

Article 8 TEU imposes an obligation on the EU to engage with its neighbourhood by establishing a special relationship. The way it is formulated - 'the Union shall develop a special relationship' - leaves no doubt but to understand this as mandatory. This, however, may lead to a number of conclusions. First, if it is to be understood as nothing less than an obligation, then a failure to meet the objectives of Article 8 TEU may lead to proceedings before the Court of Justice of the EU.³⁵¹ However, the overall vagueness of this provision raises questions on how such a failure would be

³⁴⁹ *ibid.*

³⁵⁰ The quest to establish an Energy Policy for Europe serves as a good example. See further, P Van Elswege, 'The EU's governance of external energy relations: the challenges of a 'rule-based market approach' in D Kochenov, F Amtebrink (eds), *The European Union's Shaping of the International Legal Order* (Cambridge, Cambridge University Press, 2014) 215.

³⁵¹ This is a development suggested by Christophe Hillion in *The EU neighbourhood competence...* (n 348) 4. He does not, however, indicate what procedure he had in mind. One may assume proceedings under Articles 258 and 265 TFEU would be appropriate.

assessed/measured and which institutions would be responsible for it? Equally unclear is the definition of what would be regarded as a satisfactory execution of the objectives of Article 8 TEU. Would having a policy in place be enough, or rather would agreements concluded with the neighbouring countries mark satisfactory implementation of the objectives? These questions remain open. But there are a number of further questions. If this provision constitutionalises the ENP, then the distribution of responsibilities among institutions in charge of delivering this policy ought to be addressed in a far more formal way.³⁵² In addition, if Article 8 TEU provides a legal basis for the legitimisation of the ENP, how would this affect existing relations with neighbouring countries? This is where geopolitics, in particular the interests and historical ties between the EU, its Members States and their neighbours, come into play. Furthermore, they have the potential to clash with the ambitious aim of establishing a single relation, unless one considers that this single relation serves as an umbrella for multiplicity of bilateral and multilateral Member States – non-Member States relations. At the same time, there is a way to escape the legal dilemmas by employing a political interpretation of Article 8 TEU. This approach would allow a reading of the neighbourhood provision to mean only a political commitment, and a failure to meet all its objectives would not seem as harmful as the legal take on it would suggest.

³⁵² The ENP has been operating mostly by using soft law and political tools. See eg B Van Vooren, 'A Case Study of 'Soft Law' in EU External Relations...' (n 12) 696.

3.3. *A special relationship*

Article 8 TEU provides for the EU to establish a special relationship with its neighbours. The way this is expressed imposes a formal obligation on the EU to engage with its neighbours.³⁵³ In many ways, this pivotal element of the provision in question makes the intentions of the EU legislator difficult to understand. First of all, there is a translation issue that ought to be raised. The French version of this provision speaks of ‘privileged relations’ with neighbouring countries,³⁵⁴ while the English version has ‘a special relationship’.³⁵⁵ If a literal interpretation of the English version is applied, it leads to a rather impossible obligation to establish a single relationship with such a diverse group of countries that the EU neighbours represent. It seems that the French version of the Treaty represents a more sensible choice of wording that allows for a multiplicity of models applied in relations with EU neighbours.

There is also the matter of the relation (relations) that the EU is bound to establish. The French version that speaks of privileged relations can be interpreted as a framework for special rights, advantages and opportunities. The English version refers to a special relationship. Should this be understood as greater than normal, and, if so, it remains unclear what constitutes a normal (regular) relation. There is another approach to the said special relationship, which aims to pursue

³⁵³ C Hillion, ‘The EU mandate to develop a ‘special relationship’ with its (Southern) neighbours’ in G Fernández Arribas, K Pieters and T Takács (eds), *The European Union’s Relations with the Southern-Mediterranean in the Aftermath of the Arab Spring* (The Hague, CLEER Working Papers No 3, 2013) 13.

³⁵⁴ ‘L’Union développe avec les pays de son voisinage **des relations privilégiées**’.

³⁵⁵ A review of selected versions of Article 8 TEU indicates that most versions were translated from French into other official languages, e.g. the Italian version uses ‘relazioni privilegiate’, Dutch ‘bijzondere betrekkingen’, Portuguese ‘relações privilegiadas’. There are also versions which speak of relations, although these are not described as privileged but specific, eg Polish version ‘szczególne stosunki’, Swedish version ‘särskilda förbindelser’.

a model aspiring to develop deep forms of cooperation.³⁵⁶ This interpretation blends very well with trends to establish deep and comprehensive free trade areas, first with Eastern partners, and at a later stage with the Mediterranean countries.³⁵⁷ Ambitions driving this approach are faced with the critique of how a uniform model of deep integration, which emerges from Article 8 TEU, can be implemented in relations with the diverse group of countries that the EU neighbours form. It has to be said that this rather utopian uniform model would not stand a chance when tested against the complexity and differentiated needs of the neighbours. Perhaps the only way to establish a special relationship is through diversified relations with each partner country. This would reflect the ability, willingness and progress made by each neighbour.³⁵⁸ After all, it is the ENP model that offers an umbrella policy that is delivered through means that reflect, or at least try to reflect, the specific character of each partner country. There is also the question of how this special relationship or relationships should be classified in the hierarchy of EU relations with all its

³⁵⁶ Hanf (n 343) 3.

³⁵⁷ According to the European Commission ‘a deep and comprehensive FTA should cover substantially all trade in goods and services between the EU and ENP partners including those products of particular importance for our partners and should include strong legally-binding provisions on trade and economic regulatory issues,’ European Commission, ‘Strengthening the European Neighbourhood Policy’ COM (2006) 726 final, Brussels, 4 December 2006, 4. See further F Hoffmeister, ‘The deep and comprehensive free trade agreements of the European Union – concepts and challenges’ in M Cremona, T Takás (eds), *Trade liberalisation and standardisation – new directions in the ‘low politics’ of EU foreign policy* (The Hague, CLEER Working Papers No 6, 2013) 11; K Pieters, ‘Deep and comprehensive free trade agreements: liberalization of goods and services between the Mediterranean neighbours and the EU’ in G Fernández Arribas, K Pieters, T Takács (eds), *The European Union’s relations with Southern-Mediterranean in the aftermath of the Arab Spring* (The Hague, CLEER Working Papers No 3, 2013) 95; M Emerson (ed), *The Prospect of Deep Free Trade between the European Union and Ukraine* (Brussels, Centre for Policy Studies, 2006).

³⁵⁸ S Blockmans, ‘The ENP and ‘more for more’ conditionality: plus que ça change...’ in G Fernández Arribas, K Pieters and T Takács (eds), *The European Union’s Relations with the Southern-Mediterranean in the Aftermath of the Arab Spring* (The Hague, CLEER Working Papers No 3, 2013) 58.

neighbours, where, for example, relations with the Russian Federation are described as ‘strategic’.³⁵⁹

3.4. *Neighbouring countries*

Article 8 TEU formulates the EU’s neighbourhood competence. In many ways the concept of ‘neighbour’ is very ambiguous. In the case of Article 8 TEU, the term is not defined, so there is plenty of room for speculation. Turning to history ‘in the Judeo-Christian tradition, one’s neighbour is someone to care for and even love, a neighbour is also someone inherently other’.³⁶⁰ Drawing from an English language dictionary, a neighbour is a tangible and visible entity but also an entity that can cast a shadow.³⁶¹ The shadow can be interpreted as an influence or a state of being that motivates action and such interpretation can serve the purpose of this chapter. Furthermore, a geopolitical approach is appropriate as ‘discussion of neighbourhood must [...] link to the question of controlling territory for the sake of securing oneself. Neighbours can also

³⁵⁹ For accounts of the EU – Russian Federation strategic partnership, see eg P Van Elsuwege, ‘The four Common Spaces: new impetus to the EU-Russia Strategic Partnership?’ in A Dashwood, M Maresceau (eds), *Law and Practice of EU External Relations. Salient Features of a Changing Landscape* (Cambridge, Cambridge University Press, 2008) 334; Hillion, ‘Russian Federation’ (n 183) 465.

³⁶⁰ Cremona, ‘The European Neighbourhood Policy...’ (n 140) 253.

³⁶¹ In search of definitions, the law of tort’s principle of neighbour can also come to the rescue: ‘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 answer 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 mind to the acts or omissions which are called in question’, Lord Atkin, *Donoghue v Stevenson* [1932] AC 562 House of Lords.

be viewed as the source of risks and threats'.³⁶² This is particularly relevant to assess the reasons behind the decision to elevate relations with neighbours to the level of a treaty. Indeed, the changing environment of the EU and the ways to create the foundations of a credible and attractive setting were some of the reasons behind the decision, but the question of who the partners are, that is, the addressees of this provision, remains open. There is an unquestionable link to the ENP. At the time when what is now Article 8 TEU was being formulated, the countries covered by the ENP were indeed the most obvious addressees. This would lead to Article 8 TEU being understood as an ENP provision, although this approach has its flaws. If it were only the ENP countries that this provision concerns, then it would have been short-lived and limited. This would also not have been a comprehensive understanding of the text. This provision speaks of neighbouring countries and does not specify whether these are the countries that Article 49 TEU would not apply to. Neither does the provision provide any other specific information to indicate that the category of neighbours is meant to be limited to a particular group. It seems that on this occasion vagueness is one of this provision's advantages. The category of EU neighbouring countries should be understood to cover all neighbours of the EU. At present this category should include the ENP countries, Switzerland, the EEA-EFTA countries, micro-states, the Russian Federation and in the near future the United Kingdom. Such an interpretation would help to mitigate issues arising from the classification of relations with EU neighbours. After all, why should only relations with the ENP neighbours be classified as 'special', and not the deepest integration model represented by the EEA-EFTA countries, Switzerland or the strategic partnership with the Russian Federation. It is perhaps far-fetched to suggest applying Article 8 TEU ad interim to neighbours in the process of accession negotiations. Nevertheless, this approach to neighbourhood as a whole could contribute to the ambitious aim to establish an area

³⁶² C Kølvaraa and J Ifversen, 'European Neighbourhood Policy: geopolitics or value export?' in F Bindi and I Angelescu (eds), *The Frontiers of Europe. A Transatlantic Problem?* (Washington-Rome, Brookings Institution Press and Scuola Superiore della Pubblica Amministrazione, 2011) 55.

of prosperity. As daring as this approach seems, it would contribute to the overall coherence of EU relations with its neighbours.

3.4.1. Declaration on Article 8 of the Treaty on European Union

There is a Declaration on Article 8 TEU among the declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon. It states that '[t]he Union will take into account the particular situation of small-sized countries which maintain specific relations of proximity with it'.³⁶³ This declaration holds two meanings. First, it clearly confirms that the scope of Article 8 TEU should not be limited to the ENP.³⁶⁴ Second, it is rather interesting that out of the pool of EU neighbours it is the group of micro-states that received special recognition. Not undermining the role these countries would like to play, this declaration carries a potentially powerful message that can contribute to the debate on membership alternatives. Indeed, this would fit into the current trends among micro-states to evaluate their relations with the EU, and review the alternative options to European integration that are available to them.³⁶⁵ If these aspirations were channelled through the Article 8 TEU framework, then this provision might be given new life as a treaty basis for the formulation of alternatives to EU membership.

³⁶³ [2012] OJ C 326/339.

³⁶⁴ P Van Elsuwege and R Petrov, 'Article 8 TEU...' (n 20) 692.

³⁶⁵ Liechtenstein has been particularly active in this respect. See eg Pelkmans and Böhler (n 87).

3.5. *An area of prosperity and good neighbourliness*

Article 8 TEU binds the EU to establish ‘an area of prosperity and good neighbourliness’. This bold objective does not come with an explanation of what constitutes prosperity, and whether the successful completion of this task (the establishment of an area of prosperity) would be equally enjoyed by all parties. In most cases, relations between the EU and its neighbours are asymmetric and it is up to the EU to set the rules of engagement. Some observers argue that there is a striking difference between the ENP and enlargement.³⁶⁶ In the case of the latter, it is up to an eligible country to initiate the process by applying for EU membership. There is a different scenario laid out in Article 8 TEU, but equally there is a different purpose envisaged by this provision. The enlargement process is aimed at enabling European countries that prove that they meet all the necessary criteria to join the EU, while relations with neighbours (without a prospect or aspiration of applying for membership) are principally about developing a state of affairs to satisfy all parties, but above all a state of affairs that would provide the EU with a stable vicinity. An overwhelming number of scholars perceive the aim of this provision to establish an area of prosperity as ‘a competence with a finalité’.³⁶⁷ Some regard this aim as utopian.³⁶⁸ It would be difficult to disagree with this assessment, bearing in mind a spectrum of problems that torments the neighbourhood. It is particularly challenging to build an area of prosperity with the ENP countries.³⁶⁹ There is

³⁶⁶ Hanf (n 343) 7.

³⁶⁷ This is the view expressed by C Hillion, ‘The EU neighbourhood competence...’ (n 21) 4; C Hillion, ‘Anatomy of EU norm export towards the neighbourhood. The impact of Article 8 TEU’ in P Van Elswege, R Petrov, (eds), *The Application of EU Law in the Eastern Neighbourhood of the EU. Towards a Common Regulatory Space?* (London and New York, Routledge, 2014) 17; and Hanf, (n 343) 8.

³⁶⁸ Blockmans, ‘Friend or foe...’ (347) 116.

³⁶⁹ A new EU approach to its neighbouring countries cannot be confined to the border regions alone. If the EU is to work with its neighbourhood to create an area of shared prosperity and stability, proximity policy must go hand-in-hand with action to tackle the root causes of the political instability, economic

certainly a way to look at the aim of Article 8 TEU as progressive integration that may lead to the establishment of an area of prosperity. Such a progressive feature may be a way to make the aim feasible. Furthermore, the visible element of conditionality plays a vital role here. The conditionality applied in the neighbourhood provision has a number of features, including prosperity itself. Although the provision does not indicate what is meant by prosperity, drawing on the ENP experience and the model of EEA integration³⁷⁰ suggest that only countries meeting the necessary criteria could enjoy it. The said prosperity could be understood as gradual access to the Internal Market. Countries willing to accept and apply the relevant *acquis* will be given the reward.³⁷¹

3.5.1 The principle of good neighbourliness

Under Article 8 TEU, the EU is obliged to create an area of prosperity as well as good neighbourliness. This is not just the first time that this principle has formed an integral part of an objective that the EU is bound to achieve, but it is the first time that it is positioned *expressis verbis* as an element of primary sources of EU law. It is worth taking a closer look at the principle and

vulnerability, institutional deficiencies, conflict and poverty and social exclusion, Wider Europe COM (2003) 104 final, 6.

³⁷⁰ 'The long-term goal of the ENP is 'to move towards an arrangement whereby the Union's relations with the neighbouring countries ultimately resemble the close political and economic links currently enjoyed with the European Economic Area', European Commission, 'Wider Europe' (n 99) 15.

³⁷¹ 'In return for concrete progress demonstrating shared values and effective implementation of political, economic and institutional reforms, including aligning legislation with the *acquis*, the EU's neighbourhood should benefit from the prospect of closer economic integration with the EU. Specifically, all the neighbouring countries should be offered the prospect of a stake in the EU's Internal Market and further integration and liberalisation to promote the free movement of – persons, goods, services and capital (four freedoms)', *ibid* 10.

its impact on the neighbourhood provision. This may be particularly beneficial as this part of the chapter explores good neighbourliness to an extent not observed in publications on Article 8 TEU.³⁷²

The principle of good neighbourliness is a concept of law with a multiplicity of applications developed over the years.³⁷³ Its origins can be traced to ancient history and the very early stage of international relations. One approach would question the clarity of the stance of good neighbourliness, as it is regarded by some as not a strictly defined legal concept.³⁷⁴ However, there is another approach that can be applied here, which sees good neighbourliness as a principle of public international law. As such, it appears in the preamble of the Charter of the United Nations: ‘We the Peoples of the United Nations express determination to practice tolerance and live together in peace with one another as good neighbours’. This should be read in conjunction with the prohibition of the use of force in international relations expressed in Article 2(4) of the UN Charter.³⁷⁵

³⁷² Most publications on Article 8 TEU do not provide any interpretation of good neighbourliness, apart for its role as a conditionality tool. See eg N Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU: A Legal Analysis* (n 3) at 31-32. Some authors identify both prosperity and good neighbourliness as ‘an amalgam of fuzzy concepts hard to define’, Blockmans, ‘Friend or foe...’ (n 347) 116.

³⁷³ E Basheska, ‘The Principle of Good Neighbourliness in European Law’ (PhD Thesis, University of Groningen, 2014); D Kochenov, E Basheska (eds), *The Principle of Good Neighbourliness in European Legal Context* (Leiden, Martinus Neijhof, 2015).

³⁷⁴ See eg A Henrikson, ‘Facing across Borders: The Diplomacy of Bon Voisinage’ (2012) 21(2) *International Political Science Review* 124.

³⁷⁵ ‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations’, Article 2(4) of the Charter of the United Nations. In this context, It is also worth noting the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (2625/1970), which

In the European context, good neighbourliness is related to the drive to establish a form of cooperation that would enable peaceful relations between European countries, which is what the European Union model successfully encapsulates. EU law with its principles and dispute settlement mechanisms between the Member States helps these European countries to maintain peaceful and good neighbourly relations within the boundaries of the Union. Unavoidably, the events outside the EU borders started to suggest that, if the EU was not able to find ways not only to export its norms, but above all to find a formula to establish a secure and peaceful neighbourhood for the expanding EU, the emerging risk of instability could easily affect the economic, political and social stability enjoyed within the EU.³⁷⁶ Attempts to encourage and promote regional cooperation, which is regarded as an effective tool of good neighbourliness, were made in the Communities and then in the Union relations with third countries and international organisations.³⁷⁷

Regional cooperation and good neighbourly relations have become an element of enlargement that serves the EU's efforts to minimise security threats from applicant/candidates countries.³⁷⁸ Their application has been observed from the very early stages of the formulation of

confirms that '[e]very State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence.'

³⁷⁶ Article 8 TEU provides the EU with yet another channel to implement the European Security Strategy, 'Building Security in Our Neighbourhood', in European Council, *A Secure Europe in A Better World*, European Security Strategy (n 1) 7; M Cremona, C Hillion, 'L'Union fait la force? Potential and limits of the European Neighbourhood Policy as an integrated EU foreign and security policy' (Florence, European University Institute, EUI Working Paper, Law No 39, 2006) 5.

³⁷⁷ E Best, 'The European integration process: an example for other regions?' in: A Ott and E Vos (eds), *Fifty Years of European Integration* (The Hague, TMC Asser Press, 2009) 342.

³⁷⁸ 'Regional cooperation and good neighbourly relations remain essential parts of the enlargement process. They contribute to prosperity, stability, reconciliation and a climate conducive to addressing open bilateral

enlargement, where Turkish and Greek aspirations raised questions about their peaceful cooperation.³⁷⁹ Then changes in Central and Eastern Europe³⁸⁰ and crisis, followed by conflicts in the Balkans,³⁸¹ brought forward initiatives but above all the introduction of a specific ‘regional conditionality’³⁸² imposed on Central, Eastern and Southern countries, which was expressed in Essen in 1994: ‘Being aware of the role of regional cooperation within the Union, the Heads of State and Government emphasize the importance of similar cooperation between the associated countries for the promotion of economic development and good neighbourly relations [emphasis added]’.³⁸³ These elements, namely economic stability, good neighbourly relations, respect for

issues and the legacies of the past,’ General Affairs Council, Council Conclusions on Enlargement and Stabilisation and Association Process, Brussels, 17 December 2013, 2.

³⁷⁹ In this case, discussions are on-going between Greece and Turkey: ‘The threat of casus belli in response to the possible extension of Greek territorial waters made in the 1995 resolution of the Turkish Grand National Assembly still stands. In line with the negotiating framework, the Council has underlined that Turkey needs to commit itself unequivocally to good neighbourly relations and to the peaceful settlement of disputes in accordance with the United Nations Charter, having recourse, if necessary, to the international Court of Justice’, Turkey 2012 Progress Report, Commission Staff Working Document, SWD (2012) 336 final, Brussels, 10 October 2012, 36.

³⁸⁰ The Central and Eastern European countries entered transformation with a number of disputes and disagreements. These could have gone unnoticed by the EU and its Member States. An initiative by the then French foreign minister, E. Balladur, to stabilise the region, resolve disputes and guarantee minority rights was reviewed and accepted. As noted by the European Council in Copenhagen: ‘The European Council discussed the French proposal for an initiative to be taken by the European Union in favour of a Pact on stability in Europe. This initiative is directed towards assuring in practice the application of the principles agreed by European countries with regard to respect for borders and rights of minorities.’ The European Council agreed that recent events in Europe have shown that action in these areas is timely and appropriate. It welcomed the idea of using the instrument of Joint Action in accordance with the procedures provided for in the Common Foreign and Security policy.

³⁸¹ Blockmans, *Tough Love. The European Union’s Relations with the Western Balkans* (n 84).

³⁸² Tatham, *Enlargement of the European Union* (n 23) 218. The author suggests that conditionality derives from a number of international agreements and principles. See also S Blockmans, ‘Raising the threshold for further EU enlargement’ in A Ott and E Vos (eds), *Fifty Years of European Integration* (The Hague, TMC Asser Press, 2009), 203, at 209-210.

³⁸³ European Council, Presidency Conclusions, Essen, 9-10 December 1994.

borders and the rights of minorities, went on to play a leading role in the formulation of EU policies and initiatives towards its neighbourhood. In the case of Central and Eastern European countries, their regional cooperation was encouraged through political and financial instruments,³⁸⁴ while in case of the Balkan states the approach was significantly different. In their case, political and financial instruments are subordinate to the Stabilisation and Association Agreements, where regional cooperation and good neighbourliness are presented as obligations.³⁸⁵ This is a clear indication that regional cooperation and good neighbourly relations were becoming a necessary addition to the Copenhagen criteria in order to enable the implementation of a strategy to prepare for the accession of new members to the EU.³⁸⁶

³⁸⁴ See eg K E Smith, *The Making of EU Foreign Policy: The Case of Eastern Europe* (2nd edn, London, Palgrave Macmillan, 2004) at 155-158.

³⁸⁵ All Stabilisation and Association Agreements contain provisions that not only acknowledge the importance of regional cooperation and good neighbourly relations, they impose obligations; for example, the FYROM Stabilisation and Association Agreement provides in Article 3 ‘International and regional peace and stability, the development of good neighbourly relations are central to the Stabilisation and Association Process’. This objective is then reformulated as a FYROM obligation in Article 4: ‘The former Yugoslav Republic of Macedonia **commits itself to enter into cooperation and good neighbourly relations** [*emphasis added*] with the other countries of the region including an appropriate level of mutual concessions concerning the movement of persons, goods, capital and services as well as the development of projects of common interest. This commitment constitutes a key factor in the development of the relations and cooperation between the Parties and thus contributes to regional stability’. Title III sets specific conditions on how the cooperation between FYROM and other countries of the region should develop, imposing an obligation on FYROM to ‘engage in regional cooperation’ (Article 13 SAA).

³⁸⁶ See Annex IV to the Presidency Conclusions, European Council Essen 1994, in particular section XII ‘Intraregional cooperation and promotion of ‘bon voisinage’. In the case of the Balkan states and their disputes, this represented a departure from group enlargement towards the individual assessment of each candidate. See further S Blockmans, ‘Western Balkans’ in S Blockmans and A Lazowski (eds), *The European Union and Its Neighbours: A Legal Appraisal of the EU’s Policies of Stabilisation, Partnership and Integration* (The Hague, TMC Asser Press, 2006) 315, at 326.

There is no doubt that the enlargement process also in this aspect affected the formulation of the ENP and its instruments. The role of regional cooperation and good neighbourliness is essential to encourage stability within the territories of the ENP partners as well as among them. It is a particularly challenging task in an environment of instability, disputes and conflicts, including military ones. Nevertheless, as recognised by Marise Cremona '[t]he EU sees itself as a champion of regional integration, particularly regional integration as a mechanism for economic development and conflict resolution'.³⁸⁷ The importance of regional cooperation was touched upon in the already mentioned 'Wider Europe' letter by Solana and Patten. The ENP launch in 2003 brought a clear definition of the EU as a promoter of regional cooperation: '[t]he EU must act to promote the regional and sub-regional cooperation and integration that are preconditions for political stability, economic development and the reduction of poverty and social divisions in our shared environment'.³⁸⁸ Furthermore, the ENP, reflecting upon the experience in the Balkans, adopts good neighbourly relations and applies them as a common value on which the privileged relations with neighbours will be built.³⁸⁹ The classification of good neighbourly relations as a common value can be justified by approaching the experience of the EU and the ENP partner countries, in particular the Eastern Partnership countries, from their collaboration in other international organisations, namely the UN and the OSCE. Nevertheless, this common value is no less than a conditionality tool.³⁹⁰

The importance of regional as well as cross-border cooperation was also recognised and reflected in the ENP specific financial instrument, which replaced existing geographic and thematic programmes. In the proposal to establish the ENP Instrument, the European

³⁸⁷ Cremona, 'The European Neighbourhood Policy...' (n 140) 286.

³⁸⁸ European Commission, 'Wider Europe' (n 99).

³⁸⁹ European Commission, 'European Neighbourhood Policy. Strategy Paper' (n 292) 3.

³⁹⁰ Ghazaryan, *The European Neighbourhood Policy* (n 3) 32.

Commission highlighted that ‘[d]eveloping an area of good “neighbourliness” requires resources to promote cross-border cooperation between partner countries and the Member States so as to promote integrated regional development among border regions and avoid the creation of new dividing lines’.³⁹¹ These needs were taken into account and Article 1 of the of Regulation No 232/2014 states that this regulation establishes a Neighbourhood and Partnership Instrument to provide assistance for the development of an area of prosperity and good neighbourliness involving the European Union, and the partner countries.³⁹²

Taking into account all the above and combined with the diversity of sources of instability in the EU’s neighbourhood, in particular in the ENP pool,³⁹³ the EU’s concerns regarding the stability of its vicinity are more than justified. They can be understood as a force advocating the application of good neighbourliness as a conditionality tool. Besides, this tool has been strengthened in Article 8 TEU. There, good neighbourliness is put together with prosperity, and so it can be understood that one cannot exist without the other. If neighbouring countries decide not to pursue the route of peace and friendly relations among themselves, then they cannot expect to be given a share in prosperity. However, there is of course the timing issue and the matter of how the EU wishes to persuade its neighbours to pursue the route towards the establishment of an area of prosperity and good neighbourliness. It well may be that the other elements of Article 8 TEU can provide the solutions.

³⁹¹ Proposal for a Regulation of the European Parliament and of the Council laying down general provisions establishing a European Neighbourhood and Partnership Instrument, COM (2004) 628, Brussels, 29 September 2004, 3.

³⁹² Regulation (EU) No 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument, [2014] OJ L77/30.

³⁹³ N Tocci, ‘Comparing the EU’s Role in Neighbourhood Conflicts’ in M Cremona (ed), *Development in EU External Relations Law* (Oxford, Oxford University Press, 2008) 216.

3.6. *The values of the European Union*

Article 8 TEU stipulates that a special relationship with neighbouring countries ought to be founded on the values of the Union and characterised by close and peaceful relations based on cooperation. Starting with an examination of the wording used in the provision, one can notice a significant difference of language applied here when compared with the ENP documents. The Treaty provision speaks of the values of the Union, not of ‘shared’ or ‘common’ values or norms, which had been widely applied in the ENP framework.³⁹⁴ This introduction of the values of the EU in the neighbourhood provision can be regarded as a showing of the ‘true colours’ of the intentions of the EU in its proximity. The values are no longer an indication of the establishment of relations based on shared principles. It is now all down to an emanation of EU normative power³⁹⁵ and confirmation of the asymmetric character of relations between the EU and its neighbourhood.³⁹⁶

Moreover, to understand what role the values of the Union should play in relations with neighbours, one should understand the meaning of this provision in a broad treaty context. When Article 8 TEU is measured against the duties imposed by Article 3(5) (the Union shall uphold and promote its values in its relations with the wider world) and Article 21 TEU (the Union’s action on the international scene shall be guided by the principles which inspired its own creation,

³⁹⁴ See for eg European Commission, ‘European Neighbourhood Policy. Strategy Paper’ (n 292) uses ‘common values’, ‘sharing the EU’s fundamental values’ and ‘shared values’. See further Ghazaryan, *The European Neighbourhood Policy...* (n 3). As noted by Peter Van Elsuwege and Roman Petrov, the catalogue of values referred to in the ENP Action Plans goes beyond the setting of Article 2 TEU and includes democratic standards developed by international organisations, Van Elsuwege and Petrov, ‘Article 8 TEU...’ (n 20) 694.

³⁹⁵ Manners, ‘Normative Power Europe’ (n 37) 235.

³⁹⁶ Van Elsuwege and Petrov, ‘Article 8 TEU...’ (n 20) 694.

development and enlargement and shall seek to develop relations and build partnerships with third countries, and international, regional and global organisations which share these principles), it is clear that it should be understood as *lex specialis*. It also moves from the promotion of values to their application as the foundation of a relationship with neighbouring countries. This shift may be interpreted as a legal basis for the extension of the values of the EU beyond membership and as such can be regarded as a notion of external governance.³⁹⁷ Christophe Hillion interprets Article 8 TEU as ‘an express competence for EU norms export’.³⁹⁸ He notes that until the Treaty of Lisbon, the EU projected its values through different means, such as different agreements concluded with neighbouring countries, as well as the political instruments of the ENP. The introduction of this provision makes the application of norms in relations with neighbours mandatory.³⁹⁹ However, this legal interpretation raises a political question. Assuming that Article 8 TEU applies to relations with all EU neighbours, then the application of its norms in relations with some of its neighbours may be problematic.⁴⁰⁰ These political issues may lead to the conclusion that only neighbouring countries which express and show respect of EU values may be considered as suitable candidates for the development of relations as defined in this provision. Furthermore, it could lead again to the question: should the non-application of the values in relations with a particular neighbour be regarded as a failure to meet the objectives of Article 8 TEU, and, as such, should it lead to proceedings before the CJEU? There is another argument submitted by Sandra Lavenex and Frank Schimmelfennig who ask ‘to what extent is the EU able

³⁹⁷ S Lavenex, F Schimmelfennig, ‘EU rules beyond EU borders: theorizing external governance in European politics’ (2009) 16(6) *Journal of European Public Policy* 791; S Lavenex, ‘EU external governance in “Wider Europe”’ (2004) 11(4) *Journal of European Public Policy* 680.

³⁹⁸ Hillion, ‘Anatomy of EU norm export...’ (n 21) 13.

³⁹⁹ *ibid* 17.

⁴⁰⁰ As noted by Peter Elsuwege and Roman Petrov, it may be difficult for Russia to accept that their relationship with the EU would be founded on the values of the EU, Van Elsuwege and Petrov, ‘Article 8 TEU...’(n 20) 700.

to integrate its external environment into common systems of rules'.⁴⁰¹ An answer to this might come in approaching the objectives of art 8 TEU not in legal terms, but as an instrument of transformation.⁴⁰² As such, with the application of conditionality and a 'more for more' approach, it would make the establishment of an area of prosperity and good neighbourliness possible. Indeed, the application of the values of the Union as a foundation of relations with neighbouring countries confirms the strict conditionality approach expressed in the neighbourhood provision. There is, of course, a risk that partner countries would not be able or willing to accept the demands of meeting criteria set up by the EU, even where the prospect of economic prosperity is on the horizon. This probably forms the biggest challenge of the EU's conditionality strategy, despite all the political and financial incentives offered to boost close and peaceful cooperation.⁴⁰³

3.7. Specific agreements (Article 8(2) TEU)

As already noted, until the introduction of Article 8 TEU, there was no Treaty provision dealing specifically with EU relations with its neighbours. There was also no list of instruments to be found in primary law that would specifically serve relations with neighbouring countries. Article 8

⁴⁰¹ S Lavenex, F Schimmelfennig, 'EU rules beyond EU borders: theorizing external governance in European politics' (2009) 16(6) *Journal of European Public Policy* 792.

⁴⁰² Christophe Hillion speaks of Article 8 TEU as neighbouring state-building policy indicating that as such it would engage governmental and non-governmental entities, Hillion, 'Anatomy of EU norm export...' (n 21) 18. The author of the thesis would rather approach Article 8 TEU as the basis for change in neighbouring countries that would work to the EU's benefit, namely improved democratic structures, respect for human rights, and good neighbourly relations in the proximity of the EU.

⁴⁰³ Article 8(2) TEU provides for a possibility for the parties to undertake joint activities. It also introduces an obligation to periodically review the implementation of specific agreements envisaged by this provision. It fits into the practice of Association Agreements that provide for setting up an institutional framework and strengthens the collaborative aspect of relations with neighbours.

TEU changed all that by setting up the objectives for relations with the EU neighbours, but also by naming an instrument that could be used with regard to the neighbourhood provision. Article 8(2) TEU identifies ‘specific agreements’ as a possible measure that can be applied to meet the objectives of paragraph 1. Similarly to the difficulty observed when the character of ‘a special relationship’ was assessed in sub-section 3.3 of this chapter, here one is faced with ‘specific agreements’. There is no indication how their specific character should be understood. Historically, there was an ambition to create a new model of contractual agreements to serve EU relations with its neighbours. It was in the Solana-Patten ‘Wider Europe’ letter that the matter of specific Neighbourhood (Proximity) Agreements was mentioned.⁴⁰⁴ In the European Commission communication on Wider Europe, the role of the Neighbourhood Agreements was outlined as a way to take contractual relations to a new level.⁴⁰⁵ This approach was confirmed in the Strategy Paper of 2004, in which the name of new agreements was changed to ‘European Neighbourhood

⁴⁰⁴ ‘Do we need to create new contractual arrangements such as Neighbourhood or Proximity Agreements? There is already scope to upgrade relations within the existing agreements with the countries concerned and we must guard against cosmetic changes distracting attention or even becoming a substitute for substantive measures. The debate needs careful handling to avoid unrealistic expectations over the prospects of future enlargement. On the other hand, if we decide to set our specific and qualitatively enhanced objectives for our policy, this could justify a relabeling of our relations. Moreover, the strong symbolism of a new label that marks a strengthened commitment or the Union could help to raise the profile of relations with the EU and thus unlock additional political will and administrative capacity. The strong political and economic ties between the future members and their neighbours should help in this respect.’

⁴⁰⁵ ‘The EU will examine the scope for new Neighbourhood Agreements to build on existing contractual relations. These would supplement existing contractual relations where the EU and the neighbouring country have moved beyond the existing framework, taking on new entitlements and obligations’, European Commission, ‘Wider Europe’ (n 99) 17.

Agreements'.⁴⁰⁶ The initial ambitious aim to create European Neighbourhood Agreements⁴⁰⁷ was dropped in the wake of the demise of the Constitutional Treaty. During the period of reflection and work on the EU Reform Treaty, not only did the name – (European) Neighbourhood Agreements – disappear but, more importantly, the idea on how to organise an upgrade of relations with neighbours changed to give way to a new concept. The Commission introduced the notion of deep and comprehensive free trade agreements, which 'should cover substantially all trade in goods and services between the EU and ENP partners including those products of particular importance for our partners and should include strong legally-binding provisions on trade and economic regulatory issues',⁴⁰⁸ as well as strong legally-binding provisions on the implementation of trade and economic regulatory issues.⁴⁰⁹ Furthermore, the development of a new generation of

⁴⁰⁶ 'The next step in the development of bilateral relations, including the possibility of new contractual links. These could take the form of European Neighbourhood Agreements whose scope would be defined in the light of progress in meeting the priorities set out in the Action Plans', European Commission, 'European Neighbourhood Policy. Strategy Paper' (n 292) 3.

⁴⁰⁷ 'The ENP brings added value, going beyond existing cooperation and takes [a form of] [n]ew contractual links, in the form of European Neighbourhood Agreements, whose scope will be defined in the light of an evaluation by the Commission of progress in meeting the priorities set out in the Action Plans', European Commission, 'European Neighbourhood Policy. Strategy Paper' (n 292) 8-9.

⁴⁰⁸ European Commission, 'Strengthening the European Neighbourhood Policy' (n 357) 4.

⁴⁰⁹ European Commission, 'A Strong Neighbourhood Policy' COM (2007) 774 final, Brussels, 5 December 2007, 4. Further definitions of a DCFTA can be found in official documents, e.g. a definition in a memo of the European Commission of a DCFTA with Georgia is given in the following manner: 'The [EU-Georgia] Deep and Comprehensive Free Trade Area (DCFTA) is part of the Association Agreement and covers trade in goods. This includes energy, services and traditional flanking measures such as rules of origin, customs and trade facilitation, together with anti-fraud provisions as well as trade defence instruments. These rules aim to ensure that trade is liberalised to the fullest extent possible but provide for necessary precautions to ensure only eligible goods qualify for preferential treatment. A bilateral dispute settlement procedure is envisaged to solve issues in an expeditious manner. The DCFTA also tackles the 'comprehensive' elements of an FTA, designed for Eastern Partnership countries. These include regulatory disciplines that aim to ensure a stable and growth-oriented policy framework that will boost competitiveness. It includes competition and transparency provisions, intellectual property rights,

Association Agreements was nurtured, and the name ‘European Neighbourhood Agreements’ was replaced ad interim with ‘enhanced agreements’⁴¹⁰ chosen in the end as the name for the new generation of Association Agreements.⁴¹¹

Domik Hanf sees Article 8 TEU as ‘a new and specific legal basis empowering the Union to conclude neighbourhood agreements’.⁴¹² He also notes that the difference between Article 8 TEU and Article 217 TFEU is that they refer to two different types of agreements: specific and Association Agreements respectively. Therefore, he does not recognise the reference to Article 217 TFEU as ‘a real enabling clause’.⁴¹³ In his view, reference to it has a preventive role and establishes a barrier for third states to prohibit them from participation in the Union’s institutions. This is a rather far-reaching assumption. Although his last point is interesting and not noted by other scholars, it is difficult to agree with the distinction he drew between specific and Association Agreements. Overall, Association Agreements have been present in the Union’s external relations from early stages of their development. It is therefore questionable why these specific agreements could not be considered types of Association Agreements. There is, however, a potential risk that classifying the new agreements to be concluded with the EU neighbours as Association Agreements may lead to applying to them the existing jurisprudence of the CJEU. Association Agreements are regarded as the most advanced model of EU relations with third countries with which the EU wishes to establish and develop deepening relations extending to numerous areas based on trust and respect of common values. The CJEU, in relation to the EU-Turkey

adaptation of domestic law with the EU *acquis* in the selected services areas and in public procurement’, European Commission Memo, Brussels, 22 July 2013.

⁴¹⁰ See further European Commission, ‘A Strong Neighbourhood Policy’ *ibid* 4.

⁴¹¹ See eg Joint Declaration on the EU-Ukraine Association Agreement, EU-Ukraine Summit, 12812/08 (Presse 247), Paris, 9 September 2008.

⁴¹² Hanf (n 343) 3.

⁴¹³ *ibid*.

Association Agreement, held that the ‘establishment of an association implies the creation of special privileged [emphasis added] links with a non-Member country that must, at least to a certain extent, take part in the [Union] system’.⁴¹⁴ From the Court’s view, this would suggest that perhaps neighbourhood specific agreements in the form of Association Agreements could contribute to the establishment of privileged (special) relations with neighbours of the EU. There is also a more pragmatic approach, suggesting that the selection of Association Agreements for the Eastern Partnership countries was determined by the need to balance relations with all partners covered by the ENP. The EU concluded Association Agreements with its Southern neighbours,⁴¹⁵ and therefore offering anything less than association to the Eastern countries would not be seen as a way to enhance bilateral relations with them. It may also be argued that the application of the association formula may indicate recognition of the membership aspirations of the Eastern partners. This approach would indicate a departure from the clear division between the ENP and the enlargement process. To a certain extent, this line of reasoning can be defended, in particular when examined in the setting confirming that Association Agreements can serve different purposes. Moreover, the objective of these agreements can change over time.⁴¹⁶

There is also the question on how partner countries perceive an offer of opening negotiations of new agreements. Surprisingly, Ukraine, the first Eastern Partnership country that started negotiations, was hostile towards the application of the word ‘neighbour’. These reservations were addressed, and negotiations on new generation Association Agreements and

⁴¹⁴ Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd*, ECR [1987] 3719.

⁴¹⁵ See eg Pieters, ‘The Mediterranean countries’ (n 142); K Pieters, *Deep and Comprehensive Free Trade Agreements: Liberalization of Goods and Services between the Mediterranean Neighbours and the EU*, in G Fernández Arribas, K Pieters, T Takács (eds), *The European Union’s Relations with Southern-Mediterranean in the Aftermath of the Arab Spring* (The Hague, CLEER Working Papers 3, 2013) 95.

⁴¹⁶ Europe Agreements, although not originally intended as enlargement tools, led to the accession of the Central and Eastern European countries to the EU.

deep and comprehensive free trade agreements with the Eastern Partnership countries started respectively in 2008 and 2010. It is surprising that there were reservations regarding relatively minor issues, such as the name of the negotiated agreement or the identification of Georgia as an Eastern European country, while partner countries accepted very demanding substantive obligations in the field of law approximation.

There is also the matter of a suitable procedure that should be applied in order to conclude these specific (or, as they are now known, new generation Association Agreements). Things get blurry, as a reading of Article 8 TEU would confirm that there is no specific procedure to conclude these agreements. The only instruction that this provision provides is in the form of the echoed section of Article 217 TFEU stating that these agreements ‘may contain reciprocal rights and obligations’.

The way Article 8 TEU is formulated could not provide for it to be a free-standing legal basis for the conclusion of an agreement. Peter Van Elsuwege and Roman Petrov argue that if an association agreement had Article 8 TEU and Article 217 TFEU as its legal bases, then the distinction between Association Agreements leading to EU membership and Association Agreements with the objective of Article 8 TEU would confirm the separation of the ENP from the enlargement process.⁴¹⁷

However, the provision was not used to conclude the EU-Ukraine, EU-Moldova and EU-Georgia Association Agreements. Instead Article 217, in conjunction with Article 218(5) TFEU, second subparagraph of Article 218(8) and Article 218(7) TFEU were selected as the legal bases.⁴¹⁸

⁴¹⁷ Van Elsuwege and Petrov, ‘Article 8 TEU...’ (n 20) 693.

⁴¹⁸ See eg Council Decision of 17 March 2014 (2014/295) on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European

Interestingly enough, there is no explicit reference to Article 8 TEU neither in the Proposal nor in the Explanatory Memorandum. It can be interpreted as a way to maintain the detachment between political instruments of the ENP and its legal instruments. The absence of explicit reference to Article 8 TUE can also be regarded as a safety net that will give the EU more options and more flexibility to develop a new policy, for example an ENP bis once the ENP will no longer be regarded as sufficient to serve as a framework neighbourhood policy.

4. Conclusions: The neighbourhood provision - does it carry value added?

Although the analysis of the origins of Article 8 TEU indicates that the ENP was used to accelerate the drafting of this Treaty provision, there is no direct or specific reference to the ENP in the provision in question. The ENP, however, does come to mind when Article 8 TEU is assessed, mostly because it heavily influenced its formulation. Furthermore, the use of Article 8 TEU as a way to constitutionalise the ENP de facto limits the possibilities the policy offers. This policy has developed outside the Treaty framework,⁴¹⁹ and was not founded on any particular legal basis.⁴²⁰ It was a choice made at the time when the three-pillar structure was in place and so the introduction of a legal basis for the ENP could only lead to competence issues and conflicts between institutions and Member States. In addition, if Article 8 TEU were only to be applied to the ENP countries, it would be very limited. The ENP should then remain a policy driven by soft law and political instruments, while Article 8 TEU could serve a broader agenda. In this way, efforts made within

Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble, Article 1, and Titles I, II and VII thereof [2014] OJ L161/1.

⁴¹⁹ C Hillion, 'The EU's Neighbourhood Policy towards Eastern Europe' in A Dashwood and M Maresceau (eds), *Law and Practice of EU External Relations. Salient Features of a Changing Landscape* (Cambridge, Cambridge University Press, 2008) 310.

⁴²⁰ *ibid* 315.

the ENP framework would not be wasted and the ENP would maintain a link with the treaty provision only in political and symbolic terms while preserving the policy's flexibility.

It cannot go unnoticed that the neighbourhood provision is thus far more ambitious than the ENP. Its added value should be perceived as a step that can help to integrate the whole spectrum of issues related to relations with neighbours into a single framework.⁴²¹ At the same time, new initiatives to address the objectives of Article 8 TEU could be formulated, taking into account the experience of the past five years. Since the entry into force of the Treaty of Lisbon, Article 8 TEU has received modest interest from scholars who suggest various interpretations and ways to improve this provision. However, there is no evidence of the application of the neighbourhood provision in the political or legal instruments of the EU. Perhaps some members of the Convention were not entirely wrong when they suggested that the then predecessor of Article 8, ie Title IX: Article 42 of the Constitutional Treaty, should be deleted as '[it] is unnecessary [...]'. As a statement of foreign policy it raises more questions than it answers. As a constitutional provision it gives no powers to the Union, which are not enshrined elsewhere. By its deeds the Union shall be known! Not by its puffery'.⁴²² Nevertheless, the provision is in force and forms a part of primary law, and as such carries a powerful message. It imposes an obligation on the EU to engage with its neighbourhood in a special relationship in order to establish an area of prosperity and good neighbourliness.

Dominik Hanf suggests that the provision can be interpreted as the constitutionalisation of the concept of 'integration without membership'.⁴²³ It can be accepted only when this act of

⁴²¹ Blockmans, 'Friend or foe...?' (n 347) 114.

⁴²² Amendment to Article 42 proposed by R Maclellan and N MacCormick <<http://european-convention.eu.int/docs/Treaty/pdf/42/Art42MaclellanMacCormick.pdf>> accessed 17 July 2018.

⁴²³ Hanf (n 343) 5.

constitutionalisation is seen as a starting point for the further development of membership alternatives. These alternatives are still at an early stage of formulation and further shaping through political discussions, as well as dialogue with the countries that they would appeal to, is required. Once this phase is completed, a legal framework for these alternatives will be needed. This may well be a treaty provision that would legitimise a new level of European integration, which is needed to maintain the momentum of European integration and boost the attractiveness of the EU without membership. It might be a good opportunity to revisit the idea of associate membership.⁴²⁴

Beyond the option mentioned above aimed at giving the neighbourhood provision a purpose, it is clear that its introduction has not significantly changed the way the EU organises its relations with neighbours. The ambitious objective to establish an area of prosperity, when confronted with the diverse pool of neighbours, indicates a rather long-term engagement with no prospect of achieving *finalité*. In the interim, a more moderate interpretation of Article 8 TEU can be applied. Drawing on international relations theory, the neighbourhood provision can be perceived as a tool of positive conditionality, standing here for influencing the internal and external policies of neighbouring countries. It has worked well, not to say as an indispensable mechanism of pre-accession strategy, and therefore it could also make a difference for the EU in its relations with neighbours.

The diversity of the EU neighbourhood contributes to a spectrum of interpretations that can be applied to Article 8 TEU. The ambiguity of the provision further adds to various translations of its meaning. The overall conclusion of the analysis presented in this chapter perhaps suggests that the EU should not pursue a single relationship with neighbouring countries, but

⁴²⁴ Presented by A Duff during work on the Treaty establishing a Constitution for Europe.

instead should address its neighbourhood as a whole. In this way, the boundaries of neighbourhood would be perceived as fluid, would change over time to reflect internal and external processes that may, among other things, influence the formulation of EU relations with its neighbourhood (Scottish independence, the decision of one or more Member States to withdraw from the Union). Article 8 TEU could provide a framework for a multiplicity of relations that would accommodate different levels of ambitions of the EU towards a particular neighbouring country, as well as the abilities of the neighbour in question to meet the conditions laid out by the EU. In this way, although diverse in speed and level of integration, a model aiming at the fulfilment of the objective of the ‘establishment of an area of prosperity and good neighbourliness founded on the values of the EU’ would be more realistic as well as more appealing to the EU neighbourhood. Overall, the willingness of neighbours to engage is crucial for the successful implementation of the objectives of Article 8 TEU. It would mirror the model of the EU in terms of a diversified internal integration model, which includes the euro zone and Schengen. In this way, the EU and its neighbours could draw closer to achieving a privileged state of relations, based on ‘proximity, long-standing values and European identity’⁴²⁵ that would lead to economic prosperity and peaceful neighbourliness.

⁴²⁵ Preamble to the European Economic Area Agreement [1994] OJ L1/3.

Chapter V

New generation of Association Agreements

1. Introduction

The relations between the EU and three Eastern Partnership countries: Georgia, Moldova and Ukraine have evolved since the early 1990's when all three countries, along with other post-Soviet republics, were invited to conclude the Partnership and Cooperation Agreements (PCAs).⁴²⁶ Since then, their gradual and sometimes frail Europeanisation,⁴²⁷ geopolitical turbulences in the region and, during the last decade, implementation of the ENP have influenced the process of their rapprochement to the EU. The evolution of the legal framework of the EU relations with these three countries reached a historic point in 2014 when, after long negotiations and despite the surge of tensions stimulated by the aggressive actions of the Russian Federation, the EU signed Association Agreements with these three countries.⁴²⁸ The model of association offered to them

⁴²⁶ S Peers, 'E.C. framework of international relations: cooperation, partnership, association' in A Dashwood and C Hillion (eds), *The general law of E.C. external relations* (London, Sweet and Maxwell, 2000) 164.

⁴²⁷ R Petrov, P Kalinichenko, 'The Europeanization of third country judiciaries through the application of the EU acquis: the cases of Russia and the Ukraine' [2011] *International & Comparative Law Quarterly* 325; A Gawrich, I Melnykowska, R Schweickert, 'Neighbourhood Europeanization through ENP: The case of Ukraine' (Berlin, Freie Universität Berlin, Working Paper No 3, 2009); K Wolczuk, 'Integration without Europeanisation: Ukraine and its Policy towards the European Union' (Florence, European University Institute, EUI Working Papers, RSCAS No 15, 2004).

⁴²⁸ The process of negotiations started with the EU-Ukraine negotiations of the Association Agreement, followed by opening of negotiations with three other Eastern Partnership countries: Armenia, Georgia and Moldova. Negotiations with Armenia were concluded in July 2013, however Armenian authorities decided not to pursue with signing of the Agreement and instead applied to join the Eurasian Customs Union with Russia, Belarus and Kazakhstan, see further *Implementation of the European Neighbourhood Policy in Armenia Progress in 2013 and recommendations for action*, SWD (2014) 69 final, Brussels, 27 March 2014. Despite this drawback the Eastern Partnership Vilnius Summit of 2014 brought a declaration on the EU and Armenia's commitment 'to further develop and strengthen their cooperation in all areas of mutual interest within the Eastern Partnership framework, stressing the importance of reviewing and updating the existing basis of their relations,' *Joint Declaration of the Eastern Partnership Summit*, Vilnius, 28-29

is based on common values,⁴²⁹ while association is understood as a framework for enhanced political dialogue as well promotion, preservation and strengthening of peace. The agreements also aim to establish conditions for enhanced economic and trade relations enabling Georgia, Moldova and Ukraine gradual integration in the EU Internal Market by setting up Deep and Comprehensive Free Trade Areas (DCFTAs). Furthermore, all three countries are encouraged to engage in enhanced cooperation in the field of the Common Foreign and Security Policy (CFSP) and Justice, Freedom and Security to reinforce the rule of law and the respect for human rights and fundamental freedoms. These comprehensive objectives of the agreements will strongly depend on gradual approximation of Georgia, Moldova and Ukraine legislation with EU law.

This chapter provides an overview of developments that led to the conclusion of the three new generation of Association Agreements and teases out their main features. This exercise will enable us to address the question whether the political will to upgrade relations with the Eastern Partnership countries can not only translate into a new contractual framework driven by conditionality, but provides enough necessary *instrumentarium* and driving force to guarantee implementation of the ambitious Association Agreements. The mechanisms of conditionality used in these Association Agreements are assessed to explore whether strict conditionality, with no

November 2013, Eastern Partnership: the way ahead. Since then the EU-Armenia 6th round of human rights dialogue took place, while latest meeting of the EU-Armenia Cooperation Council confirmed joint commitment to enhance and deepen their cooperation in all areas possible and compatible with Armenia's new international obligations, Foreign Affairs Council, Press Release 89/15, Brussels, 20 January 2015. The EU not only continues its support for Armenia in its efforts to implement the Mobility Partnership, but does not dismiss an option of reviving the draft of the Association Agreement. Commissioner Hahn said immediately after the January 2015 EU-Armenia Cooperation Council that the EU 'should make best possible use of the already existing Association Agreement which we negotiated and safeguarded for future reference,' and that it needs 'to be adjusted in order to reflect the new context but the substance of its political part should be kept.'

⁴²⁹ M Cremona, 'Values in EU Foreign Policy' (n 28) 275.

immediate prospect of EU membership can translate into an effective model of EU relations with its neighbours bringing the EU closer to achieving stability and security in its vicinity. Section 2 provides a review of EU-Georgia, Moldova and Ukraine relations that led to the conclusion of the Association Agreements. Section 3 addresses matters of the legal bases of these agreements, while section 4 assesses these Agreements as an ENP instrument. Section 5 provides an overview of character and contents of the three Agreements, including DCTAs. It is followed by a review of the institutional framework set up to make the implementation process possible. Section 7 is dedicated to review of the approximation of law, and is followed by a part of the Chapter where application of conditionality is reviewed. Section 9 looks at the entry into force of the three Agreements. Section 10 discusses the potential of the associated membership model. Conclusions can be found in the final section of this chapter.

2. Towards new generation of Association Agreements

The Eastern neighbours of the EU⁴³⁰ represent perpetual challenge to the EU. The enlargement of 2004 brought threats to EU's security even closer to its borders. The three countries that concluded Association Agreements in 2014 represent well types of encounter that the EU needs to address. Ukraine due to its size and location in the buffer zone between Poland, Russia and Belarus, Moldova with its frozen conflict in Transnistria, and Georgia struggling with separatists in the South Ossetia and Abkhazia are faced with a large geopolitical struggle.⁴³¹ The role played by the Russian Federation in the region cannot go unnoticed. It is causing direct problems for the

⁴³⁰ 'Eurasia is [...] the chessboard on which the struggle for global primacy continues.' Z Brzezinski, *The Grand Chessboard* (New York, Harper Collins Publishers, 1997) 31.

⁴³¹ R Alcaro and E Alessandri, 'Engaging Russia: Prospects for a Long-Term European Security Compact' (2010) 15 *European Foreign Affairs Review* 191.

three Eastern Partnership (EaP) countries and equally challenges the EU.⁴³² The EU is faced with a question on how to develop relations with these three countries at the time when the Russian Federation contributes directly to escalation of conflicts and tensions in the region. The annexation of Crimea as well as Russian contribution to unrest in the Eastern Ukraine put the EU's role in the neighbourhood to the ultimate test and in many ways stimulates the EU to respond quickly to the changing dynamics in its neighbourhood.⁴³³

2.1. Partnership and Cooperation Agreements and Strategy on Ukraine

Some parts of the Partnership and Cooperation Agreements still govern relations between the EU, its Member States and respectively Georgia,⁴³⁴ Moldova⁴³⁵ and Ukraine⁴³⁶ They are framework agreements, which are supported by a number of sectoral agreements that reflect development of relations between the EU and the three countries.⁴³⁷ The PCAs were signed in 1994 and entered

⁴³² A V Papava, 'The Eurasianism of Russian Anti-Westernism and the Concept of 'Central Caucaso-Asia'' (2013) 51(6) *Russian Politics and Law* 45.

⁴³³ M Emerson, 'The EU-Ukraine-Russia Sanctions Triangle' (Brussels, Centre for European Policy Studies, CEPS Commentary, 2014).

⁴³⁴ Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Georgia, of the other part [1999] OJ L205/3.

⁴³⁵ Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Moldova, of the other part [1998] OJ L181/3.

⁴³⁶ Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Georgia [1999] OJ L205/3.

⁴³⁷ See, inter alia, agreements concluded with Georgia: Agreement between the European Union and Georgia on the status and activities of the European Union Rule of Law Mission in Georgia, EUJUST THEMIS [2004] OJ L389/42; Agreement between the European Community and the government of Georgia on certain aspects of air services [2006] OJ L134/24; Agreement between the European Union and Georgia on the facilitation of the issuance of visas [2011] OJ L52/34; Common Aviation Area Agreement between the European Union and its Member States and Georgia [2012] OJ L321/3; Agreement between the European Union and Georgia on protection of geographical indications of agricultural

products and foodstuff [2012] OJ L93/3; agreements concluded with Moldova: Agreement between the European Union and the Republic of Moldova on the protection of geographical indications of agricultural products and foodstuffs [2013] OJ L10/3; Common Aviation Area Agreement between the European Union and its Member States and the Republic of Moldova [2012] L292/3; Agreement between the European Community and the Republic of Moldova on the facilitation of the issuance of visas [2007] OJ L334/169; Agreement between the European Community and the Republic of Moldova on the readmission of persons residing without authorization [2007] OJ L334/149; Agreement between the European Community and the Republic of Moldova on certain aspects of air services [2006] OJ L126/24; agreements concluded with Ukraine: Protocol to the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Ukraine, of the other part, on a Framework Agreement between the European Union and Ukraine on the general principles for the participation of Ukraine in Union programmes [2011] OJ L18/3; Agreement between the European Union and Ukraine amending the Agreement between the European Community and Ukraine on the facilitation of the issuance of visas [2013] OJ L168/11; Bilateral Agreement between the European Community and Ukraine on the readmission of persons [2007] OJ L332/48; Bilateral Agreement between the European Community and the Government of Ukraine on trade in certain steel products - Protocol A [2007] OJ L178/24; Bilateral Agreement in the form of an Exchange of Letters between the European Community and Ukraine, represented by the Government of Ukraine, concerning the extension and amendment of the Agreement between the European Community and Ukraine on trade in textile products [2007] OJ L17/18; Bilateral Protocol to the Partnership and Cooperation Agreement (PCA) between the European Communities and their Member States, of the one part, and Ukraine, of the other part, on accession of the Republic of Bulgaria and Romania to the PCA [2007] OJ L110/29; Bilateral Agreement between the European Community and Ukraine on certain aspects of air services [2006] OJ L211/24; Bilateral Agreement between the European Community and the Government of Ukraine on trade in certain steel products - Agreed minute - Declarations - Protocol A [2005] OJ L232/43; Bilateral Agreement between Ukraine and the European Union on the security procedures for the exchange of classified information [2005] OJ L172/84; Bilateral Agreement between the European Union and Ukraine establishing a framework for the participation of Ukraine in the European Union crisis management operations [2005] OJ L182/29; Bilateral Agreement between the European Atomic Energy Community and the Cabinet of Ministers of Ukraine for Co-operation in the Peaceful Uses of Nuclear Energy [2006] OJ L261/27; Bilateral Agreement in the form of an Exchange of Letters between the European Community and Ukraine, represented by the Government of Ukraine, concerning the extension and amendment of the Agreement between the European Economic Community and Ukraine on trade in textile products of 1993 [2005] OJ L65/26; Bilateral Agreement between the European Community and the Government of Ukraine on trade in certain steel products [2004] OJ L384/23; Bilateral Agreement between the European Union and Ukraine on the participation of Ukraine in the European Union Police Mission in the former Yugoslav Republic of Macedonia (EUPOL

Proxima) [2004] OJ L354/82; Bilateral Protocol between the European Communities and their Member States, of the one part and Ukraine, of the other part (PCA), on accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the PCA and on adjustments to the PCA [2006] OJ L224/16; Bilateral Agreement renewing the Agreement on Cooperation in Science and Technology between the European Community and Ukraine 07/10/2003 Bilateral Agreement between the European Union and Ukraine on the participation of Ukraine in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) [2003] OJ L239/38; Bilateral Agreement for scientific and technological co-operation between the European Community and Ukraine [2003] OJ L36/32; Bilateral Agreement in the form of an Exchange of Letters between the European Community and Ukraine concerning the extension and amendment of the Agreement between the European Economic Community and Ukraine on trade in textile products initialled on 5 May 1993, as last amended by the Agreement in the form of an Exchange of Letters initialled on 15 October 1999 [2001] OJ L16/3; Bilateral Agreement for Cooperation between the European Atomic Energy Community and the Cabinet of Ministers of Ukraine in the field of controlled nuclear fusion [2002] OJ L322/40; Bilateral Agreement for Cooperation between the European Atomic Energy Community and the Cabinet of Ministers of Ukraine in the field of nuclear safety [2002] OJ L322/33; Bilateral Protocol to the Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one Part, and Ukraine, of the other part [to include Austria, Finland and Sweden in the Partnership] [2003] OJ L283/28; Bilateral Agreement in the form of an Exchange of Letters between the European Community and Ukraine concerning the renewal of the Agreement between the European Economic Community and Ukraine on Trade in Textile Products initialled on 5 May 1993, as last amended by the Agreement in the form of an Exchange of Letters initialled on 22 December 1994 [1996] OJ L81/294; Bilateral Protocol to amend the agreement to establish a science and technology centre in Ukraine (STCU) [1998] OJ L225/10; Multilateral Agreement to establish a science and technology centre in Ukraine (STCU), as amended by the Protocol of 7 July 1997 [1998] OJ L225/5.

into force four years later.⁴³⁸ Their sections on trade have been in operation since 1996 (Ukraine and Moldova) and 1997 (Georgia) under the terms of the Interim Agreements.⁴³⁹ The PCAs were concluded for initial ten year periods, and after the ten year periods were automatically renewed year by year.⁴⁴⁰ The PCAs are regarded to be entry-level agreements, and as such do not envisage membership in the EU. The term ‘entry-level agreements’ was introduced by Steve Peers to describe PCAs as a way ‘to assist with the integration of the ex-Soviet States into the world economy.’⁴⁴¹ Roman Petrov adds the following to describe the character of PCAs as entry-level agreements: [they] do not envisage membership, but endorse the potential interest in developing further mutual cooperation between Parties.⁴⁴² Their overall aim is to provide basis for cooperation between parties. The objectives of the PCAs concluded with Georgia, Moldova and Ukraine included establishment of a framework for political dialogue; promotion of trade, investment and economic relations; support for consolidation of democracy in transition to a

⁴³⁸ PCAs were concluded with Newly Independent States in the wake of dissolution of the Soviet Union. Although PCAs are considered to have limited substantive scope, the ones concluded with Ukraine and Russia envisage closer cooperation than Agreements concluded with Moldova and the Southern Caucasus states. See further M Maresceau, ‘A Typology of Mixed Bilateral Agreements’ in C Hillion, P Koutrakos (eds), *Mixed Agreements Revisited. The EU and its Member States in the World* (Oxford, Hart Publishing, 2010) 21.

⁴³⁹ Interim Agreement on trade and trade-related matters between the European Community, the European Coal and Steel Community and the European Atomic Energy Community, of the one part, and the Ukraine, of the other part [1995] OJ L311/2; Interim Agreement on trade and trade-related matters between the European Community, the European Coal and Steel Community and the European Atomic Energy Community, of the one part, and Georgia, of the other part [1997] OJ L129/3; Interim Agreement on trade and trade-related matters between the European Community, the European Coal and Steel Community and the European Atomic Energy Community, of the one part, and Moldova, of the other part [1996] OJ L40/12.

⁴⁴⁰ Article 101 of EU-Ukraine PCA, Article 97 of EU-Georgia PCA, Article 98 EU-Moldova PCA.

⁴⁴¹ S Peers, ‘From Cold War to lukewarm embrace: the European Union’s agreements with the CIS’ (1995) 44 *International and Comparative Law Quarterly* 845.

⁴⁴² R Petrov, ‘Recent Developments in the Adaptation of Ukrainian Legislation to EU Law’ (2003) 8 *European Foreign Affairs Review* 127.

market economy as well as completion of their transition into market economies; and enhancement of cultural, legislative economic, social, financial, civil, scientific and technological cooperation. The Court of Justice identified that the PCA [with Russia] is designed to bring about the gradual integration between Russia and a wider area of cooperation in Europe.⁴⁴³

The PCAs also provide for cooperation in the areas of the Common and Foreign Security Policy and Justice and Home Affairs. It adds to mixed character of the PCAs. Marc Maresceau argues that the ‘cross-pillar mixity [...] explains [...] an extra need for the Member States’ involvement in the conclusion of the PCAs.⁴⁴⁴ The PCAs with Ukraine and Moldova contained provisions, namely Article 4 of both PCAs, that provided a basis for an examination of the circumstances, which might allow in the future for establishment of free trade areas. It is a less beneficial provision than the one used in the PCA concluded with Russia where an explicit objective ‘to create a free trade area between the Community and Russia’⁴⁴⁵ was included. In case of Georgia, the prospect of a free trade area was not expressed in the PCA at all.⁴⁴⁶

It can be easily observed that Ukraine among the EaP countries has been given special attention. It was not only the matter of formulation of the ENP, but also when there was sufficient

⁴⁴³ Case C-265/03, *Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, ECR [2005] I-02579, para 35.

⁴⁴⁴ Maresceau, ‘A Typology of Mixed Bilateral Agreements’ (n 438) 21. Also see R A Wessel, ‘Cross-pillar Mixity: Combining Competences in the Conclusion of EU International Agreements’ in C Hillion, P Koutrakos (eds), *Mixed Agreements Revisited. The EU and its Member States in the World* (Oxford, Hart Publishing, 2010) 30.

⁴⁴⁵ Article 3 of the Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part [1997] OJ L327/5.

⁴⁴⁶ Georgia as well as Armenia and Azerbaijan were offered the least beneficial PCAs ie free trade areas was not envisaged within the PCA framework, see further A Labeledzka, ‘The Southern Caucasus’ in S Blockmans, A Lazowski (eds), *The European Union and Its Neighbours. A legal appraisal of the EU’s policies of stabilisation, partnership and integration*, (The Hague, TMC Asser Press, 2006) 575.

political will to consider introduction of a new agreement that would serve EU relations with its Eastern neighbours, again it was Ukraine that was the first country invited to negotiate. This process has had a direct impact on evolution of negotiations of Association Agreements with Georgia, Moldova and Armenia. Although all post-Soviet countries were offered a PCA, it was only Russia and Ukraine that were considered as worthwhile partners for enhancement of the relationships. In case of Ukraine, it was the decision of the European Council to approve the Common Strategy on Ukraine, which complemented the PCA,⁴⁴⁷ underlined the importance of ‘the emergence of a democratic, stable, open, and economically successful Ukraine as a prominent actor in the new Europe.’⁴⁴⁸ Although the common strategies can be regarded as the first instrument of the EU towards its immediate neighbours,⁴⁴⁹ they have been broadly criticised for

⁴⁴⁷ 1999/877/CFSP European Council Common Strategy of 11 December 1999 on Ukraine [1999] OJ L331/1 its validity was extended by Common Strategy 2003/897/CFSP of the European Council of 12 December 2003 amending Common Strategy 1999/877/CFSP on Ukraine in order to extend the period of its application [2003] OJ L333/96 until 23 December 2004. The common strategies were unilateral instruments introduced by the Treaty of Amsterdam. The European Council was given the authority to decide ‘on common strategies to be implemented by the Union in areas where the Member States have important interest in common’ (the then Article 13 (2) TEU (ex Article J.3)). Vienna European Council asked the Council to prepare common strategies on Russia (1999/414/CFSP Common Strategy of the European Union of 4 June 1999 on Russia [1999] OJ L157/1 its validity extended by Common Strategy 2003/471/CFSP of the European Council of 20 June 2003 amending Common Strategy 1999/414/CFSP on Russia in order to extend the period of its application), the Mediterranean region (Common Strategy of the European Council of 19 June 2000 on the Mediterranean region [2000] OJ L183/5 was valid until 21 July 2004) and the Western Balkans (Although the European Council requested a common strategy on the Western Balkans to be prepared, it has never been finalised and approved). Furthermore, the European Council decided that thematic subject should be considered for future common strategies (European Council, Vienna, 11-12 December 1998).

⁴⁴⁸ European Council, Presidency Conclusions, Helsinki, 10-11 December 1999.

⁴⁴⁹ C Hillion, ‘Common Strategies and the Interface between E.C. External Relations and the CFSP: Lessons of the Partnership between the E.U. and Russia’ in A Dashwood and C Hillion (eds), *The General Law of E.C. External Relations* (London, Sweet and Maxwell, 2000) 287; Hillion, ‘Russian Federation’(n 183) 486.

lack of added value,⁴⁵⁰ their ‘vagueness and platitudes’⁴⁵¹ and were soon overtaken by other instruments.⁴⁵² Member States considered common strategies to be too risky due to ‘a significant limitation of the unanimity rule’⁴⁵³ and potential that they ‘may give rise to legal obligations for the institutions of the Union and/or for the Member States.’⁴⁵⁴ Despite the limited role played by the short-lived common strategies, key points of the Common Strategy on Ukraine are worth a summary. It did not impose any legal obligations on Ukraine, and its primary goals included contribution to the emergence of a stable, open and pluralistic democracy in Ukraine, governed by the rule of law and underpinning a stable functioning market economy which will benefit all Ukrainians; cooperation with Ukraine in the maintenance of stability and security in Europe and the wider world, and in finding effective responses to common challenges facing the continent; and increasing economic, political and cultural cooperation with Ukraine as well as cooperation in the field of justice and home affairs.⁴⁵⁵ It confirmed that the Union ‘will [...] examine the circumstances which might, in addition to the World Trade Organisation (WTO) accession, allow for the future establishment of an EU-Ukraine Free Trade Area, as foreseen in the PCA.’⁴⁵⁶

⁴⁵⁰ ‘[Common strategies] are sometimes so thoroughly negotiated among the Member States that they do not contain real priorities and have become little more than inventories of existing policies and activities.’ Evaluation report from the Secretary-General / High Representative on the subject of Common Strategies, 14871/00, Brussels, 21 December 2000, 5.

⁴⁵¹ P Koutrakos, *EU International Relations Law* (Oxford and Portland, Hart Publishing, 2006) 395.

⁴⁵² Evaluation report from the Secretary-General / High Representative on the subject of Common Strategies, 14871/00, Brussels, 21 December 2000.

⁴⁵³ As noted by the House of Lords Select Committee ‘Not all EU member states were in agreement over the extent to which an extension of QMV would enhance the EU’s international effectiveness,’ Ninth Report by the Select Committee appointed to consider European Union documents and other matters relating to the European Union. The Common Mediterranean Strategy, House of Lords, London 2001, para 3.

⁴⁵⁴ A Dashwood, ‘Decision-making at the Summit’ [2000] *Cambridge Yearbook of European Legal Studies*, 85.

⁴⁵⁵ Article 5 of the Common Strategy on Ukraine.

⁴⁵⁶ Article 32 of the Common Strategy on Ukraine.

Ukraine was encouraged to undertake the task of progressive approximation of legislation towards that of the EU, especially in areas of competition policy, standards and certification, intellectual property rights, data protection, customs procedures and environment, competition policy, financial services, standards and certification, fiscal policy as well as employment and intellectual property rights.⁴⁵⁷

2.2. Impact of the EU enlargement of 2004

The EU enlargement of 2004 turned rapprochement between the EU and the new Eastern neighbours into necessity. Once again Ukraine was recognised as a special case.⁴⁵⁸ Moreover the country expressed its wish to move beyond the existing model of cooperation towards gradual economic integration and political association. The Orange Revolution was followed by a period of political instability, which formed one of the major obstacles preventing an effective use of the ENP to promote Ukraine's Europeanisation.⁴⁵⁹ Impact of domestic developments, lack of political stability in particular, can be regarded as a factor that turns the ENP only into a catalyst of the Europeanisation⁴⁶⁰ process instead of making it the main driver.⁴⁶¹ Furthermore attractiveness of

⁴⁵⁷ Articles 20 and 52 of the Common Strategy on Ukraine.

⁴⁵⁸ N Gallina, 'Ukraine Knocking at the Door? The EU-Ukraine Relationship after the Orange Revolution' in A N Lushnycky, M Riabchuk (eds), *Ukraine on its Meandering Path between East and West* (Berne, Peter Lang, 2009) 41.

⁴⁵⁹ Although post-Rose revolution Georgia took a pro-Western turn, the country, along with Moldova considered another front-runner of the EaP, was not selected as the first one to negotiate an Association Agreement, A Paul, Z Shiryev, 'Georgia's future: between Euro-Atlantic aspirations and geopolitical realities' (Brussels, European Policy Centre, Policy Brief, 2012).

⁴⁶⁰ See J Olsen, 'The many faces of Europeanization' (2002) 40(5) *Journal of Common Market Studies* 921 who offers an analysis of different dimensions of the Europeanisation process.

⁴⁶¹ Gawrich, Melnykowska, Schweickert, 'Neighbourhood Europeanization through ENP: The case of Ukraine' (n 427) 21.

European agenda needs to be assessed in a broader perspective, and therefore impact of the eastwards enlargement needs to be taken into consideration.⁴⁶² Positive changes were marked by 2006 general elections that were noted by the EU-Ukraine Summit and described as a way to show ‘that the consolidation of democracy and the freedom of speech had been key achievements of the past two years.’⁴⁶³ The Summit also brought a consensus on a joint comprehensive and ambitious approach to a new agreement between the EU and Ukraine. This new agreement would envisage establishment of a deep free trade area, which would serve as an important element of association. In March 2007 political and economic reforms in Ukraine have been recognised and marked by opening of negotiations of the then called a New Enhanced Agreement. The aim of the negotiations was to focus on delivering a draft of a more ambitious and comprehensive agreement that would not only replace the Partnership and Cooperation Agreement, but would also enable parties to move their relations to a new level. The dynamics of economic integration were accelerated by Ukraine’s WTO membership.⁴⁶⁴ In 2008, in parallel with an Enhanced Agreement, negotiations of a Deep and Comprehensive Free Trade agreement were launched.⁴⁶⁵ It was confirmed, in a joined statement issued after the EU-Ukraine summit in 2008, that an Association Agreement will be concluded and it was confirmed ‘that gradual convergence of Ukraine with the EU in political, economic and legal areas will contribute to further progress in

⁴⁶² See O Shepotylo, *EU Integration and Trade: a Look from the Outside of the EU Eastern Border* (Kiev, 2009) for an overview of economic impact of 2004 enlargement on Ukraine.

⁴⁶³ EU-Ukraine Summit, Joint Press Statement 14604/06 (Presse 297), Helsinki, 27 October 2006.

⁴⁶⁴ Ukraine became a WTO member on 16 May 2008, while Georgia joined on 14 June 2000 and Moldova on 26 July 2001.

⁴⁶⁵ According to the European Commission ‘a deep and comprehensive FTA should cover substantially all trade in goods and services between the EU and ENP partners including those products of particular importance for our partners and should include strong legally-binding provisions on trade and economic regulatory issues’, European Commission, ‘Strengthening the European Neighbourhood Policy’ (357) 4. See further section 3.7 of this chapter.

EU-Ukraine relations'.⁴⁶⁶ The negotiations with Ukraine were followed by decisions to open negotiations with Moldova⁴⁶⁷ and Georgia.⁴⁶⁸ The negotiation process in all three cases was lengthy and imposed a burden on the EaP countries teams that were faced with legal, institutional and economic challenges.⁴⁶⁹ It is interesting to note that the Moldovan negotiators opted for a more ambitious approach than Ukrainians. They asked for a more demanding monitoring mechanism, however their request was only partially accepted by the EU.⁴⁷⁰

At the EU-Ukraine Summit on 19 December 2011, the EU leaders and the Ukrainian President noted that a common understanding on the text of the Association Agreement was reached.⁴⁷¹ On 30 March 2012 the chief negotiators of the European Union and Ukraine initialled the text of the Association Agreement, which included provisions on the establishment of a DCFTA as an integral part. In December 2012 the Council 'reaffirmed the EU's engagement with

⁴⁶⁶ Joint Declaration on the EU-Ukraine Association Agreement, EU-Ukraine Summit, 12812/08 (Presse 247), Paris, 9 September 2008.

⁴⁶⁷ Negotiations of the Moldovan Agreement started on 12 January 2010.

⁴⁶⁸ Negotiations of the Georgian Agreement started on 15 July 2010.

⁴⁶⁹ Alan Mayhew provided an insightful summary of negotiation process: 'while there are two parties negotiating the Association Agreement, the draft has been prepared by the EU side. The draft is basically path-dependent, based on the texts of previous agreements. The EU Council draws up the negotiating directives, which guide the EU negotiators when they decide which proposals by the other party can be accepted and which not,' A Mayhew, 'Negotiations on an Association Agreement between the European Union and Ukraine' (Wider Europe, Working Paper 8, 2010) 7. He also criticised the two-fold model of negotiations, where the negotiations of the DCFTA and Association Agreement were conducted uncoordinated to great extent as if the two were completely separate. Critically about lack of information about the negotiation process see M Dabrowski, S Taran, 'The Free Trade Agreement between the EU and Ukraine: Conceptual Background, Economic Context and Potential Impact' (Warsaw, Center for Social and Economic Research, CASE Network Studies and Analysis No 437, 2012).

⁴⁷⁰ H Kostanyan, 'Examining the Discretion of the EEAS: What Power to Act in the EU-Moldova Association Agreement?' (2014) 19(3) European Foreign Affairs Review 373, at 381.

⁴⁷¹ Ukraine-EU Summit Joint Statement 18835/11 Presse 513, Kiev, 19 December 2011.

Ukraine, and stated that Ukraine's performance will determine the pace of engagement, and will be assessed on the basis of progress in three areas: the compliance of the 2012 parliamentary elections' with international standards and follow-up actions, as well as Ukraine's progress in addressing the issue of selective justice and preventing its recurrence, and in implementing the reforms defined in the jointly agreed Association Agenda.⁴⁷² The EU-Ukraine Summits held in February and June 2013 confirmed all three conditions that Ukraine needs to meet before signing of the Agreement will be possible.⁴⁷³ The fact that the June Summit noted no progress may indicate that Ukraine was not engaging effectively enough to meet all three conditions in time for the Eastern Partnership summit in November 2013.⁴⁷⁴ The fulfilment by Ukraine of the conditions necessary for signing Association Agreement at the Vilnius Summit has been put on the agenda of the Foreign Affairs Council of the European Union on 21 October 2013. 'The Council will also draw attention to whether the conditions of the EU, which are necessary to sign the Association Agreement, have been fulfilled.'⁴⁷⁵ Events of November 2013 changed the dynamic of plans of the EaP summit in Vilnius and more importantly affected stability of Europe. Although the European Council confirmed on 18 November 2013 that the summit 'could see the initialling of the Association Agreements with Moldova and Georgia as well as the signature of the Agreement with

⁴⁷² Council Conclusions on Ukraine, 3209th Foreign Affairs meeting, Brussels, 10 December 2012.

⁴⁷³ EU-Ukraine Summit, Joint Statement, 6811/13 Presse 72, Brussels, 25 February 2013; EU-Ukraine Cooperation Council, EU Press Release 11741/13 Presse 289, Brussels, 24 June 2013.

⁴⁷⁴ 'We think it is possible to sign the Association Agreement, with the trade part, at Vilnius, provided Ukraine fulfils the benchmarks that have been provided by the Council last December. But we still remain worried about rule of law and selective justice issues. It is important to keep our engagement, important to be clear on our expectations', Remarks by C Ashton, EU High Representative at the AFET Committee, European Parliament, A 356/13, Brussels 27 June 2013; Poland warns EU-Ukraine bilateral agreement 'clearly' at risk, 26 June 2013 <<http://www.euractiv.com/europes-east/sikorski-warns-ukraine-vinius-su-news-528869>> accessed 10 September 2018.

⁴⁷⁵ Foreign Affairs Council (Overview of the agenda) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/fc/135443.pdf> accessed 10 September 2018.

Ukraine. Ministers exchanged views on Ukraine's progress in fulfilling the conditions for the possible signing of the EU-Ukraine Association Agreement',⁴⁷⁶ President Yanukovich only three days later decided to suspend the process of conclusion of the Agreement. His decision provoked Maidan revolt that led to him being forced out of the country, but also expansive intervention of the Russian Federation.⁴⁷⁷ The Vilnius summit brought only initialling of the Agreements with Georgia and Moldova,⁴⁷⁸ while turbulent developments in Ukraine delayed the signing of political provisions of the Agreement until 21 March 2014,⁴⁷⁹ while remaining provisions were signed on 27 June 2014. The Georgian and Moldovan Agreements were signed then as well.⁴⁸⁰

3. Legal bases of the Association Agreements concluded with Georgia, Moldova and Ukraine

The legal basis empowering the EU to conclude Association Agreements is laid down in Article 217 TFEU (previously it was the then Article 238 EEC and Article 310 EC).⁴⁸¹ An

⁴⁷⁶ Foreign Affairs Council, Press Release, Presse 482, Brussels, 18-19 November 2013.

⁴⁷⁷ T Iwański, 'Ukraine: political gridlock with an ever-more radical Maidan in the background' (Warsaw, Centre for Eastern Studies, 2014); M Emerson, 'Can Ukraine be saved at this 11th hour?' (Brussels, Centre for European Policy Studies, 2014).

⁴⁷⁸ Joint Declaration of the Eastern Partnership Summit, Vilnius, 28-29 November 2013, Eastern Partnership: the way ahead, Presse 513, 17130/13, Vilnius, 29 November 2013, 3.

⁴⁷⁹ Statement by President of the European Council Herman Van Rompuy at the occasion of the signing ceremony of the political provisions of the Association Agreement between the European Union and Ukraine, Presse 176, Brussels, 21 March 2014.

⁴⁸⁰ The EU's Association Agreements with Georgia, the Republic of Moldova and Ukraine, Memo, European Commission, Brussels, 23 June 2014; J M Durão Barroso, Remarks by President Barroso at the signing of the Association Agreements with Georgia, the Republic of Moldova and Ukraine, European Commission, Brussels, 27 June 2014.

⁴⁸¹ It was, for example, the legal basis for the Ankara Agreement (Agreement establishing an Association between the European Economic Community and Turkey [1977] OJ L 361/1), the European Economic Area Agreement (Agreement on the European Economic Area [1994] OJ L 1/3), the Euro-Mediterranean

introduction of Article 8 TUE by the Treaty of Lisbon, as well as the complex character of the Association Agreements with Ukraine, Georgia and Moldova initially raised a number of uncertainties regarding the legal basis that would be used by the European Union to conclude these Agreements⁴⁸² A brief reminder is fitting that Article 8 (2) TUE states that ‘the Union may conclude specific agreements’ and ‘these agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly’. The wording of this provision raises a number of questions and led to speculations on what format such a new type of agreement could take.⁴⁸³ As noted by Steven Blockmans and Bart Van Vooren these agreements may (not must!) contain reciprocal rights and such formulation can be interpreted as an indication of differentiation in bilateral relations.⁴⁸⁴ Although such interpretation can indicate that the Treaty provision is unambiguous when it comes to types of agreements selected for the ENP countries, there is also another way to explain it. Freedom given to the EU and partner countries to choose a model of

Agreements (e.g. Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part [2004] OJ L304/39; Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part [2000] OJ L147/3). The then Article 310 EC in conjunction with Article 300 EC (now Articles 217-218 TFUE) were selected for the Stabilisation and Association Agreements, e.g. Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part [2004] OJ L84/13; Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Montenegro, of the other part [2010] OJ L108/3. They also served as the legal bases of the Europe Agreements, eg Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part [1994] OJ L359/2; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and Romania, of the other part [1994] OJ L357/2.

⁴⁸² See further Ch IV.

⁴⁸³ Van Elsuwege and Petrov, ‘Article 8...’ (n 20) 688; D Hanf (343).

⁴⁸⁴ S Blockmans, B Van Vooren, ‘Revitalizing the European Neighbourhood Policy: Binding Sectoral Multilateralism as an Effective tool for EU External Relations’ (Leuven, Leuven Centre for Global Governance Studies Working Paper No 91, 2012) 4.

agreement that would suit best their needs, can be interpreted as flexibility and differentiation of bilateral relations within the ENP framework. This argumentation falls within a new approach to the ENP: ‘The partnership will develop with each neighbour on the basis of its needs, capacities and reform objectives. Some partners may want to move further in their integration effort, which will entail a greater degree of alignment with EU policies and rules leading progressively to economic integration in the EU Internal Market. The EU does not seek to impose a model or a ready-made recipe for political reform, but it will insist that each partner country’s reform process reflect a clear commitment to universal values that form the basis of our renewed approach. The initiative lies with the partner and EU support will be tailored accordingly.’⁴⁸⁵

Although Article 8 TEU could potentially serve as a legal basis to develop contractual relations with the neighbouring countries and mark development of the ENP, it seems that a significant shift has been made in relation to how this provision could be interpreted and applied. Originally it was intended to serve as a legal basis to conclude ‘specific agreements’/‘specific form of association’,⁴⁸⁶ though it could not act as a sole legal basis. There are no procedural guidelines in Article 8 TEU and it can be viewed as better suited to serve as a general, in many ways symbolic provision, and as such it should be interpreted as a political instrument of EU external relations.⁴⁸⁷ This approach could lead to speculation that Article 8 TEU has much broader character than serving only the ENP. The majority of scholars identified the safe option of already well tested Article 217 TFEU as the most appropriate legal basis for the new Association Agreements.⁴⁸⁸ The

⁴⁸⁵ Joint Communication by the High Representative of the Union for Foreign Affairs and Security Policy and the European Commission, ‘A New Response to a Changing Neighbourhood, a review of European Neighbourhood Policy’ (n 160) 2.

⁴⁸⁶ Hanf (n 343) 3.

⁴⁸⁷ Van Elsuwege and Petrov, ‘Article 8...’ (n 20) 697.

⁴⁸⁸ Blockmans, Van Vooren, ‘Revitalizing the European Neighbourhood Policy ...’ (n 484) 4; Hillion, ‘Mapping-Out the New Contractual Relations...’ (n 5) 174; R Petrov, ‘Legal Basis and Scope of the New

confirmation of this option came in the form of Council Decisions on conclusion of Association Agreements with Georgia, Moldova and Ukraine.⁴⁸⁹ The European Commission has selected Article 217, in conjunction with Article 218 (5) TFEU, second subparagraph of Article 218 (8) and Article 218 (7) TFEU as the legal bases. Interestingly, there is no explicit reference to Article 8 TEU either in the proposals, decisions or in the Explanatory Memorandum. It can be interpreted as a way to maintain the detachment between political instruments of the ENP and its legal instruments. The absence of explicit reference to Article 8 TUE can also be regarded as a safety net that will give the EU more options and more flexibility to develop a new policy, for example

EU-Ukraine Enhanced Agreement. Is there any room for further speculation?' (Florence, European University Institute, 2007) 1; Van Elsuwege, Petrov (n 20) 689.

⁴⁸⁹ A tentative confirmation of the legal basis selected for the EU-Ukraine Association Agreement came in the Proposal for a Council decision. Proposal for a Council Decision on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, COM (2013) 289 final, Brussels, 29 May 2013. An assessment to inform the Council's final decision on whether signature by the time of the Vilnius Summit is appropriate will be presented at the Foreign Affairs Council on 21 October 2013. A separate recommendation for Council approval of the conclusion by the Commission of the parts of the Agreement which fall under the Treaty establishing the European Atomic Energy Community (EAEC) was presented in September 2013, Recommendation for a Council Decision approving the conclusion by the Commission, on behalf of the European Atomic Energy Community of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, COM (2013) 653 final, Brussels, 25 September 2013. The final confirmation appeared in the adopted Council decisions: Council Decision of 16 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part [2014] OJ L261/1; Council Decision of 16 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2014] OJ L260/1; Council Decision of 17 March 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble, Article 1, and Titles I, II and VII thereof [2014] OJ L161/1.

an ENP bis once the ENP will no longer be regarded as sufficient to serve as a framework neighbourhood policy.

Furthermore, these Decisions also brought an interesting development regarding the mixed character of these Agreements. In the Explanatory Memoranda the following statements can be found: ‘The fact that the Commission has submitted its proposal as an agreement of the Union and its Member States and Ukraine is related to the genesis of this Agreement under the rules of the Treaty before the entry into force of the Treaty of Lisbon.’ This paragraph raises a number of controversies and it can be said with a high degree of probability that the matter will be broadly discussed in the near future. It is doubtful whether Member States will easily agree with the interpretation given by the Commission that the Lisbon Treaty gives the EU an exclusive competence to conclude similar agreements in the future.⁴⁹⁰ It will be interesting to see what date will be identified by the Commission as ‘the initiation date’ of the Association Agreements with Georgia and Moldova.⁴⁹¹ It well may be that the European Commission has inserted this sentence on purpose to trigger a debate and potentially even litigation on the scope of Article 3 TFEU.

⁴⁹⁰ It is worth to note current developments in relation to the Common Commercial Policy and EU’s exclusive competence, eg Case C-414/11, *Daiichi Sankyo Co. Ltd Sanofi-Aventis Deutschland GmbH v. DEMO Anonymos Viomichaniki kai Emporiki Etairia Farmakon*, ECLI:EU:C:2013:520. The Court of Justice ruled that since entry into force of the Treaty of Lisbon the Common Commercial Policy within the context of the EU’s external relations and relates to trade with non-member countries also concerns the commercial aspects of intellectual property, and therefore the TRIPS Agreement falls within the scope of the CCP and the exclusive competence of the EU.

⁴⁹¹ Negotiations with them commenced in 2010.

4. The relationship between Association Agreements and the European Neighbourhood Policy

The Association Agreements mark a new phase of EU relations with its Eastern neighbours. It does indeed fulfil the ENP promise confirming that ‘the implementation of the ENP brings the perspective of moving beyond cooperation to a significant degree of integration’ and will prepare partners ‘for gradually obtaining a stake in the EU’s Internal Market; justice and home affairs; energy; transport; information society, environment and research and innovation; and social policy and people-to-people contacts.’⁴⁹² The Association Agreement interpreted within the ENP framework meets the criteria of a tool that ‘offers concrete benefits and preferential relations.’⁴⁹³ It is a tool of proximity policy enabling progressive integration aiming at establishment of association or even a new model, an alternative to membership.

Classification of this new generation of Association Agreements as an ENP tool can raise a number of questions. Firstly, within the ENP policy framework, use of legally binding, international agreements will be a novelty. Until now the development of the ENP has been achieved through use of instruments which legal basis and legal character can be questionable,⁴⁹⁴ while contractual relations between the EU and its neighbours relied on agreements concluded prior to establishment of the ENP. Therefore introduction of a new quality to contractual relations with EU’s Eastern neighbour will affect development of the policy itself and can - in many ways - influence further development of the ENP and its instruments. However, the new generation

⁴⁹² European Commission, ‘European Neighbourhood Policy. Strategy Paper’ (n 292) 8.

⁴⁹³ Cremona, ‘The European Neighbourhood Policy. More than Partnership?’ (n 6) 248.

⁴⁹⁴ ‘Increasing use of instruments that are not explicitly envisaged by the Treaty on European Union is one of the recent trends in the EU external relations,’ C Hillion, ‘The EU’s Neighbourhood Policy towards Eastern Europe’ in A Dashwood and M Maresceau (eds) (n 419) 309.

Association Agreement cannot be regarded strictly as a tool of the ENP. The Association Agreements with Georgia, Moldova and Ukraine are the first examples of the new generation Association Agreements that were concluded between the European Union, its Member States, Euroatom and Eastern Partnership countries. Although the connection to the ENP is undeniable, it is equally difficult to escape comparisons to enlargement policy and its instruments as the Association Agreement ‘greatly reminds of the so called ‘pre-accession’ strategy’.⁴⁹⁵ Here however, it is not used to conduct pre-membership preparations but ‘to transform the EU neighbours into a ‘ring of [EU] friends’.⁴⁹⁶ Such clear separation of the two policies and dismissal of membership ambitions of EU neighbours has always been politically difficult. The matter is probably more questionable now - in the light of the Council Decision on the signing of the Association Agreement which offers to leave Ukraine’s options open: This [Association Agreement] constitutes a new stage in the development of EU-Ukraine contractual relations, aiming at political association and economic integration and leaving open the way for further progressive developments [emphasis added].⁴⁹⁷ Although current climate and symptoms of enlargement fatigue, as well a number of statements confirming that the ENP and therefore the Association Agreement are not designed to prepare for membership,⁴⁹⁸ it is difficult not to question signals

⁴⁹⁵ *ibid* 310.

⁴⁹⁶ ‘I want to see a ‘ring of friends’ surrounding the Union and its closest European neighbours, from Morocco to Russia and the Black Sea.’ Romano Prodi, then President of the European Commission speech ‘A Wider Europe - A Proximity Policy as the key to stability. Peace, Security And Stability International Dialogue and the Role of the EU, Sixth ECSA-World Conference. Jean Monnet Project. Brussels, 5-6 December 2002.

⁴⁹⁷ Council Decision of 17 March 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble, Article 1, and Titles I, II and VII thereof [2014] OJ L161/1.

⁴⁹⁸ C Hillion, ‘The EU’s Neighbourhood Policy Towards Eastern Europe’ in A Dashwood, M Maresceau (eds) (n 419) 313; Communications from the Commission COM (2003) 104, 5, European Commission,

indicating that extension of the Association Agreement could be taken beyond the ENP boundaries when there will be satisfactory conditions to do so.⁴⁹⁹ The Ukrainian case look even more interesting when review against lack of direct reference to the ENP and/or EaP in the Association Agreement. It might be another argument supporting strong reluctance of Ukraine towards the ENP as a non-enlargement policy. Hence, clear absence of direct reference could be interpreted as a victory of the Ukrainian negotiations who wished for the Association Agreement to be detached from the shortcomings of the ENP. Nevertheless, Preambles to the Association Agreements with Georgia and Moldova contain a paragraph where the Eastern Partnership as a specific dimension of the European Neighbourhood Policy is presented as the framework for development of strong links and common values of the parties to these Agreements. The Preamble of the Agreement with Georgia also contains a paragraph on contribution to the economic reforms in Georgia, including in the framework of the European Neighbourhood Policy and the Eastern Partnership. This development could be perceived as constitutionalisation of the ENP and EaP. The review of the Agreement with Moldova brings another argument that could support this claim. A section of the Preamble of this Agreement confirms ‘the importance of the EU-Republic of Moldova European Neighbourhood Policy Action Plan of February 2005 in strengthening EU-Republic of Moldova relations and in helping to move the reform and approximation process in the Republic of Moldova forward, thus contributing to gradual economic integration and

‘European Neighbourhood Policy. Strategy Paper’ (n 292) 3, European Commission, ‘Strengthening the European Neighbourhood Policy’ (n 357), 2.

⁴⁹⁹ In the past there were indications that options of accession and association should not be eliminated from scenarios available to the EU neighbours, e.g. statement by the EU-Ukraine Parliamentary Cooperation Committee: ‘[The Committee] supports [European Parliament] statement that the policy [Wider Europe/Neighbourhood Policy] may, in fact, despite being separate from enlargement policy, constitute an important instrument enabling those countries neighbouring the EU to move towards the stage at which they are in a position to apply for accession under Article 49 TEU on the basis of the progress made so far: nor should the Wider Europe/ Neighbourhood policy exclude forms of association at a later stage.’ Brussels, 16-17 February 2004.

deepening of political association.’ In the Moldovan case it is also a matter whether now the Action Plan of 2005 should be a legally binding instrument.

5. *New generation of Association Agreements*

5.1. *Introduction*

Historically, Association Agreements may be regarded as the most advanced model for the EU to establish and develop relations with third countries that would be both deep and wide, spreading to numerous areas based on trust and respect of common values. The CJEU, in relation to the EU-Turkey Association Agreement held that ‘establishment of an association implies creation of special privileged links with a non-Member country that must, at least to a certain extent, take part in the [Union] system.’⁵⁰⁰ Over the years the EC/EU and its Member States have concluded a number of Association Agreements that reflect the vast complexity of their external relations.⁵⁰¹ The initial ambitious aim to create new ENP instruments, including a proposal for the European Neighbourhood Agreements,⁵⁰² was dropped in the wake of the Constitutional Treaty’s demise. Instead a new generation of Association Agreements was nurtured and developed.⁵⁰³ It was a much

⁵⁰⁰ Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd*, ECR [1987] 3719.

⁵⁰¹ The first Association Agreement was concluded with Greece in 1961; Agreement establishing an association between the European Economic Community and Greece [1963] OJ 26/294. This was followed *inter alia* by Agreement establishing an association between the European Economic Community and the Republic of Cyprus [1973] OJ L133/2; and Agreement establishing an association between the European Economic Community and Malta [1971] OJ L61/2.

⁵⁰² ‘The ENP brings added value, going beyond existing cooperation and takes [a form of] [n]ew contractual links, in the form of European Neighbourhood Agreements, whose scope will be defined in the light of an evaluation by the Commission of progress in meeting the priorities set out in the Action Plans,’ European Commission, ‘European Neighbourhood Policy. Strategy Paper’ (n 292) 8-9.

⁵⁰³ Name of ‘European Neighbourhood Agreements’ was replaced with ‘enhanced agreements’, see eg European Commission, ‘A Strong Neighbourhood Policy’ (n 409) 4.

welcomed development by the ENP countries, as they were not keen to have the word ‘neighbourhood’ used in the titles of new agreements.⁵⁰⁴ However, the EU had reservations that selecting Association Agreement model would imply similarities to agreements concluded in the past, such as the Europe Agreements and Stabilisation and Association Agreements.⁵⁰⁵ Some Member States were concerned that the association formula may indicate recognition of membership aspirations of the Eastern partners. In the end a pragmatic assessment of available options as well as the pressure to show support to the Europe-oriented political movements in these countries prevailed.⁵⁰⁶

The early stages of the EU-Ukraine negotiations indicated that the new agreement should have much broader scope than the PCA and offer deepening of integration, especially through a deep and comprehensive free trade agreement. The EU negotiation team presented Moldova, Georgia and Armenia⁵⁰⁷ with drafts of the Association Agreements very similar to that negotiated with Ukraine. Negotiations of the EU-Moldova and EU-Georgia Association Agreements were concluded in June and July 2013 respectively. Features of this new type of agreements were presented in the initial phase of formulating the ENP instruments. For instance in the first Communication on the ENP the European Commission argued that ‘the EU will examine the

⁵⁰⁴ Ukrainian negotiators perceived the term as negative. See further Van Elsuwege and Petrov, ‘Article 8...’ (n 20) 697.

⁵⁰⁵ Hillion, ‘Mapping-Out...’ (n 5) 175.

⁵⁰⁶ The EU-Ukraine summit in September 2008 confirmed that parties will negotiate an Association Agreement, which was described as [a way that] ‘will renew our common institutional framework, facilitate the deepening of our relations in all areas, strengthen political association and economic integration between Ukraine and the European Union by means of reciprocal rights and obligations. It will provide a solid basis for further convergence between Ukraine and the EU on foreign policy and security issues, including promoting respect for the principles of independence, sovereignty, territorial integrity and inviolability of borders. Joint Declaration on the EU-Ukraine Association Agreement, EU-Ukraine Summit, 12812/08 (Presse 247), Paris, 9 September 2008.

⁵⁰⁷ Hillion, ‘Mapping-Out...’ (n 5) 171.

scope for new Neighbourhood Agreements to build on existing contractual relations. These would supplement existing contractual relations where the EU and the neighbouring country have moved beyond the existing framework, taking on new entitlements and obligations. If, however, the Neighbourhood Agreements contain provisions going beyond those of the Euro-Mediterranean Association Agreements, similar arrangements could be offered, on equivalent terms, to the Mediterranean partners.⁵⁰⁸

5.2. Contents of the Association Agreements

The initial look at the Association Agreements concluded with Georgia, Moldova and Ukraine suggest that they are complex and voluminous. Such a general approach would also suggest that these agreements are very similar. Indeed, there are a great number of similarities and the impact of the first out of the three, namely the EU-Ukraine Association Agreement and its use as a

⁵⁰⁸ European Commission, 'Wider Europe' (n 99) 17. To date the EU concluded seven Euro-Med Association Agreements and one Euro-Med Interim Agreement with its Southern partners. A Euro-Med Association Agreement with Tunisia was signed on 17 July 1995 (the only one concluded outside Barcelona process framework). It came into force on 1 March 1998. In the framework of the Barcelona process, the EU and its Member States signed an Association Agreement with Morocco on 26 February 1996, which entered into force on 1 March 2000, with Israel, which entered into force on 1 June 2000, with Jordan on 24 November 1997, which entered into force on 1 May 2002, with Egypt on 25 June 2001, which entered into force on 1 June 2004, with Algeria on 22 April 2002, which entered into force on 1 September 2005, and with Lebanon on 17 June 2002, which entered into force on 1 April 2006. An Interim Association Agreement on trade and trade-related matters between the EU and the PA has been in force since 1 July 1997. At the end of 2004, the Association Agreement with Syria had been submitted to the political authorities on both sides for final approval and signature but it has not been signed to date by the EU Council. More on Euro-Med Agreements see: Pieters, 'The Mediterranean countries' (n 142) 391; K Pieters, 'Deep and Comprehensive Free Trade Agreements: Liberalization of Goods and Services between the Mediterranean Neighbours and the EU' in G Fernández Arribas, K Pieters, T Takács (eds) (n 156) 95.

template of the agreements with Georgia and Moldova is clear. Nevertheless there are certain differences that can suggest application of differentiation during the negotiations with Georgia and Moldova.

The Agreements establish association between the Union and its Member States and the three EaP partners.⁵⁰⁹ The Agreements contain sections on general principles, political dialogue, political association, cooperation and convergence in the field of Foreign and Security Policy (CFSP), Justice, Freedom and Security (JFS), trade and trade-related matters,⁵¹⁰ economic and sector cooperation, financial cooperation and anti-fraud provisions, institutional and general provisions.

5.2.1. Preambles

The role played by preambles in understanding of objectives and aims of international treaties⁵¹¹ makes them an important element of the process of filling the gaps in the interpretation process. It has been observed in the jurisprudence of the Court of Justice that they provide necessary support to interpret the character of international agreements.⁵¹² Therefore, in contrast to Hans

⁵⁰⁹ Article 1 of the EU-Georgia Association Agreement, Article 1 of the EU-Moldova Association Agreement and Article 1 of the EU-Ukraine Association Agreement.

⁵¹⁰ These titles provide for establishment of Deep and Comprehensive Free Trade Areas.

⁵¹¹ Although Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (1986) is not yet into force it simply codifies custom law on interpretation of international treaties. Furthermore, its provision on interpretation of international treaties mirrors the provision of Vienna Convention on the Law of Treaties (1969): ‘The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes,’ Article 31(2) of both conventions.

⁵¹² See eg Joint Cases 21 to 24/72, *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*, ECR [1972] 01219, para 21; Case C-280/93, *Federal Republic of Germany v Council of the European Union*,

Kelsen theories, it can be argued that preambles have normative meaning.⁵¹³ In the case of the three Association Agreements it would be interesting to see how the Court of Justice would interpret these preambles in cases referred to it to address the relationship between ambitious and far reaching wording applied in these preambles and Council decisions denying direct effect of these agreements.

There is also the political dimension of preambles that also needs to be acknowledged, and therefore an analysis of the preambles to the Agreements with Georgia, Moldova and Ukraine helps to identify differences among them. These findings support the rule of differentiation that has gained significant role in the evolution of EU relations with its neighbours. Furthermore it should help to understand the character of these agreements. It is also be useful to assess these preambles as integrative measures, and as such they can enable to see these agreements as a tool of socialisation and as observed by Liav Orgad ‘preamble can foster integration by forging a common identity.’⁵¹⁴ After all, it is the final aim of the EU to develop a special relationship with neighbouring countries based on common (EU) values.⁵¹⁵ Common values play a vital role in all three preambles, while in the Ukrainian and Moldovan agreements common history is also acknowledged and in case of Georgia – the historical links are noted. This can be read as a method of differentiation of Georgia from the other two countries. It is confirmed further when both Ukraine and Moldova are recognised as European countries while Georgia surprisingly is called an Eastern European country. The special position of Ukraine is further recognised through acknowledgement of its European identity and progressively closer links with the EU. Moreover,

ECR [1994] I-04973, para 106; Case C-386/08, *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*, ECR [2010] I-01289.

⁵¹³ F Rigaux, ‘Hans Helsen on International Law’ (1998) 9 *European Journal of International Law* 325.

⁵¹⁴ L Orgad, ‘The preamble in constitutional interpretation’ (2010) 8(4) *International Journal of Constitutional Law* 714, at 731.

⁵¹⁵ Article 8(1) TEU.

the Ukrainian Agreement does not contain direct reference to the PCA while they are clear in two other Agreements.

Promotion of good neighbourly relations as well as cross-border cooperation is among objectives of the Georgian and Moldovan Agreements, however they are absent from the Ukrainian Agreement. It could be regarded as recognition of the Ukrainian reluctance to be called an EU neighbour, however such conclusion would be far-reaching and dismissive of the role played by the principle of good neighbourly relations. Another significant difference between the Ukrainian Agreement and the other two is the first objective. In case of Ukraine it is formulated as promotion of 'gradual rapprochement between the parties' while the Georgian and Moldovan Agreements speak of promotion of 'political association and economic integration between parties.' It well may be to mark the special character of Ukraine and giving it higher expectations than to the other two neighbours. This interpretation would be justified with evidence from the EU-Ukraine relations where the options of consideration of other ways of integration were not dismissed. However, recent developments in Georgia and Moldova may suggest that these two countries consider their Association Agreements as a way to prepare applications for EU membership.

The formulation of the objective of promotion, preservation and strengthening of peace and stability also appear in different wording. In case of the Ukrainian agreement, it contains direct reference to the principles of the United Nations Charter, the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe and the objectives of the Charter of Paris for a New Europe of 1990. The same acts are named in the peace objective of the Georgian Agreement, however they do not appear in the Moldovan one. In addition both Georgian and Moldovan peace objectives include efforts to eliminate sources of tension, enhancing border security. This element is not included in the Preamble of the Ukrainian Agreement, which in the

context of Russian's illegal annexation of Crimea and involvement in unrest in the Eastern Ukraine seems like a lacuna.

All three sets of objectives speak of enhanced cooperation in the area of Freedom, Security and Justice, but only Moldovan acknowledges the role of people-to-people contacts. All three refer to enhanced economic and trade relations leading to establishment of DCFTAs. In addition to this, Georgian and Moldovan agreements offer to support these countries in development of their economic potential. Interestingly when legal approximation is named as a mean to it, the wording used there speaks of approximation of their legislation to the legislation of the EU. In case of Ukraine the offer is to support this country in its efforts to complete the transition into a functioning market economy by means of the progressive approximation of its legislation to that of the EU.

5.2.2. Political dialogue and cooperation in the field of the Common Foreign and Security Policy

Titles II of all three agreements contain provisions on political dialogue and reform, political association, cooperation and convergence in the field of the Foreign and Security Policy. These sections set up the aims of the political dialogue which include deepening of political association, promotion of international stability and security based on effective multilateralism, contribution to consolidating domestic political reforms, strengthening of dialogue between parties on international security and crisis management in order to address global and regional challenges and threats, fostering result-oriented cooperation for achieving peace and security on the European continent, development of dialogue and deepening of cooperation in the field of security and defence, promotion of independence, sovereignty, territorial integrity and inviolability of borders. Parties also commit themselves to strengthening of peace and international justice by ratifying and

implementing the Rome Statute of the International Criminal Court (1998) and its related instruments.

Application of multilateralism as basis of political cooperation with EaP partners is not surprising. The EU's commitment to 'the practice of coordinating national policies in groups of three or more States'⁵¹⁶ is not new and by far the European Security Strategy can be regarded 'a holistic framework for engagement.'⁵¹⁷ Overall the challenge here is how to make the multilateral approach effective. It well may be that the EU should 'promote changes in the multilateral system so that it gradually becomes a more adequate system of global governance, based on the EU relinquishing some of its institutional power in the system to other actors, so that this reshaping of the EU's representation is accompanied by that of its function and competences and promoted by the acceptance of its rules.'⁵¹⁸ Such interpretation of effective multilateralism would fit well with positive value-based conditionality pursued by the EU in its relations with all three countries. Most certainly the effectiveness of multilateralism can be measured with visible effects. In the light of recent developments in Ukraine the question remain to what extent the EU is able to shape its neighbourhood pursuing its external policy priorities.⁵¹⁹ It is definitely worth to review how multilateralism will translate during the implementation process of the Association Agreements. It would be worth to verify whether effectiveness of EU's promotion of multilateralism can result in creation of regional mechanisms of cooperation in its neighbourhood.⁵²⁰

⁵¹⁶ R Koehane, 'Multilateralism: An Agenda for Research' (1990) (45)4 *International Journal* 731.

⁵¹⁷ G Christou, 'Multilateralism, Conflict Prevention, and the Eastern Partnership' (2011) 16 *European Foreign Affairs Review* 207.

⁵¹⁸ M Montobbio, 'Reflections on effective multilateralism and global governance as guiding concepts of the European Global Strategy' (Madrid, Elcano Royal Institute, 2013) 5.

⁵¹⁹ J Wouters, S de Jong, P De Man, 'The EU's commitment to effective multilateralism in the field of security: theory and practice' (Leuven, Leuven Centre for Global Governance Studies, Working Paper No 45, 2010) 9.

⁵²⁰ See section 6.5. where parliamentary cooperation is discussed.

In the field of the Foreign and Security Policy, including the Common Security and Defence Policy, parties aim to intensify their dialogue and cooperation and to promote gradual convergence in this area with a particular focus on conflict prevention and crisis management, regional stability, disarmament, non-proliferation, arms control and arms export control, dialogue in the field of space. The parties are encouraged to use bilateral, international and regional fora to pursue these goals. Parties commit themselves to promote stability, security and democratic development in their common neighbourhood, in particular to work for the peaceful settlement of regional conflicts. Furthermore they commit to conflict prevention, crisis management and military-technological cooperation, which lays the basis for all three countries to increase their participation in the EU-led civilian and military crisis management operations⁵²¹ as well as exercise and training in the framework of the Common Security and Defence Policy.⁵²² Non-proliferation

⁵²¹ Agreement between the European Union and Ukraine establishing a framework for the participation of Ukraine in the European Union crisis management operations was signed on 13 June 2005 [2005] OJ L182/29; Agreement between the European Union and the Republic of Moldova establishing a framework for the participation of the Republic of Moldova in European Union crisis management operation was signed on 13 December 2012 [2013] OJ L8/2; Agreement between the European Union and Georgia establishing a framework for the participation of Georgia in European Union crisis management operations was signed on 29 November 2013 [2014] OJ L14/2.

⁵²² In case of the EU-Ukraine Agreement (Article 10(3)) there is also an indication that cooperation between Ukraine and the European Defence Agency will be established to work on military capability improvement, including technological issues. The European Defence Agency was established in 2004 ‘to support the Council and the Member States in their effort to improve the EU’s defence capabilities in the field of crisis management and to sustain the European Security and Defence Policy as it stands now and develops in the future’, 2004/551/CFSP Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency [2004] OJ L245/17. A Council’s Decision adopted in 2011 repealed the Council Joint Action and defined the statute and operational procedure of the Agency as well strengthened its role in the process of developing key defence capabilities for the Common Security and Defence Policy, Council Decision 2011/411/CFSP of 12 July 2011 defining the statute, seat and operational rules of the European Defence Agency and repealing Joint Action 2004/551/CFSP [2011] OJ L183/16.

of weapons of mass destruction, disarmament, arms control, arms export control and fight against illicit trafficking of arms as well as combating terrorism are also addressed in these provisions.

5.2.3. Enhanced cooperation in the field of Freedom, Security and Justice

The cooperation in the field of Freedom, Security and Justice falls within the framework set as the external dimension of the EU cooperation in justice and home affairs.⁵²³ Without a doubt it is an area of cooperation, in which the EU aims at closer ties with all three countries in order to tackle issues such as trafficking in human beings.⁵²⁴ The scope of Title III stretches from the rule of law and respect for human rights, personal data protection, mobility of persons covering mobility and treatment of workers, migration, asylum as well as border management, through prevention and fight of crimes (money laundering, terrorism, fight against illicit drugs, corruption), to judicial cooperation in civil and criminal matters. The rule of law and respect for human rights are a cornerstone of the Association Agreement objectives. Parties commit themselves to attach particular importance to the consolidation of the rule of law and strengthening the role of institutions at all levels of administration with judicial administration being named as particularly important. Cooperation in the area of protection of personal data aims to ensure an adequate level of protection of personal data in accordance with the highest European and international standards, including instruments of the Council of Europe.⁵²⁵ This area of cooperation is regarded

⁵²³ European Council, Presidency Conclusions, Seville, 21-22 June 2002, 10.

⁵²⁴ International Organisation for Migration, 'Combating Trafficking in Human Beings: Ukraine' (Kiev, 2013); E Ivaschenko-Stadnik, 'The policy of combating trafficking in human beings: the Ukrainian context' [CARIM-East Explanatory Note 13/63] (Florence, European University Institute, 2013).

⁵²⁵ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data; Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and trans-border data flows.

to be of ‘extreme practical importance’ to enable Georgia, Moldova and Ukraine access existing EU databases and expand the scope of information exchange necessary to make progress with the Association Agreements implementation of commitments related to customs cooperation.⁵²⁶ The challenge facing all three countries is to ensure the highest standards of data protection.⁵²⁷

5.2.4. Mobility and visa free treatment

Joint management of migration flows and dialogue development on all migration related issues that include illegal migration, legal migration, smuggling and trafficking in human beings are identified as priority areas. It is no surprise as both trafficking in human beings and illegal migration form a challenge to EU relations with its EaP partners and overall impact of the aims of the Union.⁵²⁸ Activities that can help to address these matters are identified and include tackling the root causes of migration through cooperation not only among parties to the Agreements but also with third countries and in international fora. The EU will work with Georgia, Moldova and Ukraine towards development of policies that would prevent illegal migration, smuggling of migrants and trafficking in human beings, establishing of dialogue on asylum issues. In addition

⁵²⁶ O Sushko and O Zielinska (eds), ‘EU-Ukraine Association Agreement: Guideline for Reforms’ (Kiev, Konrad Adenauer Stiftung, KAS Policy Paper No 20, 2012) 18.

⁵²⁷ Proposals for a reform of the existing *acquis* need to be noted. The Commission presented changes to the data protection framework in January 2012, see further Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM (2012) 11 final, Brussels, 25 January 2012; Proposal for a directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, COM (2012) 10 final, Brussels, 25 January 2012.

⁵²⁸ In particular promotion of peace and EU values, Article 3(1) TEU.

activities that could contribute to effective implementation of border management are named and include training exchange of best practices, exchange of information and exchange of liaison officers.

As already noted the existing and future sectoral agreements will not only operate in parallel to the Association Agreements, but will also actively contribute to the development of relations between the parties. The cooperation in the field of visa treatment serves as an example of this mechanism. The Association Agreements bind parties to ensure full implementation of the Agreements on the Readmission of Persons and the Agreement on the Facilitation of the Issuance of Visas.⁵²⁹ The Association Agreements also set conditions for the introduction of a visa-free regime based on existing Action Plans.⁵³⁰ It strengthens the role played by action plans in EU relations with its neighbours, turning them into tools of conditionality. Although implementation of the Action Plan on Visa Liberalisation does not depend on the entry into force of the Association Agreements, nevertheless it would be valuable to see to what extent the Association

⁵²⁹ Respectively Article 16 of the EU-Georgia Association Agreement (Agreement between the European Union and Georgia on the readmission of persons residing without authorization [2011] OJ L52/47; Agreement between the European Union and Georgia on the facilitation of the issuance of visas [2011] OJ L52/34); Article 15 of the EU-Moldova Association Agreement (Agreement between the European Community and the Republic of Moldova on the readmission of persons residing without authorization [2007] OJ L334/149; Agreement between the European Community and the Republic of Moldova on the facilitation of the issuance of visas [2007] OJ L334/169; Agreement between the European Union and the Republic of Moldova amending the Agreement between the European Community and the Republic of Moldova on the facilitation of the issuance of visas [2013] OJ L168/3) and Article 19 of the EU-Ukraine Association Agreement (Agreement between the European Community and Ukraine on the readmission of persons [2007] OJ L332/48; Agreement between the European Community and Ukraine on the facilitation of the issuance of visas [2007] OJ L332/68; Agreement between the European Union and Ukraine amending the Agreement between the European Community and Ukraine on the facilitation of the issuance of visas [2013] OJ L168/11).

⁵³⁰ Article 16(2) of the EU-Georgia Association Agreement, Article 15(2) of the EU-Moldova Association Agreement, and Article 19(3) of the EU-Ukraine Association Agreement.

Agreements prior to their ratification would influence implementation of the Action Plans and in effect the evolution of cooperation on visa liberalisation. This is an area of cooperation that holds a powerful political weight. It is also a measure, next to progress on establishment of DCFTAs, of all three countries reforms that will result in deepening of their European integration.

The Action Plans on Visa Liberalisation are an integral part of the visa liberalisation dialogue that the EU established with all three countries.⁵³¹ These Plans contain two tiers of benchmarks: preliminary benchmarks concerning the policy framework (legislation and planning), which would pave the way for meeting more specific benchmarks (effective and sustainable implementation of relevant measures). Although Ukraine was the first one to start the process, the annual report of 2013 confirmed that the country only managed to complete the first phase of the liberalisation process.⁵³² Nevertheless, due to the exceptional situation of Ukraine, the EU confirmed its support to the country and offered to enhance people-to-people contacts.⁵³³ Acceleration of Visa Liberalisation Action Plan within the established framework and an offer of a Mobility Partnership were among support measures presented by the European Commission in March 2014.⁵³⁴ Moldova achieved the greatest reforms progress,⁵³⁵ and its citizens (holders of biometric passports) are exempt from visa requirement since 28 April 2014.⁵³⁶ Georgian efforts

⁵³¹ The EU-Ukraine Visa Liberalisation Dialogue was launched on 29 October 2008, the EU-Moldova Visa Liberalisation Dialogue on 29 October 2010, and the dialogue with Georgia was opened on 4 June 2012.

⁵³² Third report on the implementation by Ukraine of the Action Plan on Visa Liberalisation, COM (2013) 809 final, Brussels, 15 November 2013.

⁵³³ The European Parliament advocated for an immediate facilitation of visa regime for Ukrainians, see European Parliament resolution of 27 February 2014 on the future of EU visa policy, 2014/2586 (RSP).

⁵³⁴ European Commission's support to Ukraine, Press Release IP/14/219, Brussels 5 March 2014.

⁵³⁵ Fifth Report on the implementation by the Republic of Moldova of the Action Plan on Visa Liberalisation, COM (2013) 807 final, Brussels 15 November 2013.

⁵³⁶ Regulation (EU) No 259/2014 of the European Parliament and of the Council of 3 April 2014 amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of

were recognized as satisfactory,⁵³⁷ and in November 2014 Foreign Affairs Council welcomed ‘the Commission’s assessment on possible migratory and security impacts on the EU of future visa liberalisation for Georgia.’⁵³⁸

5.2.5. *Deep and Comprehensive Free Trade Area(s)*

It’s been established that ‘bilateral (and regional) agreements are the most common trade policy instruments.’⁵³⁹ The EU has been concluding free trade⁵⁴⁰ agreements⁵⁴¹ not only with its immediate neighbours but also with trade partners further afield.⁵⁴² As noted by the Commission

visas when crossing the external borders and those whose nationals are exempt from that requirement [2014] OJ L105/9.

⁵³⁷ First Progress Report on the implementation by Georgia of the Action Plan on Visa Liberalisation, COM (2013) 808 final, Brussels, 15 November 2013.

⁵³⁸ Foreign Affairs Council, ‘Conclusions on Georgia,’ Brussels, 17 November 2014.

⁵³⁹ O Cattaneo, ‘The political economy of PTAs’ in S Lester and B Mercurio (eds), *Bilateral and Regional Trade Agreements. Commentary and Analysis* (Cambridge, Cambridge University Press, 2009) 30.

⁵⁴⁰ As noted by Bernard Hoekman and Michel Kostecki ‘in a free trade area, trade restrictions among member countries are removed, but each country retains its own tariff structure against outsiders,’ B Hoekman and M Kostecki, *The Political Economy of the World Trading System. From GATT to WTO* (Oxford, Oxford University Press, 2001) 213.

⁵⁴¹ ‘Free Trade Agreements (FTAs), if approached with care, can build on WTO and other international rules by going further and faster in promoting openness and integration, by tackling issues which are not ready for multilateral discussion and by preparing the ground for the next level of multilateral liberalisation. Many key issues, including investment, public procurement, competition, other regulatory issues and IPR enforcement, which remain outside the WTO at this time can be addressed through FTAs,’ Global Europe. Competing in the world - A contribution to the EU's Growth and Jobs Strategy, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM (2006) 567 final, Brussels, 4 October 2006, 8.

⁵⁴² To date the EC/EU concluded the following free trade agreements or Association Agreements with FTA component: Agreement establishing an association between the European Community and its Member States and the Republic of Chile [2002] OJ L352/3; Free trade Agreement between the European Union and its Member States and the Republic of Korea [2011] OJ L127/6; Economic Partnership, Political

‘FTAs are by no means new for Europe. [...] [T]hey play an important role in the European neighbourhood by reinforcing economic and regulatory ties with the EU’.⁵⁴³ Concept of a deep and comprehensive free trade agreement, originally called ‘free trade agreement plus’ was developed under a strong influence and experience gathered during the creation of the Single European Market, as well as during the enlargements of 2004 and 2007, and stabilisation and association process offered to the Western Balkans countries. Economic links with the ENP countries have been playing a significant part in the development of the policy and ties with individual countries. The Commission pointed out that ‘tailor-made deep and comprehensive free trade agreements (DFTAs), including measures to reduce non-tariff barriers through regulatory convergence, are the keys to increased economic integration with ENP partners. A DCFTA should cover substantially all trade in goods and services between the EU and the ENP partner ‘including those products of particular importance for our partners’⁵⁴⁴ as well as strong legally-binding provisions on the implementation of trade and economic regulatory issues.’⁵⁴⁵

Coordination and Cooperation Agreement between the European Community and its Member States and the United Mexican States [2000] OJ L276/44; Agreement on Trade, Development and Cooperation between the European Community and its Member States and the Republic of South Africa [1999] OJ L311/3; Agreement establishing an Association between the European Union and its Member States and Central America [2012] OJ L346/3; Political dialogue and Cooperation Agreement between the European Community and its Member States and the Andean Community and its Member Countries (Bolivia, Colombia, Ecuador, Peru and Venezuela) has not yet entered into force; negotiations of FTAs with the following partners are in progress: ASEAN, Canada, Gulf Co-operation Council, India, Malaysia, Singapore.

⁵⁴³ *A Global Strategy for the EU's Foreign and Security Policy*, Brussels 2016 available at < https://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf> accessed 10 September 2018.

⁵⁴⁴ European Commission, ‘Strengthening the European Neighbourhood Policy’ (357) 4.

⁵⁴⁵ European Commission, ‘A Strong Neighbourhood Policy’ (n 409) 4. Further definitions of a DCFTA can be found in official document, e.g. a definition in a memo of the European Commission of a DCFTA with Georgia describes in the following manner: ‘The [EU-Georgia] Deep and Comprehensive Free Trade Area (DCFTA) is part of the Association Agreement and covers trade in goods. This includes energy,

The EU–Ukraine Summit in December 2005 ‘reconfirmed the goal of promoting deep economic integration between the EU and Ukraine and, in order to achieve this, look forward to an early start of negotiations of a Free Trade Area once Ukraine has joined the WTO.’⁵⁴⁶ This declaration fits well within the ENP framework. As noted by Christophe Hillion ‘ENP promotes legislative and regulatory approximation to EU standards in return for ‘a stake in the Internal Market’⁵⁴⁷ ultimately to create an ‘economic community between the EU and the ENP partners.’⁵⁴⁸ It was confirmed in 2006 that an agreement envisaged would be ‘deep and comprehensive.’⁵⁴⁹ In 2007 the Council of the European Union stressed importance of economic integration: ‘Deeper economic integration is [...] in the Union’s own interest’, and outlined the character of bilateral relations with EU’s neighbours: ‘The central platform for this increased economic integration is the adoption of bilateral deep free trade agreements. The opening of negotiations on such agreements will be preceded by the accession of partner countries to the WTO. At the time it was assumed that the Enhanced Agreement with Ukraine, including a deep and comprehensive FTA, serves as a model in this regard, though further agreements will of course depend on the ambition and individual state of development of each country, thus reflecting the performance-oriented,

services and traditional flanking measures such as rules of origin, customs and trade facilitation, together with anti-fraud provisions as well as trade defence instruments. These rules aim to ensure that trade is liberalised to the fullest extent possible but provide for necessary precautions to ensure only eligible goods qualify for preferential treatment. A bilateral dispute settlement procedure is envisaged to solve issues in an expeditious manner. The DCFTA also tackles the ‘comprehensive’ elements of an FTA, designed for Eastern Partnership countries. These include regulatory disciplines that aim to ensure a stable and growth-oriented policy framework that will boost competitiveness. It includes competition and transparency provisions, intellectual property rights, adaptation of domestic law with the EU *acquis* in the selected services areas and in public procurement,’ European Commission Memo, Brussels 22 July 2013.:

⁵⁴⁶ EU–Ukraine Summit, Joint Press Statement 15222/05 (Presse 337), Kiev, 1 December 2005.

⁵⁴⁷ Hillion, ‘The EU’s Neighbourhood Policy Towards Eastern Europe’ in A Dashwood, M Maresceau (eds) (n 419) 314.

⁵⁴⁸ European Commission, ‘Strengthening the European Neighbourhood Policy’ (n 357) 5.

⁵⁴⁹ *ibid* 3.

differentiated nature of the enhanced ENP.⁵⁵⁰ Ukraine's ambition has evolved since conclusion of the PCA, which offered a modest model of integration. It contained most favoured nation clause⁵⁵¹ and envisaged abolition of quantitative restrictions and freedom of transit of goods⁵⁵² as well as perspective for the parties 'to consider establishment of a free trade area'.⁵⁵³ Ukraine's accession to the WTO influenced further liberalization of the EU-Ukraine trade relations and prerequisite for commencement of a negotiation process.⁵⁵⁴ The negotiations of an enhanced agreement started in 2007, while the negotiations of a free trade agreement followed a year later.⁵⁵⁵ The scope of negotiations was broad to reflect the ambitious character of a deep and comprehensive free trade agreement. A DCFTA covers traditional trade liberalization named by Michael Emerson as 'shallow' and described as a 'move to zero tariffs for trade in goods, but

⁵⁵⁰ General Affairs and External Relations Council (GAERC), 'Strengthening the European Neighbourhood Policy. Presidency Progress Report,' Brussels, 18-19 June 2007.

⁵⁵¹ Article 10 of the Ukraine PCA.

⁵⁵² R Petrov, 'The Partnership and Cooperation Agreements with the Newly Independent States' in A Ott and K Inglis (eds), *European Enlargement Handbook* (The Hague, Asser Press, 2002) 183.

⁵⁵³ Article 4 of the Ukraine PCA. The PCA's provision on establishment of a free trade area in comparison to similar provisions in Europe Agreements and Stabilisation and Association Agreements is much less advantageous; e.g.: Article 7 of the EA with Poland: 'The Community and Poland shall gradually establish a free trade area in a transitional period lasting a maximum of 10 years starting from the entry into force of this Agreement,' OJ L348/1993, p. 2; Article 16.1. of the Association Agreement with Albania: 'The Community and Albania shall gradually establish a free trade area over a period lasting a maximum of ten years starting from the date of entry into force of this Agreement' [2009] OJ L107/166.

⁵⁵⁴ Dabrowski, Taran, (n 469) 18.

⁵⁵⁵ '[Opening of negotiations is] a sign of the EU's commitment to Ukraine [...]. The process [...] is not just about trade and investment flows. It is a mark of Ukraine's continuing political and economic integration into the global economy, and deep partnership with the EU.' [...] The EU and Ukraine plan to build on the liberalisation set in train by WTO membership with a wide-ranging agreement that will bring regulatory standards into convergence and improve access for investment in both directions. It will lower the costs of EU imports for Ukrainian businesses and consumers, and increase Ukraine's access to the EU single market, which is the largest in the world.' EU-Ukraine launched free trade agreement negotiations, Press Release IP/08/249, Brussels, 18 February 2008.

perhaps with some limited exclusions such as those applying to agriculture⁵⁵⁶ and much more, including reduction of non-tariff barriers, liberalisation of trade in services, harmonisation of law as well as aspects of free movement of persons and labour, and macroeconomic approximation.⁵⁵⁷ The most typical elements of a DCFTA include investment rules, regulation of anti-dumping procedures, competition policy, dispute settlement mechanism, regulation of services.⁵⁵⁸ The EU-Ukraine DCFTA negotiations were carried out by 18 working groups divided into three areas: trade in goods; services, establishment, investment and capital movements; rules of trade.⁵⁵⁹

The DCFTA serves as a framework for ambitious modernisation of economic development of all three countries and deepening of their trade relations with the EU. Georgia, Moldova and Ukraine are given an opportunity to open their markets by using progressive removal of customs tariffs and quotas but equally important its success heavily depends on harmonisation their national laws and regulations in economic sectors. The approximation process – if successful – would modernise all three legal orders and bring them to conformity with EU norms and standards. Nevertheless, the task of approximation is a major challenge. The countries will be obliged to transpose and implement numerous acts of EU secondary legislation,⁵⁶⁰ as well reform its administrative capacity, in order to claim access to the EU internal market. The summary of the key DCFTA provisions can be found in the table at the end of this chapter.

⁵⁵⁶ M Emerson, *The Prospect of Deep Free Trade between the European Union and Ukraine* (Brussels, Centre for Policy Studies, 2006) 17.

⁵⁵⁷ The Free Trade Agreement between the EU and Ukraine: Conceptual Background, Economic Context and Potential Impact, Directorate-General for External Policies of the Union workshop, EXPO/B/INTA/2011/18, Brussels, 20 October 2011, 25.

⁵⁵⁸ *ibid.*

⁵⁵⁹ Dabrowski, Taran, (n 469) 19.

⁵⁶⁰ Sushko and Zielinska (eds), *EU-Ukraine Association Agreement: Guideline for Reforms* (n 526) 23.

6. Institutional framework of the Association Agreements

6.1. Introduction

The Association Agreements establish institutional frameworks with features that bring no surprise, however raise a number of issues in relation to their effectiveness, and their role of driving forces of the association process. Firstly, these institutional structures offer institutionalisation of political dialogue. The Association Agreements envisage different levels of political dialogue offering only to Ukraine the highest level of summits. This can suggest differentiation of the three partners, clearly marking the special character of Ukraine. It is a clear recognition of Ukrainian efforts as well as formalisation of the customary summits held with Ukraine in the past. Nevertheless, lack of the highest level of structured, regular meetings with Georgian and Moldovan authorities may put the development of progressive association at risk. Lack of necessary impetus and clear political directions can translate into a less dynamic integration of these two countries.⁵⁶¹ There is evidence suggesting that they were not offered summit meetings due to economic reasons. If that is the case, then it seems that a rather prosaic argumentation prevented an establishment of an effective political dialogue that should be at the centre of the political association within the Agreements' framework. Key elements of the EU-Ukraine Summits are given in section 6.2. Next two levels of executive political dialogue are offered to all three partners. As argued by Christophe Hillion Association Councils can influence the association much further than the Cooperation Councils could influence the development of partnership and cooperation under the regime of PCAs.⁵⁶² However, it remains open to speculate how much further Association Councils could

⁵⁶¹ It can be argued that similar effect internally within the EU would be caused by irregular and informal meetings of the members of the European Council.

⁵⁶² Hillion, 'The evolving system of European Union external relations as evidenced in the EU Partnerships with Russia and Ukraine' (n 25) 92.

take the political association forward. When it comes to measuring impact of Association Committees there is a significant difference between tasks of the EU-Ukraine Association Committee and the other two. In case of the former, it is a matter of its effectiveness in enabling political dialogue at all levels envisaged in Article 5 of the EU-Ukraine Association Agreement. There is no similar link drawn in the line of duties of the EU-Georgia and EU-Moldova Association Agreements.

The most striking difference between the institutional framework of PCAs and Association Agreements lies with the capacity of the Association Councils and Committees to take binding decisions. This development is necessary to address demands of law approximation that Georgia, Moldova and Ukraine must fulfil, however this new legal capacity of the Councils and Committees raises a number of questions that are addressed in sections 6.3. and 6.4.

The Association Agreements provide for setting up Parliamentary Association Committees. This is a standard setting, however a slow start of setting these bodies up may have negative impact on this level of political dialogue. There are also other coordination and recognition issues that are addressed below, in section 6.5.

The Association Agreements with Georgia, Moldova and Ukraine bring also a new dimension, namely Civil Society Platforms. This is thus far a novel development and could be interpreted as recognition of the role played by the civil society organisations. Nevertheless, the fact that civil society bodies in these three countries are poorly developed may suggest that an institutional framework has been introduced to encourage growth and involvement of such organisation in the association process. This development can also be interpreted as a natural development based on ambitions of Eastern Partnership in this area and activities undertaken

within its Civil Society Forum.⁵⁶³

6.2. EU-Ukraine Summits

Summits can be considered as a vital element of the top-down approach that enables the EU to execute its soft power at the highest level.⁵⁶⁴ This platform of political relations is only offered to Ukraine, while relations with Georgia and Moldova at the highest level can take place outside association framework. The EU-Ukraine Association Agreement envisages the ‘highest level of political and policy dialogue’ to be delivered at a Summit level with meetings taking place at least once a year.⁵⁶⁵ It codifies the existing practice as Summits with Ukraine at the highest level of representation have been taking place since 1997. The evolution of EU-Ukraine relations presented in section 2 confirms that Summits significantly contributed to this process. Article 460 of the EU-Ukraine Association Agreement confirming Summits as the highest level of dialogue can be regarded as an upgrade of EU-Ukraine relations. It is an improvement in comparison to the PCA, which does not envisage bilateral Summits. However, in Title II of the PCA on political dialogue it states: ‘Consultations as appropriate shall be held between the Parties at the highest political level.’⁵⁶⁶ Similar provision in the PCA with Russia, in Title II on political dialogue, is much more specific, although does not use term ‘Summit’ but identifies level of representation: ‘meetings shall take place [...] between the President of the Council, the President of the Commission and

⁵⁶³ See eg Strategy of the Eastern Partnership Civil Society Forum for 2018-2020 available at < <http://eap-csf.eu/wp-content/uploads/CSF-2018-2020-Strategy-final.pdf> > accessed 20 September 2018.

⁵⁶⁴ A Gawrich, I Melnykovska, R Schweickert, ‘Neighbourhood Europeanization through ENP: The Case of Ukraine’ (2010) 48(5) *Journal of Common Market Studies* 1209.

⁵⁶⁵ Article 460 (1) of the EU-Ukraine Association Agreement.

⁵⁶⁶ Article 7 of the EU-Ukraine Association Agreement.

the President of Russia.⁵⁶⁷ Introduction of a provision naming Summits as the highest level of dialogue is also a novelty by Association Agreements standards. For instance, in Title I on political dialogue of the Europe Agreement with Poland there was only a statement that ‘Consultations as appropriate shall take place between the President of the European Council and the President of the Commission and the President of Poland.’⁵⁶⁸ The Euro-Mediterranean Agreement with Morocco envisages ministerial level principally within the Association Council as the highest level of political dialogue between the parties.⁵⁶⁹ The article on the EU-Ukraine Summits in the Association Agreement measured against these examples can be regarded as recognition of the importance attached to maintenance of the highest level of political and policy consultations. Nevertheless another interpretation of the provisions on the Summits should be provided. They are identified as the highest level of consultation not only in Title II on political dialogue, but also in Title VII on institutions. This makes their role far more formal and gives the EU another tool to exercise political pressure that can be applied in relations with Ukraine. At times of difficulty, in particular problems with implementation of the Agreement, Summits should enable the EU to put more weight on Ukraine’s officials and apply political conditionality effectively.

Summits with Ukraine could be interpreted as an expression of differentiation since the agreements with Georgia and Moldova do not envisage this level of meetings. Nevertheless the reasons why these two partners are not given this high level recognition is more prosaic and economy driven. It is understood that, both countries wished to have provisions on summits in their agreements, however the EU decided not to satisfy this request due to costs of such

⁵⁶⁷ Article 7 of the EU-Russia PCA.

⁵⁶⁸ Article 3 of the Europe Agreement with Poland [1993] OJ L348/2.

⁵⁶⁹ Article 5 of the Euro-Mediterranean Agreement with Morocco, Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco [2000] OJ L70/2.

meetings.⁵⁷⁰ Institutional provisions of the EU-Georgia and EU-Moldova Association Agreements give parties freedom to conduct policy and political dialogue at any level.⁵⁷¹

6.3. Association Councils

The Association Agreements establish Association Councils consisting of members of the Council of the EU, members of the Commission and members of the Georgia, Moldova and Ukrainian government to ‘supervise and monitor the application and implementation of [these] Agreement[s] and periodically review the functioning of th[ese] Agreements in the light of [their] objectives.’⁵⁷² Furthermore the Agreements endow these Councils with the right to take binding decisions.⁵⁷³ It distinguishes Association Councils from Cooperation Councils (PCAs) and their decisions that are non-binding and therefore their impact on rapprochement between parties have been insignificant.⁵⁷⁴ Powers granted to the Association Councils are similar to those given to the Association Council established by the Euro-Mediterranean Agreement with Morocco.⁵⁷⁵ Indeed, both can take binding decisions and make recommendations, however the provisions in the

⁵⁷⁰ H Kostanyan, ‘Examining the Discretion of the EEAS’ (470) 373.

⁵⁷¹ Article 403 of the EU-Georgia Association Agreement and Article 433 of the EU-Moldova Association Agreement.

⁵⁷² Article 404 of the EU-Georgia Association Agreement, Article 434 of the EU-Moldova Association Agreement and Article 461 of the EU Ukraine Association Agreement. Similar tasks were given to the Cooperation Councils established by the PCAs, see: Article 81 of the PCA with Georgia, Article 82 of the PCA with Moldova and Article 83 of the PCA with Ukraine. Similar description of the Cooperation Council can be found in the PCA with Russia (Article 90 PCA with Russia) and Euro-Mediterranean Agreements (eg Article 78 of the Euro-Mediterranean Agreement with Morocco).

⁵⁷³ Article 406 of the EU-Georgia Association Agreement, Article 436 of the EU-Moldova Association Agreement and Article 463 of the EU-Ukraine Association Agreement.

⁵⁷⁴ Hillion, ‘Russian Federation’ (n 183) 479.

⁵⁷⁵ Article 80 of the Euro-Mediterranean Agreement with Morocco.

Agreements with Georgia, Moldova and Ukraine go further and provide instructions for the parties in relation to implementation of the Association Council's decision. They are asked to take appropriate measures including actions in specific bodies established by the Association Councils to implement their decisions. This stipulation confirms the Association Councils' authority to create support organs. It also explicitly identifies the authority of the parties to influence the work of these bodies to attain higher implementation rate of the Councils' decisions. These clauses could be seen as a conditionality measure imposing pressure on all three countries to meet objectives of the association. The Association Councils are also authorised to delegate any of their powers, including the power to take binding decisions.⁵⁷⁶

As already noted, the Association Councils are foras to maintain political dialogue at ministerial level. Relevant provisions of the Association Agreements copy similar provisions in the PCAs, Europe Agreements and Euro-Mediterranean Agreements.⁵⁷⁷ However, an unprecedented and by far more complex task is given to the Association Council in the area of law approximation. The Association Councils not only 'will be a forum for exchange of information on European Union and legislative acts,⁵⁷⁸ but it is also given the competence 'to update or amend the Annexes to the Agreement, taking into account the evolution of EU law and applicable standards set out in international instruments deemed relevant to the Parties.'⁵⁷⁹ As the latter is formulated as a right not an obligation it confirms the difference between association model of approximation and the

⁵⁷⁶ Article 408(2) of the EU-Georgia Association Agreement, Article 438(2) of the EU-Moldova Association Agreement and Article 465(2) of the EU-Ukraine Association Agreement.

⁵⁷⁷ See as examples Article 7 of the EU-Ukraine PCA, Article 7 of the EU-Russia PCA, Article 9 of the EU-Albania Stabilisation and Association Agreement, Article 2 Poland Europe Agreement, Article 5 of the EU-Morocco Euro-Mediterranean Agreement.

⁵⁷⁸ Article 406(2) of the EU-Georgia Association Agreement, Article 436(2) of the EU-Moldova Association Agreement and Article 463(2) of the EU-Ukraine Agreement.

⁵⁷⁹ Article 406(3) of the EU-Georgia Association Agreement, Article 436(3) of the EU-Moldova Association Agreement and Article 463(3) of the EU-Ukraine Agreement.

EEA integration model with an obligation to adopt all new EU acquis.⁵⁸⁰ Nevertheless, the dynamic character of EU acquis and method used in the Association Agreements to list the legislation that Georgia, Moldova and Ukraine need to approximate their legislation with, would require the Association Councils to exercise this right fully to reflect all necessary amendments in the Annexes to the Agreement. The Association Councils are also given operational powers to set up special committees and bodies necessary for the implementation of the Agreements. Similar powers were given to Councils established by the PCAs and SAAs.⁵⁸¹

6.4. Association Committees

The Association Agreements also establish Association Committees composed of representatives, at the senior civil servant level, of members of the Council of the EU, members of the Commission and members of the Georgian, Moldovan and Ukrainian governments. The Association Committees will assist the Association Councils in the performance of their duties.⁵⁸² The role and the composition of the Committees are similar to those given to the Committees established by the PCAs, and SAAs,⁵⁸³ however the Association Committees can be given the authority by the

⁵⁸⁰ M E Méndez-Pinedo, *EC and EEA Law. A Comparative Study of the Effectiveness of European Law* (Groningen, Europa Law Publishing, 2009); T van Stiphout, 'Homogeneity vs. Decision-Making Autonomy in the EEA Agreement' (2007) 9(3) *European Journal of Law Reform* 431.

⁵⁸¹ See eg Article 88 of the EU-Ukraine PCA, Article 120 of EU-Albania Stabilisation and Association Agreement.

⁵⁸² Article 407 of the EU-Georgia Association Agreement, Article 437 of the EU-Moldova Association Agreement and Article 464 of the EU-Ukraine Association Agreement.

⁵⁸³ See eg Article 87 of the EU-Ukraine PCA, and Articles 120-121 of the EU-Albania Stabilisation and Association Agreement.

Association Councils to take binding decisions.⁵⁸⁴ This raises the question of ownership of such decisions and their legitimacy. It will be particularly relevant in dispute cases.

The Association Committees meet in a specific configuration to address all issues related to trade and trade related matters.⁵⁸⁵ Although the names ‘Trade Committee’ (EU-Ukraine Association Agreement), ‘Association Committee in Trade configuration’ (EU-Georgia Association Agreement and EU-Moldova Association Agreement) do not appear in the provisions on the Association Committee, these names are broadly used across the Titles on trade and trade related matters.⁵⁸⁶ Specific roles and duties of the Trade Committee/ Association Committee in Trade configuration include, inter alia, decisions on the implementation timelines of the legislation relevant to Title on trade and trade related matters of the Agreements and updates of relevant Annexes to the Agreement, management of arbitration,⁵⁸⁷ modification of Chapter 14 (Dispute Settlement), rules of procedure for arbitration,⁵⁸⁸ code of conduct of arbitration panels and mediators,⁵⁸⁹ regular assessment of market access (Chapter 8 Public Procurement).⁵⁹⁰

⁵⁸⁴ Article 408(3) of the EU-Georgia Association Agreement, Article 438(3) of the EU-Moldova Association Agreement and Article 465(3) of the EU-Ukraine Association Agreement. It is similar to the EU-Morocco Euro-Mediterranean Agreement, where the Association Council is given power to take binding decisions for the management of the Agreement (Article 83 of the EU-Morocco Euro-Mediterranean Agreement).

⁵⁸⁵ Article 408(4) of the EU-Georgia Association Agreement, Article 438(4) of the EU-Moldova Association Agreement, and Article 465(4) of the EU-Ukraine Association Agreement.

⁵⁸⁶ See for example Article 268, Article 271 of the EU-Georgia Association Agreement, Article 148 and Article 155 of the EU-Moldova Association Agreement, Article 74(4), Article 307(2) and Article 315(4) of the EU-Ukraine Association Agreement.

⁵⁸⁷ Article 307(2-3) of the EU-Ukraine Association Agreement.

⁵⁸⁸ Annex XXIV to the EU-Ukraine Association Agreement.

⁵⁸⁹ Annex XXV to the EU-Ukraine Association Agreement.

⁵⁹⁰ Article 154 of the EU-Ukraine Association Agreement.

6.5. Parliamentary Association Committees

There are no novel proposals for the parliamentary dimension of the political dialogue. The Agreements provide for setting up of the Parliamentary Association Committees composed of members of the European Parliament and parliaments of Georgia, Moldova and Ukraine. They are given limited powers to govern parliamentary oversight of the associations, serve as foras for parliamentarians to exchange views,⁵⁹¹ and can only make recommendations to the Association Council.⁵⁹² These Committees will be able to contribute to the association process only when there

⁵⁹¹ Article 410 (1) of the EU-Georgia Association Agreement, Article 440 (1) of the EU-Moldova Association Agreement and Article 467 (1) of the EU-Ukraine Association Agreement.

⁵⁹² Article 411 (3) of the EU-Georgia Association Agreement, Article 441 (3) of the EU-Moldova Association Agreement and Article 468 (3) of the EU-Ukraine Association Agreement. The EU-Ukraine Parliamentary Association Committee has been established and is expected to hold its first meeting in the first quarter of 2015. The short-term aims include reinstating relations between *Verkhovna Rada* and European Parliament in order to support implementation of the EU-Ukraine Association Agreement. The support of the European Parliament throughout the negotiations of the Agreement and it particular in the recent months was clear. Not only both *Verkhovna Rada* and the European Parliament ratified the Agreement on the same day (16 September 2014), the European Parliament offers continuous support for Ukraine. It was reflected in resolutions on development in Ukraine adopted to date (European Parliament resolution of 15 January 2015 on the situation in Ukraine (2014/2965(RSP)); European Parliament resolution of 18 September 2014 on the situation in Ukraine and the state of play of EU-Russia relations (2014/2841(RSP)); European Parliament resolution of 17 July 2014 on Ukraine (2014/2717(RSP)), and establishment of 'Friends of European Ukraine,' which is in an informal group of support at the European Parliament for Ukraine integration. The establishment of the EU-Moldova Parliamentary Committee was initiated at the meeting between the Presidents of the European Parliament and Moldovan Parliament on 13 November 2014. It is expected that its first meeting will be held in 2015, however in this case the European Parliament does not express the urgency and support visible towards Ukraine. The European Parliament ratified the Agreement on 13 November 2014. The Agreement with Georgia was the last one to be ratified by the European Parliament on 18 December 2014, and the EU-Georgia Parliamentary Committee will be the last one to be set up. To date there was no clear signal from the European Parliament confirming its willingness to engage with Georgian Parliament immediately.

will be enough political will among MEPs to provide parliamentarians from Georgia, Moldova and Ukraine will constructive exchange. The fact that the Parliamentary Association Committees can only make recommendations to the Association Council leaves national parliamentarians with very little to influence the necessary changes. This matter raises a number of issues. First, the internal relationship between executive and parliamentary branches at the national level. They need to cooperate closely to meet the law approximation and institutional reform requirements. This crucial task needs can be achieved through agreement on national programmes for reforms. This element is further discussed in section 7 of this Chapter. Second, all three countries should be encouraged to either use existing frameworks, namely the Parliamentary Assembly EuroNest,⁵⁹³ to strengthen their multilateral cooperation in order to exchange views and good practices. There is certainly a risk that this forum is not fit for association purpose, and therefore it well may be that setting up a trilateral parliamentary forum or group would be more beneficial. This development should be encouraged by the EU as its success could be linked to the EU's commitment to regional cooperation. Third, involvement of all three countries in the works of the Conference of the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC). At present only members of the parliaments of the candidate countries can be invited as observers to the COSAC meetings,⁵⁹⁴ however Georgia expressed its wish to be given an observer status. A decision to accommodate this request would have a symbolic recognition of the country's aspirations but in legal terms could create a precedent. There is, however, another benefit that participation in COSAC's work could accommodate. All three countries need support in

⁵⁹³ The parliamentary dialogue between the European Parliament and parliaments of the Eastern Partnership countries (Azerbaijan, Belarus, Armenia, Georgia, and Moldova) takes place within the Parliamentary Assembly EuroNest.

⁵⁹⁴ Article 3(2) of the Rules of Procedure of the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (2011/C 229/01) [2011] OJ C229/3.

improving *modus operandi* for law approximation. Institutionalised contacts with representatives of the European Committees of national parliaments could be a good way to assist them.

6.6. Civil Society Platforms

The significance of civil society to the democratization process, as noted by Kristi Railk, 'has become widely acknowledged as part of the post-cold war paradigm.'⁵⁹⁵ The EU has been actively involved in the process,⁵⁹⁶ nevertheless civil society matters have not been reflected extensively in the contractual relations of the EU and its neighbours.⁵⁹⁷ However, the increased people-to-people contacts and greater involvement of civil society groups have been addressed in the Eastern Partnership framework where a Civil Society Forum was established. Introduction of provisions on Civil Society Platforms in the Association Agreements can be regarded as an ambitious outcome of its work that the three EaP countries need to address in order to make this level of institutional cooperation operational. Indeed, these Agreements contain unprecedented provisions devoted to engagement of civil society in the implementation process. The parties are obliged to promote regular meetings of representatives of their civil societies that are identified as Civil

⁵⁹⁵ K Raik, 'Promoting Democracy through Civil society: How to Step up the EU's Policy towards the Eastern Neighbourhood' (Brussels, Centre for European Policy Studies, CEPS Working Document No 237, 2006) 11.

⁵⁹⁶ C E Parau, 'Impaling Dracula: How EU Accession Empowered Civil Society in Romania' (2009) 32(1) *West European Politics* 119; A Sloat, 'The Rebirth of Civil Society. The Growth of Women's NGOs in Central and Eastern Europe' (2010) 12(4) *European Journal of Woman's Studies* 437.

⁵⁹⁷ In the past Europe Agreements did not even mention civil society. In the more recently concluded agreements, such as Euro-Mediterranean Association Agreements, civil society is also absent. Stabilisation and Association Agreements acknowledged importance of civil society by including it in preambles, eg the preamble of the SAA with Albania identified development of civil society as one of the elements that would contribute to stabilization in Albania and in the region.

Society Platforms.⁵⁹⁸ They are composed of members of the European Economic and Social Committee and representatives of Georgian, Moldovan and Ukrainian civil society organisations. Introduction of these provisions not only acknowledges the importance of the social dimension of the Agreements, but also creates opportunities for the Georgian, Moldovan and Ukrainian organisations to get involved in the process of establishment of the associations. Notwithstanding, the implementation may cause problems, as presence of civil society organisations and citizens capacity are very weak.⁵⁹⁹

The challenge presented by the Association Agreement will require local organisations to ‘enter deeper and more technical level [of expertise]’⁶⁰⁰ to engage in the dialogue with the European counterparts but above all to contribute to implementation of the Association Agreements. It would be interesting to see whether implementation of Agreements’ provisions on civil society can stimulate its growth in Georgia, Moldova and Ukraine. It would also be a learning project for the EU to assess how much the institutionalization of civil society can contribute to the implementation of Association’s objectives, especially that expectations are high.⁶⁰¹ There is also a

⁵⁹⁸ Articles 412-413 of the EU-Georgia Association Agreement, Article 442-443 of the EU-Moldova Association Agreement and arts. 469-470 of the EU-Ukraine Association Agreement.

⁵⁹⁹ As observed by Oleksandr Sushko and Olga Zielinska there are ‘no civil society associations [in Ukraine] that would both know and understand EU standards and requirements,’ Sushko and Zielinska (eds), *EU-Ukraine Association Agreement: Guideline for Reforms* (n 526) 46. The report by the UK Embassy in Ukraine draws a slightly more optimistic picture of the Ukrainian civil society organisations pointing out the differentiation between organisations based in Kiev and those located outside the Ukrainian capital. The latter are not as well informed as the former, and the biggest challenge will be to encourage them to take part in the dialogue and awareness raising of the European integration process to the public, British Embassy in Ukraine, ‘A blueprint for enhancing understanding and support for the EU-Ukraine Association Agreement including DCFTA’ (Kiev, 2013) 15.

⁶⁰⁰ Sushko and Zielinska (eds), *EU-Ukraine Association Agreement: Guideline for Reforms* (n 526) 48.

⁶⁰¹ ‘[T]he principle value of [the Association Agreement] is the impact the new agreement will have on the further strengthening of civil society, its commitment to reforms, and the consolidation and motivation of

question on how civil society organisations can help citizens to understand difficult and costly reforms that all three countries need to undertake to meet the conditions of the association. It is very challenging task since '[m]ost NGO activities pass unnoticed by the wider public'.⁶⁰² Overall, success or failure of these Platforms will influence fate of similar clauses in new agreements that the EU will conclude in the future. Internally, success of the civil society provisions will be measured by growth of civil society actors and public awareness of the association process as well as their role in the society.

7. Approximation of law

7.1. Introduction

The process of approximation aims at achievement of results within the limits of accuracy required for a given purpose. This definition highlights the importance of the outcome and its quality. Although it is borrowed from mathematics, it provides a helpful starting point for the section dedicated to approximation, since these features are crucial to understanding of the role played by approximation in the EU, its internal and external dimensions. The latter can be perceived as an expression of parallelism and growing external influence of the EU. Indeed, the development of different models of engagement (eg cooperation, association) has given the EU opportunities to use export of *acquis* as a mechanism serving these models and overall contribution to

Europe-oriented social actors.' Statement by the Civil Society Forum of the Eastern Partnership, Athens 4 July 2013.

⁶⁰² O Lutsevych, 'How to Finish a Revolution: Civil Society and Democracy in Georgia, Moldova and Ukraine' (London, Chatham House, Briefing Paper No 1, 2013) 6. In case of Georgia the numbers of registered civil society organisations are high, however they have very low membership levels, H Aliyev, 'Civil society in the South Caucasus: kinship networks as obstacles to civil participation' (2014) 14(2) Southeast European and Black Sea Studies 263.

strengthening of the EU's role as a normative power. Despite these differences, there are some common features. Third countries engaged in the approximation process are required to gradually achieve market reforms⁶⁰³ through changes in their legislation and institutional frameworks. These changes require complex planning and monitoring instruments, including regulatory impact assessments and regulatory impact assessment. These elements are costly and may be difficult to justify in political terms.

This section starts with an overview of law approximation under PCAs and within the ENP framework. It is followed by analysis of the modified model of law approximation that can not only be characterised by the shift from voluntary approximation to an obligation to approximate national legislation with EU law. It is also a very complex model where different mechanisms of approximation are applied. These are exemplified by selected areas of law that are discussed in detail. Two final sections of this part are dedicated to updates of annexes and challenges that Georgia, Moldova and Ukraine need to address in order to be capable to implement their Association Agreements.

7.2. Approximation of law under the Partnership and Cooperation Agreements

The PCAs with Georgia, Moldova and Ukraine contained the following provision on legislative approximation that requested the three countries to 'endeavour to ensure that its legislation will be gradually made compatible with that of the [Union] [emphasis added]'.⁶⁰⁴ The PCA law

⁶⁰³ R Petrov, 'Recent Developments in the Adaptation of Ukrainian Legislation to EU Law' (2003) 8(2) European Foreign Affairs Review 125.

⁶⁰⁴ Article 43 of the PCA with Georgia, Article 50 of the PCA with Moldova, Article 51 of the Ukraine PCA.

approximation framework was based on the best endeavour clause, which did not ‘by definition establish an obligation of result.’⁶⁰⁵ The PCAs identified areas of law of the then first pillar⁶⁰⁶ that the approximation of law should extend to and these are: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, public procurement, protection of health and life of humans, animals and plants, the environment, consumer protection, indirect taxation, technical rules and standards, nuclear laws and regulations, transport.⁶⁰⁷ This list of areas of approximation was similar to those used in Europe Agreements and Stabilisation and Association Agreements.⁶⁰⁸ Despite these similarities, the three Eastern Partnership countries have not been offered membership prospect what has made the approximation process more difficult to justify internally. Nevertheless the soft approximation commitment to adopt national laws and regulations compatible with EU law was accepted by them.⁶⁰⁹ Roman Petrov highlights that Ukraine has been regularly encouraged by the EU to accelerate its approximation process in order to increase its chances for progressive rapprochement with the EU. He also points out that a prospects of creation of a free trade area envisaged in the PCA, has made the approximation process a necessity.⁶¹⁰ However a number of issues have made the process difficult. Namely fragmentation of the approximation process, fragmentation of decision-making, technical issues such as problems with translation and adaptation of legislation reflecting changes and amendments of EU

⁶⁰⁵ C Hillion, ‘The EU’s Neighbourhood Policy Towards Eastern Europe’ in A Dashwood, M Maresceau (eds), (419) 320.

⁶⁰⁶ Treaty of Lisbon abolished the pillar structure. Areas of law identified in the PCA are now within the realm of TFEU.

⁶⁰⁷ Article 43 (2) of the PCA with Georgia, Article 50 (2) of the PCA with Moldova Article 51 (2) of the EU-Ukraine PCA.

⁶⁰⁸ Blockmans, *Tough Love. The European Union’s Relations with the Western Balkans* (n 84) 268.

⁶⁰⁹ V Muravyov, ‘Legal approximation: evidence from Ukraine, The European Neighbourhood Policy: A Framework for Modernisation?’ (Florence, European University Institute, 2006) 4.

⁶¹⁰ Petrov, *Recent Developments...* (n 603) 129.

secondary legislation. Some observers also point out that there are no clear criteria of evaluation of level of compliance of Ukrainian legal acts with EU law.⁶¹¹

7.3. Approximation of law within the European Neighbourhood Policy framework

The ENP has offered not only to support Georgia, Moldova and Ukraine in their efforts to meet the PCAs' obligations, but it also has offered support and has encouraged them to go further with approximation of legislation, norms and standards with EU acquis to use 'the opportunity for convergence of economic legislation, the opening of economies to each other, and the continued reduction of trade barriers which will stimulate investment and growth.'⁶¹² It is one of many ENP examples where non-legally binding instruments, such as Action Plans, are being used to enforce implementation of agreements concluded by the EU, its Member States and the ENP countries. Action Plan of 2004 contains general as well area specific measures aimed at moving the approximation forward.⁶¹³

⁶¹¹ I Kravchuk, 'Approximation of Ukrainian Law to EU Law. Basic Analysis' Comparative Law Center at the Ministry of Justice available at < <http://www.batory.org.pl/doc/k3.pdf> > accessed 17 July 2018.

⁶¹² EU-Ukraine Action Plan 2004, available at < <https://library.euneighbours.eu//content/eu-ukraine-action-plan-0>> accessed 10 September 2018.

⁶¹³ [Functioning market economy] Further advance in gradual approximation of basic legislative and regulatory framework to that of EU, and ensure its effective implementation: i) Implementation of a strategy for approximating legislation on priority areas identified under PCA§51, including improvement of quality and consistency of drafting; ii) On a basis of common understanding, finalise joint work for preparation of a scoreboard and on prioritisation for monitoring and assisting implementation; iii) Eliminate inconsistencies in the existing economic and civil codes. [Public Procurement] Continue approximation to EU legislation on public procurement in order to ensure effective implementation of the key principles of transparency, non-discrimination, competition and access to legal recourse. These principles should apply to procurement for goods, services and works across all relevant public bodies at all levels. [Social policy] to ensure a closer approximation of Ukraine to EU standards and practices in the

Furthermore, the negotiations of the Association Agreement triggered a preparatory process, which was noted by the EU-Ukraine Cooperation Council and reflected in the Association Agenda, where areas of law that require particular attention were identified. These included company law, corporate governance, auditing and accounting; sanitary and phytosanitary measures; taxation.⁶¹⁴ In 2011 Association Agenda was updated and minor changes in relation to

area of employment and social policy.

⁶¹⁴ [Company law, corporate governance, auditing and accounting] parties shall enhance their co-operation in all areas of company law corporate governance, accounting and auditing issues through exchanging experience and information about their best practice and their current regulatory frameworks and in particular: i) prepare for implementation of EU acquis included in annexes of the Association Agreement through progressive approximation of Ukraine company law legislation with the EU company law acquis; ii) by the development of administrative capacity of relevant state institutions; iii) improve functioning of company law through constant review, modernisation of relevant legislation and its application, including in particular the Joint Stock Company Law; iv) simplify rules and procedures on registration of legal persons, including companies, and natural persons, including entrepreneurs, to set up and liquidate business; v) develop further corporate governance policy and promote compliance with the code on corporate governance in line with international standards as well as gradual approximation with the EU rules and recommendations in this area; vi) introduce relevant international auditing standards at national level; vii) promote the application of international accounting standards by all listed companies at national level, notably by introducing a mechanism to this end. [sanitary and phytosanitary measures] i) develop a comprehensive strategy for reform of the SPS, food and feed, animal health and welfare policy of Ukraine. The strategy will include a time table involving intermediate stages and financing plan for its implementation and set clear priorities for areas in which rapid progress can be made. It will address, inter alia, legislative approximation, capacity building and implementation, among others in the area of food and feed safety, animal health and welfare, traceability, and audits exercised by the controlling bodies; ii) strengthen administrative capacity in these areas by: ii.i) reviewing the functions of the Ukrainian animal health and welfare, food and feed safety authorities with a view to compliance with the EC requirements (Regulation 882/2004/EC); ii.ii) training of staff of the Ukrainian competent authorities; o the development of laboratories towards EC requirements with special attention EU to make reference as in FTA given to the necessary equipment and appropriate methods of analysis (residue testing) and prepare for their accreditation in compliance with ISO standards. [taxation] i) elaborating and implementing a comprehensive strategic plan for the State Tax Administration, including structures, procedures, resources

law approximation were introduced. In the area of sanitary and phytosanitary measures requirements listed in 2009, the following tasks were added: organise information campaigns on rules and requirements on access to the EU market with relevant stakeholders and establishments; food and feed industry on the implementation of the Hazard Analysis Critical Control Point system. Also, the parties will establish a constant dialogue on sanitary and phytosanitary issues through existing mechanisms.⁶¹⁵ In case of taxation the following were added to the list of requirements: taking measures to harmonise policies in counteracting and fighting fraud and smuggling of excisable products; and developing cooperation with the tax administrations of EU Member States by exchanging new experiences and trends in the field of taxation. Company law, corporate governance, auditing and accounting requirements agreed in 2009 were repeated with no additional tasks added. There was also a new addition on the list of approximation. Ukraine gained a new task in relation to information society and needs to reform its 'legislation in the field of electronic communications.

The momentum of the Approximation Agenda was enhanced once parties identified the initialled Association Agreement as 'operational' and they commenced 'practical implementation.'⁶¹⁶ In June 2013 Association Agenda was reviewed and the following preparatory works were identified as enabling Ukraine to implement the Association Agreement:

and IT support; ii improving and simplifying tax legislation including, if necessary, its consolidation through codification; iii improving international tax cooperation in order to enhance good governance in the tax area, as described in the Association Agreement. In relation to fair tax competition, taking into account the principles of the EU Code of Conduct for Business Taxation; iv) improving capacity of the tax administration, in particular by moving towards a more focused, risk based system for tax control and audits; v) implementing a sustainable and swift solution to the VAT refund backlog.

⁶¹⁵ EU-Ukraine Association Agenda to prepare and facilitate the implementation of the Association Agreement.

⁶¹⁶ Third Joint Report of the Joint Committee of the EU-Ukraine Association Agenda to the EU-Ukraine Cooperation Council, November 2012.

- further work towards the approximation of legislation in the field of electronic communications with the EU acquis;
- gradual approximation of the Ukrainian SPS food and feed, plant health as well as animal health, and welfare legislation and practice to that of the European Union;
- gradual approximation to the taxation structure as laid down in the EU acquis set out in the relevant annex to the Association Agreement;⁶¹⁷
- progressive approximation of Ukraine company law legislation with the EU law acquis.⁶¹⁸

7.4. Approximation of law under the Association Agreements framework

The Association Agreement provides for enhancement of the EU relations with Georgia, Moldova and Ukraine by bringing all aspects of the cooperation into a single framework. This colossal integration framework is designed to enable their access to the EU Internal Market, and strongly depends on the course of law approximation. The Association Agreement model of approximation requires the three countries to move from voluntary approximation to obligatory one, where they ‘will carry out gradual approximation [emphasis added] of its legislation to EU law referred to in

⁶¹⁷ The following tasks in particular: improving and simplifying tax legislation including; improving international tax cooperation in order to enhance good governance in the tax area, as described in the envisaged Association Agreement. In relation to fair tax competition, taking into account the principles of the EU Code of Conduct for Business Taxation; improving capacity of the tax administration, in particular by moving towards a more focused, risk based system for tax control and audits; implementing a sustainable and swift solution to the VAT refund backlog; taking measures to harmonise policies in counteracting and fighting fraud and smuggling of excisable products; developing cooperation with the tax administrations of EU Member States by exchanging new experiences and trends in the field of taxation.

⁶¹⁸ EU-Ukraine Association Agenda endorsed by the EU-Ukraine Cooperation Council, Luxembourg, 24 June 2013.

Annexes I to XLIII, based on commitments identified in Titles IV, V and VI.⁶¹⁹ This provision establishes a stronger obligation than the one imposed on the Western Balkans countries,⁶²⁰ despite the clear objective of the Stabilisation and Association process to prepare these countries for the perspective of EU membership.⁶²¹

The Agreements provide for approximation of the three countries legislation in areas directly required for them to enter broad based trade and investment integration with the EU through establishment of the Deep and Comprehensive Free Trade Area. Legal approximation imposed on them is modelled on the pre-accession model,⁶²² however its scope is limited, as it does not cover the whole EU acquis. Areas of approximation are identified in three titles of the Agreement and relevant EU legislation is identified in annexes. The main characteristic of this model is its asymmetry, which translates here into different models of identification of the EU legislation that would set the standards that Georgia, Moldova and Ukraine need adapt in their respective legal systems (see further Ch VI where different models of law approximation are reviewed).

⁶¹⁹ Article 474 of the EU-Ukraine Association Agreement.

⁶²⁰ Article 70(1) of the Stabilisation and Association Agreement with Albania states: ‘The Parties recognise the importance of the approximation of Albania’s existing legislation to that of the Community and of its effective implementation. Albania **shall endeavour to ensure** [emphasis added] that its existing laws and future legislation shall be gradually made compatible with the Community acquis. Albania shall ensure that existing and future legislation shall be properly implemented and enforced.’

⁶²¹ Objective of the Stabilisation and Association process was presented in 2003: ‘The European Council, recalling its conclusions in Copenhagen (December 2002) and Brussels (March 2003), reiterated its determination to fully and effectively support the European perspective of the Western Balkan countries, which will become an integral part of the EU, once they meet the established criteria,’ European Council Presidency Conclusions 11638/03, Thessaloniki, 19-20 June 2003, 12.

⁶²² L Delcour, K Wolczuk, ‘Approximation of the national legislation of Eastern Partnership countries with EU legislation’ (Brussels, Directorate-General for External Policies of the Union, 2013) 9.

7.5. Updates of Annexes and monitoring mechanism

The method selected for the Association Agreements to present relevant EU legislation in annexes will require constant monitoring and updates to reflect the dynamic character of the relevant EU acquis.⁶²³ The Association Councils are given the task of updating and amending the annexes to reflect evolution of EU law and applicable standards set out in international instruments identified by the parties as relevant.⁶²⁴ This model falls into the static model of adaptation.⁶²⁵

At this stage it is worth to briefly outline the EEA model, which embodies the concept of a homogenous space.⁶²⁶ The homogeneity requires not only approximation, but goes further and therefore EFTA States are required to apply EU legislation relevant to the Internal Market and

⁶²³ R Petrov, 'The dynamic nature of the *acquis communautaire* in European Union external relations' (2006) 18(2) *Revue Européenne de Droit Public* 1.

⁶²⁴ Article 474 of the EU-Ukraine Association Agreement. The Trade Committee will do so in relation to legislation relevant to Title IV and its Annexes.

⁶²⁵ Adam Lazowski argues that '[t]he EEA machinery is generally considered to be a dynamic model. Each and every change to the *acquis* covered by the scope of the EEA Agreement requires action on the EEA side. The two static models are the Energy Community and the EC/EU-Swiss framework,' A Lazowski, 'Enhanced multilateralism and enhanced bilateralism: integration without membership in the European Union' (2008) 45 *Common Market Law Review* 1444.

⁶²⁶ Article 1 of the EEA Agreement states: 'The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties[...], with a view to creating a homogeneous European Economic Area [...].' In the Preamble to the Agreement the EEA is described as 'dynamic and homogeneous.' It needs to be noted that the legal character of the EEA differ from the of the EU, namely no transfer of legislative powers, no transfer of sovereign rights, limited loyalty clause, and therefore complete homogeneity will not be achieved, *Opinion 1/91* 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, ECR [1991] I-06079.

areas in which the EU-EFTA states agreed to cooperate closely, e.g. environment. The EFTA states are obliged to transpose relevant EU law to their national legal system.⁶²⁷ In order to reflect dynamic character of EU law,⁶²⁸ the EEA Agreement foresees a mechanism to ensure homogeneity and legal security of the EEA. The EEA Joint Committee is given power to take decisions to amend annexes to the Agreement to reflect amendments to EU legislation and to permit a simultaneous application of EU law and amendments of the Annexes.⁶²⁹ The decisions of the EEA Joint Committee are binding and the EFTA states are obliged to implement them.⁶³⁰ The mechanisms of the Association Agreements with Georgia, Moldova and Ukraine contain an element of similarity, however they are less stringent rules (e.g. information on new legislative acts) with more relaxed time frame that reflect the difference between the EEA and association model offered to Ukraine.

In order to achieve fulfilment of obligations arising from the Agreements, they require parties to work in accordance with the principle of sincere cooperation and take appropriate measures to reflect changes in EU legislation. Further details are provided in relation to regulatory approximation under trade and trade related titles.⁶³¹ The EU will keep partner countries and the

⁶²⁷Statistically it accounts to 65% of EU, over 1400 legal acts (160 regulations, 820 directives, 120 decisions and 300 non-binding acts), C Baudenbacher, 'Between homogeneity and independence: the legal position of the EFTA Court in the EEA' (1997) 3(2) *Columbia Journal of European Law* 176. For assessment of transposition of EU law to national legislation of the EEA-EFTA countries see eg M E Méndez-Pinedo, *EC and EEA Law* (n 580) at 118-120;

⁶²⁸ M Cremona, 'The 'dynamic and homogeneous' EEA: Byzantine structures and various geometry' (1994) 19 *European Law Review* 508 at 509.

⁶²⁹ Article 102 (1) of the EEA Agreement. The Agreement also provides for the EU to provide the Joint Committee as soon as possible of adoption of new legislative acts.

⁶³⁰ The necessary measures are in place to make sure that the EEA Joint Committee does not hold legislative powers. Article 103 of the EEA Agreement provides a procedure when implementation of decisions would require fulfilment of constitutional requirements of an EFTA state.

⁶³¹ Annex XVII to the EU-Ukraine Association Agreement.

Trade Committees regularly informed on all new and amended sector specific EU legislation. Following the notification, the Trade Committees have three months to add any new or amended EU legislative acts to the annexes to the Agreements. It is no surprise, given the scope of approximation, that the Association Agreements set monitoring mechanisms, which is defined as ‘assessments of approximation [and] continuous appraisal of progress in implementing and enforcing measures covered by the entire Agreement.’⁶³² Thus far, it is the most stringent of mechanisms embedded in an Association Agreement.⁶³³ It not only stresses the importance of approximation and implementation but enforcing measures are put with them on equal footing. Georgia, Moldova and Ukraine are obliged to report to the EU on progress in regulatory approximation to facilitate the assessment process. Timeframe of the reporting and assessment will depend on transitional periods, modalities and decisions of the Association institutions set in relation to particular section of the Agreements. The monitoring assessment goes beyond desk-based analysis of reports provided by Ukraine. Option of on-the-spot missions with ‘the participation of EU institutions, bodies and agencies, non-governmental bodies, supervisory authorities, independent experts and others as needed’⁶³⁴ seem to give an opportunity to access the approximation, implementation and enforcement activities in the three countries from different angles. However, it is not clear what role would these on-the-spot missions play, and more importantly what will happen with their findings, as the Agreement’s provisions do not clarify that. Furthermore, on-the-spot missions are not listed as activities that will be discussed by the relevant committees and bodies established by the Agreement. Therefore it can only be assumed that these missions will have a supplementary role to play, while activities such as reporting by Georgian, Moldovan and Ukrainian authorities on progress and assessment will serve the relevant bodies to

⁶³² Article 475 of the EU-Ukraine Association Agreement.

⁶³³ See eg Article 70 Albanian Stabilisation and Association Agreement; Article 73 Morocco Euro-Med Association Agreement.

⁶³⁴ Article 475(3) of the EU-Ukraine Association Agreement.

formulate joint recommendations for submission to the Association Councils. As these recommendations require unanimity, close cooperation between the parties will be required at every stage of the assessment process. Equally joint recommendations, decisions as well as failure to reach either of them cannot be subject of the dispute settlement envisaged in trade and trade related titles of the Agreements. In case of positive assessment confirming that all measures set in these titles, the Association Councils may decide on further opening of the market.⁶³⁵

The sectoral provisions support general monitoring provisions. The most detailed ones are given in Appendix XVII-6 on monitoring to ensure the correct application of Annex XVII on Regulatory Approximation in Financial Services, Telecommunications Services, Postal and Courier Services, International Maritime Transport Services. It provides details of each stage of assessment, including specification of reports that Ukrainian authorities are required to submit, confirmation that the formal assessment of the approximation should not prejudice the assessment of the effective enactment and enforcement as well details of the on-the-spot missions, which will be carried out with the cooperation of the competent Ukrainian authorities and may use the assistance of third parties at national or international level, as well as private organizations. As the element of cooperation is missing in the general provision on the-spot-missions, this sector related provision may indicate stronger persuasion of Ukrainian negotiators who wanted more involvement of its national authorities in the assessment process.

⁶³⁵ Article 475 (5) of the EU-Ukraine Association Agreement speaks of Association Council as the one making the decision, however Article 154 (2) states that the necessary assessment will be carried out by the Trade Committee: ‘The decision to proceed to a further phase of market opening shall be made on the basis of an assessment of the quality of the legislation adopted as well as its practical implementation. Such assessment shall be carried out regularly by the Trade Committee.’

8. *Application of conditionality*

8.1. *Introduction*

The interdependence between internal reforms, socio-economic transformation and democratisation of the EU neighbouring partners and the enhancement of the relations between the EU and its ENP partners forms one of the main characteristics of the ENP. Nevertheless, the concept of conditionality is not new and above all its origins had been developed for enlargement purposes long before it was adopted by the ENP.⁶³⁶

According to the general provisions of the Treaty on European Union, the Member States establish a Union ‘founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and man prevail.’⁶³⁷ The role played by values in strengthening ‘the Union’s identity, its self-perception and self-projection’⁶³⁸ has been applied in EU external relations. The evolution of application of values in external relations was marked by the Laeken declaration: ‘The European Union’s one boundary is democracy and human rights. The Union is open only to countries which uphold basic values such as free elections, respect for minorities and respect for the rule of law [...] the role [the EU] has to play is that of a power resolutely doing battle against all violence, all terror and all fanaticism.’⁶³⁹

⁶³⁶ K Inglis, ‘Pre-Accession Strategy and the Accession Partnerships’ in A Ott and K Inglis (eds), *European Enlargement Handbook* (The Hague, Asser Press, 2002) 103; Kochenov, *EU Enlargement and the Failure of Conditionality. Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (n 27).

⁶³⁷ Article 2 TEU.

⁶³⁸ Cremona, ‘Values in EU Foreign Policy’ (n 28) 275.

⁶³⁹ Laeken Declaration on the future of the European Union, Laeken 15 December 2001.

The European Security Strategy reiterated EU's commitment to 'an international order based on effective multilateralism' which in regional terms translates as '[a] task to promote a ring of well governed countries to the East of the European Union and on the borders of the Mediterranean with whom we can enjoy close and cooperative relations.'⁶⁴⁰

The Treaty of Lisbon provided for constitutionalisation of the EU's determination to promote its values and international law. The EU is committed to 'uphold and promote its values in its relations with the wider world.'⁶⁴¹ Article 21 TEU provides further specification on values in external relations stating that EU's international activities will be guided by the principles reflecting the values that inspired its own creation, development and enlargement.⁶⁴² Further characterisation of the role values ought to play in relations with neighbours is given in Article 8 TEU. This provision sets the aim of establishing an area of prosperity and good neighbourliness, founded on EU values. However, it should be emphasised it has been clear from the inception of the ENP that these values and their export play a vital role within the ENP's framework.⁶⁴³ The promotion of EU norms and standards to its neighbours, insistence on the neighbours' respect for the fundamental rights advocated by the EU developed into shared values which evolved even further to constitute an essential condition of gradual enhancement of the relations. Moreover, shared values also form an indispensable part of contractual relations between the EU and its neighbours. Shift towards promotion of common values, and not only EU values, was observed in 2008 when a review of implementation of the European Security Strategy was completed.

⁶⁴⁰ European Council, *A Secure Europe in A Better World*, European Security Strategy, (n 1).

⁶⁴¹ Article 3(5) TEU.

⁶⁴² This is a clear reference to arts. 2-3 and 6 TEU, and also general principles of law deriving from judgements of the Court of Justice of the EU.

⁶⁴³ Cremona, 'The European Neighbourhood Policy. More than Partnership?' (n 6) 256; Cremona, 'Values in EU Foreign Policy' (n 694) 275.

The Report on Implementation of the European Security Strategy confirmed that the relations with the neighbours covered by the ENP ‘should be based on respect for common values, notably human rights, democracy, and the rule of law, and market economic principles as well as on common interests and objectives.’⁶⁴⁴ The EU in its new response to a changing Neighbourhood of 2011 was very explicit in application of conditionality: ‘Increased EU support to its neighbours is conditional. It will depend on progress in building and consolidating democracy and respect for the rule of law.’⁶⁴⁵ The above mentioned Report also confirms the more-for-more approach: ‘The more and the faster a country progresses in its internal reforms, the more support it will get from the EU.’⁶⁴⁶ As noted by Peter Van Elsuwege and Roman Petrov ‘Despite the rhetoric of joint ownership, it is obvious that the Union is the dominant party in a relationship that is characterised by strict conditionality approach.’⁶⁴⁷ In case of Ukraine the use of conditionality has been visible from the very beginning of talks on potential enhancement of cooperation. To start with, Ukraine needed to meet the political criterion of holding free and fair parliamentary elections in 2006 to accelerate a free trade agreement. Furthermore, the World Trade Organisation membership was also a strict requirement to proceed with any further talks between the EU and Ukraine.⁶⁴⁸

⁶⁴⁴ Report on the Implementation of the European Security Strategy - Providing Security in a Changing World, S407/08, Brussels, 11 December 2008.

⁶⁴⁵ Joint Communication by the High Representative of the Union for Foreign Affairs and Security Policy and the European Commission, ‘A New Response to a Changing Neighbourhood, a review of European Neighbourhood Policy’ (n 160) 3.

⁶⁴⁶ *ibid.*

⁶⁴⁷ Van Elsuwege and Petrov, ‘Article 8...’ (n 20) 694.

⁶⁴⁸ Hillion, ‘Mapping-Out...’ (n 5) 181. The satisfactory outcome was noted by the EU-Ukraine Summit: ‘The [2006] elections showed that the consolidation of democracy and the freedom of speech had been key achievements of the past two years’, EU-Ukraine Summit, Joint Press Statement 14604/06 (Presse 297), Helsinki, 27 October 2006.

8.2. Conditionality under the Partnership and Cooperation Agreements

The tone of conditionality used in the PCAs is set in their Preamble, where importance of common values shared by the parties is acknowledged. Although common values are not named in this paragraph, further paragraphs of the Preamble voice parties conviction of ‘paramount importance of the rule of law and respect for human rights, particularly those of minorities, the establishment of a multiparty system with free and democratic elections and economic liberalization aimed at setting up a market economy.’⁶⁴⁹ This declaration is followed by the expression of the parties’ commitment to strengthening the political and economic freedoms seen as the very basis of the partnership. The role of commitment to human rights as well as political and economic freedoms are presented in Title I (General principles): ‘Respect for democratic principles and human rights as defined in particular in the Helsinki Final Act and the Charter of Paris for a New Europe, as well as the principles of market economy, including those enunciated in the documents of the CSCE Bonn Conference, underpin the internal and external policies of the Parties and constitute an essential element of partnership and of this Agreement.’⁶⁵⁰ As noted by Christophe Hillion this provision relates to a non-execution clause which states that violation of the essential element by any party represents material breach of the PCA, and ‘[a]s such, it is a “case of special urgency” which, in derogation from the rules attached to the dispute settlement mechanism established by the PCAs, allows the Party affected to suspend unilaterally the implementation of the Agreement.’⁶⁵¹ He called this ‘Bulgarian clause’⁶⁵² an exceptional procedure both in the context of

⁶⁴⁹ Preamble of the PCA with Ukraine.

⁶⁵⁰ Article 2 of the PCA with Ukraine.

⁶⁵¹ Hillion, ‘The evolving system of European Union external relations as evidenced in the EU Partnerships with Russia and Ukraine’ (n 25) 70.

⁶⁵² The term, as noted by Christophe Hillion was used for the first time by the Commission in its Communication on human rights in agreements with third countries. The ‘Bulgarian clause’ (‘which

dispute settlement procedures established by the PCAs as well as in view of public international law.⁶⁵³

8.3. Conditionality as an instrument of the ENP

The application of shared values⁶⁵⁴ in relations with Ukraine fulfils the ENP aim to use them as a conditionality tool. According to the European Commission ‘The level of the EU’s ambition in developing links with each partner through the ENP will take into account the extent to which common values are effectively shared [emphasis added].’⁶⁵⁵ The Action Plans contain a number of priorities intended to strengthen commitment to these values. These include strengthening

provides for appropriate measures should the parties fail to meet their obligations, following a consultation procedure ‘except in cases of special urgency’; this clause was used in the agreements with Romania, Bulgaria, the Russian Federation, Ukraine, Kyrgyzstan, Moldavia, the Czech Republic, Slovakia, Kazakhstan and Belarus’) contrasts with the ‘Baltic clause’ which refers to a specific suspension provision according to which: ‘the parties reserve the right to suspend this agreement in whole or in part with immediate effect if a serious violation occurs in the essential provisions of the present agreement’, see further Commission in its Communication on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries, COM (95) 216, Brussels 23 May 1995; H Cuyckens, ‘Human Rights Clauses in Agreements between the Community and Third Countries. The Case of the Cotonou Agreement’ (Leuven, Katholieke Universiteit, Institute of International Law Working Paper No 147, 2010) 24.

⁶⁵³ Hillion, ‘The evolving system of European Union external relations as evidenced in the EU Partnerships with Russia and Ukraine’ (n 25) 71.

⁶⁵⁴ ‘The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination. The Union’s aim is to promote peace, its values and the well-being of its peoples. In its relations with the wider world, it aims at upholding and promoting these values,’ European Commission, ‘European Neighbourhood Policy. Strategy COM (2004) 373 final, 12.

⁶⁵⁵ *ibid.*

democracy and the rule of law, the reform of the judiciary and the fight against corruption and organised crime; respect for human rights and fundamental freedoms, including freedom of media and expression, rights of minorities and children, gender equality, trade union rights and other core labour standards, and fight against the practice of torture and prevention of ill-treatment; support for the development of civil society; and co-operation with the International Criminal Court. Commitments are also sought on certain essential aspects of EU's external action, including, in particular, the fight against terrorism and the proliferation of weapons of mass destruction, as well as abidance by international law and efforts to achieve conflict resolution.⁶⁵⁶

8.4. Conditionality under the Association Agreements

The Agreements claim to strengthen the relationship between the parties in an ambitious and innovative way. By far the most ambitious elements of these Agreements depend on partners' performance and ability to meet all conditions that they required to address in order to achieve the desired levels of integration with the EU. There are a number of dimensions of conditionality applied in these Agreements. To start with, the Preambles set the scene by confirming common values that 'a close and lasting relationship [between the parties] is based on', namely respect for democratic principles, the rule of law, good governance, human rights and fundamental freedoms, including the rights of persons belonging to national minorities, non-discrimination of persons belonging to minorities and respect for diversity, human dignity and commitment to the principles of a free market economy.'

⁶⁵⁶ *ibid* 13.

These values are identified as a means that would facilitate partners' participation in the European policies. It gives a strong impression that respect for human rights and commitment to a free market economy are the only way to progress with European ambitions/aspirations of all three countries. In addition, the next paragraph expresses recognition of Ukraine as a European country⁶⁵⁷ that shares common values and is committed to their promotion. The Preamble also provides a clear statement that the political association and economic integration will depend on progress in the implementation of the Agreements and in political, legal and economic convergence with the EU, as well partners track record in ensuring respect for common values. This strikingly strong tone of conditionality is further supported by a reminder of conditions arising from the WTO membership; in particular the obligation of extensive regulatory approximation is stressed. Importance of gradual⁶⁵⁸ law approximation^{*} is also recognised and effective implementation is identified as the desired outcome of the process.

⁶⁵⁷ This confirmation of Ukraine's right to the name of a European country confirms country's aspirations and recognises negotiation efforts of Ukraine's officials and negotiation team. This issue remains a high-tension political matter as discussions regarding wording used in the Association Agreements with Moldova, Armenia and Georgia continue. It was reported that in the preamble of the Association Agreement with Georgia this country is referred to as 'an eastern European country that is committed to implementing and promoting EU values, such as democracy and rule of law.' This statement pursues the aim of differentiation of Eastern neighbours, which is coldly received by them, < <http://euobserver.com/enlargement/120789>> accessed 15 July 2018.

⁶⁵⁸ Long before the negotiation of the EU-Ukraine Association started, the Commission noted that the EU should 'to consider partners' ability to implement and sustain such agreements, as well as their level of ambition. Countries **will move** in this direction **gradually** and at different speeds, but it is important is to give them all the same perspective,' European Commission, 'Strengthening of the European Neighbourhood Policy' (n 357) 5. It's been echoed through the negotiation process and reflected in wording used in the Association Agreement.

* Different terminology is used to describe the same process of legal harmonisation.

Title II provides a clear statement setting up the criteria that the partner countries need to fulfil in order to progress with domestic reform and achieve deeper involvement into the European security area. The progress that the partner countries make will determine the EU's willingness to deepen the level of integration.⁶⁵⁹ One of the aims of the political dialogue is to strengthen respect for democratic principles, the rule of law and good governance, human rights and fundamental freedoms, including the rights of persons belonging to national ethnic minorities, non-discrimination of persons belonging to minorities and respect for diversity.⁶⁶⁰

The parties to the Agreements are also obliged to cooperate in order to ensure that their internal policies are based on principles common to them, in particular stability and effectiveness of democratic institutions and the rule of law and on respect for human rights and fundamental freedoms.⁶⁶¹ Cooperation in the field of the Foreign and Security Policy is based on common values while Georgia, Moldova, Ukraine and Member States confirm their commitment to the principles of respect for independence, sovereignty, territorial integrity and inviolability of borders as established in the UN Charter and the OSCE Helsinki Final Act and to promoting these principles in bilateral and multilateral relations.⁶⁶² Both acts are also referred to in the provision on regional stability.⁶⁶³

Title III on Justice, Freedom and Security sets commitments regarding the rule of law and respect for human rights. Article 14 of the Agreement states that parties in their cooperation in the field should attach particular importance to the consolidation of the rule of law and the

⁶⁵⁹ Cremona, 'The European Neighbourhood Policy. More than Partnership?' (n 6) 257.

⁶⁶⁰ Article 4.2(e) of the EU-Ukraine Association Agreement.

⁶⁶¹ Article 6 of the EU-Ukraine Association Agreement.

⁶⁶² Article 7 of the EU-Ukraine Association Agreement.

⁶⁶³ Article 9 of the EU-Ukraine Association Agreement.

reinforcement of institutions at all levels in the areas of administration in general and law enforcement, in particular in the administration of justice.⁶⁶⁴ This objective and its implementation will have a crucial impact on the whole association process. Success of the reforms of their judiciary and administration will influence law approximation process. Impartial and independent judiciary are a challenging task, which will require Ukrainian authorities to eagerly engage and commit to.

The conditionality applied in Titles IV-VI takes on the form of law approximation that all three countries are required to complete within the time frame agreed for the particular areas of law, in order to achieve further sectoral integration and compliance with EU standards necessary to obtain access to the EU's Internal Market. It is a strict conditionality and only satisfactory approximation of the EU acquis as well as institutional reform will enable establishment of the Deep and Comprehensive Free Trade Area, Economic and Sector Cooperation and Financial Cooperation. The details of the approximation of law are given in other sections of the thesis, however at this stage it would be useful to present an example of application of conditionality in its more-for-more form. Chapter 3 (Technical Barriers to Trade) of Title IV of the EU-Ukraine Association Agreements deals with 'the preparation, adoption and application of technical regulations, standards and conformity assessment procedures as defined in the Agreement on Technical Barriers to Trade⁶⁶⁵ that may affect trade in goods between parties.'⁶⁶⁶ Ukraine is obliged to gradually achieve conformity with EU technical regulations and EU standardisation, accreditation, conformity assessment procedures and the market surveillance system and to follow the principles and practices laid down in relevant EU decisions and regulations.⁶⁶⁷ Furthermore,

⁶⁶⁴ The respect for human rights and fundamental freedom is also to guide all cooperation on justice, freedom and security.

⁶⁶⁵ < http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf > accessed 10 September 2018.

⁶⁶⁶ Article 53 (1) of the EU-Ukraine Agreement.

⁶⁶⁷ Article 56 (1) of the EU-Ukraine Association Agreement. The following are identified in the Agreement's provision: Decision No 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a

once Ukraine meets all conditions specified in Annex III to the Agreement, parties will assess whether Ukrainian sectoral and horizontal legislation and institutions and standards have been fully aligned with those of the EU. Once the assessment will bring a positive outcome, parties agree to add an Agreement on Conformity Assessment and Acceptance (ACAA) of Industrial Products.⁶⁶⁸ It is a stringent set of conditions that Ukraine is required to meet in order to move to a phase when an ACAA can be negotiated and concluded.⁶⁶⁹

The overall assessment of the conditionality provisions confirms the asymmetrical character of the relations between the parties. The strict conditionality applied in the Agreements set the scene interchangeably. Georgia, Moldova and Ukraine will be able to progress with their European integration only by meeting all conditions laid down in the Agreements. Nevertheless, the EU also faces a challenge as well. Not only is it a matter of providing these countries with support but also a matter of developing scenarios for the eventuality of non-compliance, lack of democratic reform, satisfactory law approximation. It is overall a challenge that the EU struggles to address at present in relation to its Southern neighbours.⁶⁷⁰

common framework for the marketing of products [2008] OJ L263/12; and repealing Council Decision 93/465/EEC and Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 [2008] OJ L218/30.

⁶⁶⁸ Article 57 of the EU-Ukraine Association Agreement.

⁶⁶⁹ European Commission, 'Agreements on Conformity Assessment and Acceptance of Industrial Products' SEC (2004) 1071, Brussels, 25 August 2004.

⁶⁷⁰ Wouters and Duquet, The Arab uprisings and the European Union: in search of a comprehensive strategy, in G Fernández Arribas, K Pieters and T Takács (eds) (n 156) at 26-31.

9. Entry into force of the Association Agreements

It is expected that the ratification process of the EU-Ukraine Association Agreement will take a number of years before the whole Agreement could enter into force. Therefore, it was expected that ‘an Interim Agreement will enter into force significantly earlier [emphasis added].’⁶⁷¹ Although originally conclusion of an Interim Agreement seemed like the most probable scenario, the ultimately selected option gives way to a new approach. The Proposal of a Council Decision on the signing of the Agreement⁶⁷² confirms that there will be no Interim Agreement as parties agreed that selected parts of the Association Agreement will enter into force immediately after ratification of the Agreement by the Council of the EU and Ukrainian Parliament (Verkhovna Rada). The following sections of the Association Agreement will be applied provisionally:

- Title I;
- Title II;
- Title III: Articles 14 (the rule of law and respect for human rights and fundamental freedoms), 15 (protection of personal data), 19-22 (provisions on movement of persons; money laundering and terrorism financing; cooperation on the fight against illicit drugs, on precursors and psychotropic substances; fight against crime and corruption);
- Title IV;
- Title V: Chapter 1 (with the exception of Article 342 (cooperation in the civil nuclear

⁶⁷¹ It is expected that the ratification process of the EU-Ukraine Association Agreement will take years before the full Agreement can enter into force. It is however expected that ‘an Interim Agreement covering the Community aspects of the Agreement will enter into force significantly earlier’ [emphasis added], EU-Ukraine Association Agenda, EU-Ukraine Cooperation Council, 23-24 November 2009.

⁶⁷² Proposal for a Council Decision on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and its Members States, of the one part, and Ukraine of the other part, Brussels 15 May 2013, COM (2013) 289 final.

sector)), Chapters 6 (environment), 7 (transport), 12 (financial services), 17 (agriculture and rural development), 18 (fisheries and maritime policy), 20 (consumer protection), 26 (civil society cooperation), 28 (participation in European Union agencies and programmes), and Article 353 (gradual approximation to the excise taxation structure) and Article 428 (gradual approximation of legislation and practice regarding communicable diseases, blood tissues and cells and tobacco);⁶⁷³

- Title VI;
- Title VII, with the exception of Article 479(1), in so far as necessary for the provisional application of this Agreement;⁶⁷⁴
- Annexes I to XXVI, Annex XXVII, with the exception of nuclear issues, Annexes XXVIII to XXXVI, XXXVIII to XLI, XLIII and XLIV as well as the Protocols I to III.

⁶⁷³ The following decisions need to be implemented **by the date of entry into force of the Agreement**: Decision 2119/98/EC of the European Parliament and of the Council of 24 September 1998 setting up a network for the epidemiological surveillance and control of communicable diseases in the Community, [1998] OJ L268/1; Commission Decision 2000/96/EC of 22 December 1999 on the communicable diseases to be progressively covered by the Community network under Decision No 2119/98/EC of the European Parliament and of the Council [2000] OJ L28/50; Commission Decision 2002/253/EC of 19 March 2002 laying down case definitions for reporting communicable diseases to the Community network under Decision No 2119/98/EC of the European Parliament and of the Council [2002] OJ L86/44. It needs to be noted that there is lack of consistency in relation to approximation in this area of law [public health]. Although Article 428 of the EU-Ukraine Association Agreement sets basis for gradual approximation, timetable given in Annex XL requires implementation of these three decisions by the time the Agreements enters into force. This way no time for gradual approach is given.

⁶⁷⁴ Article 479 (1) of the EU-Ukraine Association Agreement repeals the PCA.

10. Towards associated membership

Although the new generation of Association Agreements when analysed strictly in the ENP/EaP context can be regarded as the most comprehensive, ambitious and complex of Association Agreements,⁶⁷⁵ nevertheless their character should also be evaluated in a broader context. They certainly are comprehensive and their innovative character is expressed through an introduction of a single framework covering in great depth all areas of EU relations with its three EaP neighbours. It is worthwhile to recall the EEA since an idea of EEA plus model for the ENP countries was considered.⁶⁷⁶ The establishment of the EEA was considered as an alternative to EU membership,⁶⁷⁷ and as a result the EEA Agreement was concluded providing legal and institutional framework for the highest level of integration model.⁶⁷⁸ The EEA Agreement is a multilateral

⁶⁷⁵ Sushko and Zielinska (eds), *EU-Ukraine Association Agreement: Guideline for Reforms* (n 526) 6. Official EU publications are also not free of presenting the EU-Ukraine Association Agreement/DCFTA as the most ambitious bilateral agreement that the EU has ever negotiated with a third country, eg Newsletter of the EU Delegation to Ukraine, No 102/2013; Overview of the EU-Ukraine DFTA, European Commission, Brussels 2013.

⁶⁷⁶ '[The European Parliament] [w]elcomes the re-launch, within the framework of the EU, of the "Barcelona Process: A Union for the Mediterranean" as a positive step in our relations with the southern neighbours; believes that this new development strengthens the argument in favour of specific contractual multilateral relations also with our eastern neighbours, which, compared to their southern partners, have clear European ambitions and perspectives; recalls that, as a first step, these relations should translate themselves into the establishment of a Free Trade Area, to be followed by closer relations along the lines of a European Economic Area Plus (EEA +), of a European Commonwealth or of specific regional cooperation frameworks,' European Parliament Resolution on the Commission's 2007 enlargement strategy paper (2007/2271(INI)), n. 20.

⁶⁷⁷ Cremona, 'The 'dynamic and homogeneous' EEA' (n 628) 508.

⁶⁷⁸ The EEA model raised a number of issues related to the autonomy of the EU institutions and balance of power, extent to which the EFTA states will get 'insider access'. Furthermore, 'the EEA was neither intended to have supranational character of the [TEU], nor was it meant to force the EFTA states to

Association Agreement, which provides for a creation of dynamic and homogeneous legal space, where the EFTA states have an obligation to apply the Internal Market acquis falling within the scope of the EEA Agreement.⁶⁷⁹ Furthermore close cooperation of the EU-EFTA states in the fields of ‘research and development, the environment, education and social policy’⁶⁸⁰ is required in order to attain the objectives of the Agreement. The EEA model of integration requires all new and amended Internal Market acquis to be incorporated almost automatically⁶⁸¹ into the framework of the EEA Agreement. The institutional system established by the EEA Agreement and the EFTA Surveillance Authority and EFTA Court Agreement supports not only this ambitious task of homogeneity, but also addresses matters of constitutional requirements of the EFTA states. In order to meet these complex tasks a two-pillar institutional structure was established.⁶⁸² There are joint EU-EFTA states institutions, namely the EEA Council,⁶⁸³ the EEA Joint Committee,⁶⁸⁴ the

surrender sovereignty rights or impinge on the autonomy of [EU] law,’ Baudenbacher, ‘Between homogeneity and independence’ (n 628) 176.

⁶⁷⁹ ‘[O]ne of the principal aims of the EEA Agreement is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area, so that the internal market established within the European Union is extended to the EFTA States. From that angle, several provisions of the abovementioned Agreement are intended to ensure as uniform an interpretation as possible thereof throughout the EEA,’ Case C-452/01, *Proceedings brought by Margarethe Ospelt and Schlössle Weissenberg Familienstiftung*, ECR [2003] I-9743, 29.

⁶⁸⁰ Article 1(f) of the EEA Agreement.

⁶⁸¹ ‘Automatic application is not envisaged’, Cremona, ‘The dynamic...’ (n 684) 521.

⁶⁸² As well as to address issues raised by the CJEU in its *Opinion 1/91*.

⁶⁸³ The EEA Council, composed of members of the Council of the EU, members of the Commission and of one member of each of the EFTA states (Article 90(1) of the EEA Agreement), is responsible ‘for giving the political impetus to the implementation of the Agreement and laying down general guidelines to the EEA Joint Committee, Article 89 (1) of the EEA Agreement.

⁶⁸⁴ The EEA Joint Committee, composed of representatives of EFTA states, the Commission and EU member states, ensures ‘the effective implementation and operation of the Agreement, Article 92 (1) of the EEA Agreement.

Joint Parliamentary Committee,⁶⁸⁵ and the EEA Consultative Committee.⁶⁸⁶ There are also two tailor made institutions for the EEA-EFTA states. The EFTA Surveillance Authority, ‘the enforcement body, paralleling, to the extent necessary, the Commission’s tasks’⁶⁸⁷ is an independent body that ensures that the EFTA states fulfil their obligations.⁶⁸⁸ Furthermore, the EEA has a separate judicial authority – EFTA Court with powers to deliver binding decisions in cases of infringement procedures initiated by the EFTA Surveillance Authority against the EFTA states related to the EEA Agreement, to settle disputes between two or more EFTA states, to hear appeals against the EFTA Surveillance Authority decisions.⁶⁸⁹ The EFTA Court also provides advisory opinions to the national courts of the EFTA states on interpretation of the EEA Agreement. It should also be noted that the EFTA states enjoy limited but access to EU decision-making process.⁶⁹⁰

The EEA model of integration can be clearly placed between EU membership and association. Some scholars speak of quasi membership to reflect the high degree of integration

⁶⁸⁵ The Joint Parliamentary Committee, composed of members of the European Parliament and members of national parliaments of the EFTA states, contributes to dialogue and debate in relation to the Agreement, Article 95 (3) of the EEA Agreement.

⁶⁸⁶ The EEA Consultative Committee, composed of members of the European Economic and Social Committee and members of the EFTA Consultative Committee, is given task to strengthen contacts between EU and EFTA social partners in order to enhance the awareness of the economic and social aspects of the growing interdependence of the economies of the EEA members, Article 96 (1) of the EEA Agreement.

⁶⁸⁷ B Brandtner, ‘The ‘Drama’ of the EEA. Comments on Opinion 1/91 and 1/92’ (1993) 3 *European Journal of International Law* 303.

⁶⁸⁸ Article 108(1) of the EEA Agreement.

⁶⁸⁹ Article 108(2) of the EEA Agreement.

⁶⁹⁰ T van Stiphout, ‘Homogeneity vs. Decision-Making Autonomy in the EEA Agreement’ (2007) 9(3) *European Journal of Law Reform* 434; A Lazowski, ‘EEA countries’ in S Blockmans and A Lazowski (eds), *The European Union and Its Neighbours. A legal appraisal of the EU’s policies of stabilisation, partnership and integration* (The Hague, TMC Asser Press, 2006) 119.

and its comprehensive model of association.⁶⁹¹ Although such classification would put these agreements at a lower level of integration, nevertheless there are high expectations that these Agreements are expected to meet. In particular, they are considered a mean that would enable a qualitative improvement of the EU relations with Ukraine, Moldova and Georgia. It will enable a gradual transition from partnership to association. Establishment of the association can be interpreted as recognition of their European aspirations. The aims of the Association Agreements form an ambitious desire to strengthen and widen their relations with the EU in an innovative way. In political terms, the agreements focus on acceleration of the deepening of association, and in economic terms – the ultimate goal is to establish Deep and Comprehensive Free Trade Areas and provide all three countries with gradual access to the Internal Market.

It needs to be noted that existing and future sectoral agreements will remain in force.⁶⁹² They give parties more flexibility to amend such agreements to reflect progress in their relations eg Agreement between the European Union and Ukraine amending the Agreement between the European Community and Ukraine on the facilitation of the issuance of visas.⁶⁹³

The impact of the Association Agreement goes beyond bilateral relations of the EU with the three EaP countries, and therefore a lot is at stake. These are first new generation Association Agreements, that the EU concludes with countries covered by the ENP policy, and therefore a

⁶⁹¹ S Lavenex, 'EU external governance in 'wider Europe'' (2004) 11(4) *Journal of European Public Policy* 683; J Jonsdottir, *Europeanization and the European Economic Area. Iceland's participation in the EU's policy process* (London, Routledge, 2013) at 2 and 20.

⁶⁹² Article 479 (4) of the EU-Ukraine Association Agreement confirms: 'Existing agreements relating to specific areas of cooperation falling within the scope of this Agreement shall be considered part of the overall bilateral relations as governed by this Agreement and as forming part of a common institutional framework.'

⁶⁹³ [2013] OJ L168/11.

number of factors and impact dimensions need to be examined. This chapter attempts to explain the key role of these agreements in the development of the European Neighbourhood Policy. Should it be classified as a useful tool in the development of the policy, or is it a measure applied in relations with neighbours to meet expectations and needs reaching beyond objectives of the ENP? A question on who will be the beneficiary of success or failure of the implementation process of the ambitious tasks given to Ukraine needs to be remembered while conducting the analysis. The challenge ahead has also a broader impact on other Eastern neighbours.

11. Conclusions

The Association Agreements address the ambitious aim ‘to develop and implement a coherent policy’.⁶⁹⁴ However, the biggest challenge for all parties to the Agreement lies in its implementation. The way commitments to gradual approximation are presented in the DCFTA distinguishes this new generation agreement from those concluded in the past. Until this model of free trade agreements was introduced, there was no such strong link between establishment of a free trade area and law approximation.⁶⁹⁵ Therefore, a growing role of conditionality cannot go unnoticed. It may be that the Association Agreement with Georgia, Moldova and Ukraine will introduce new type of mixity. In this case, mixity refers to flexibility of an Association Agreement known from previous agreements concluded by the EU and conditionality adopted from the enlargement process. This way, this new model of association can fall between the EEA model and the Europe Agreements and Stabilisation and Association Agreements, and become an alternative to EU membership. Overall the success of the Association Agreement will depend on how well Ukraine

⁶⁹⁴ Cremona, ‘The European Neighbourhood Policy. More than Partnership?’ (n 6) 246.

⁶⁹⁵ Sushko and Zielinska (eds), *EU-Ukraine Association Agreement: Guideline for Reforms* (n 526) 23.

will be able to meet all of the complex set of obligations that will have political, economic, legal and social implications. For the EU it will be a test whether this new model of contractual relations can, not only serve as a way to promote common values, lead to further democratisation of the neighbouring country but also sculpt a model of cooperation where enhanced economic ties and promotion of market economy depend directly on successful law approximation and implementation. It can be argued that the combination of strict conditionality, where gradual more-for-more approach serves as a ground to develop economic ties, will become the guarantor of stability and security. This three-fold approach (law approximation – economic integration – stability and security of the EU neighbourhood) could be regarded as a means to establish an area of prosperity founded on the values of the EU. This theoretical assessment will definitely be challenged by the reality and new developments that will – no doubt – critically put the Association Agreement to the test. The experience of setting up the EU-Ukraine DCFTA serves a template that is being used in negotiations with North African states such as Egypt, Morocco and Tunisia.⁶⁹⁶

The findings of this chapter set the scene for the next part of the thesis. Chapter VI looks further at the role of law approximation and its function as an integration tool. The history of the EU's relations with its neighbours indicate that a close form of cooperation can be achieved once the EU law standards are not only shared by others, but adopted as their own. This is yet another confirmation that the EU law system is unique and gives the EU an opportunity to strengthen its position of the normative power.

⁶⁹⁶ See eg the details of trade negotiations with Morocco. European Parliament, Policy Brief, PE491/509 (Brussels, 2013).

Table I: DCFTAs provisions of the EU-Ukraine, EU-Moldova and EU-Georgia Association Agreements

CHAPTER NO	TITLE	SCOPE
1	National treatment and market access for goods	<p>These sections foresee removal of customs duties on imports and export. Parties can consider accelerating and broadening the scope of elimination of customs duties. Chapter 1 incorporates WTO rules on non-tariff measures. Trade in agricultural products will be liberalised subject to quotas for sensitive agricultural products,⁶⁹⁷ and exception of garlic.</p> <p>Rules of origin are set out in Protocol I to the EU-Ukraine and EU-Georgia AA, and Protocol II of the EU-Moldova AA.</p> <p>Article 31 of the EU-Ukraine AA provides Ukraine with a mechanism to apply safeguarding measures ‘in the form of a surcharge to the export duty on the goods listed in Annex I-D.’ Ukraine can use it for a maximum of 15 years since entry into force of the Agreement.</p> <p>It is expected that abolition or reduction of duties will be applied to 98-99.9% tariff lines.⁶⁹⁸</p>
2	Trade remedies	<p>These chapters provide provisions on anti-dumping, anti-subsidy and safeguard measures. Transparency mechanisms include notifications and opportunities for consultation.</p> <p>The EU-Ukraine AA contains rules allowing Ukraine to apply safeguard measures to car imports.⁶⁹⁹</p>
3	Technical Barriers to Trade (TBT)	<p>These chapters provide for preparation, adoption and application of technical regulations and standards in accordance with (WTO) Agreement on Technical Barriers to Trade.⁷⁰⁰ Their successful implementation will directly depend on the three countries ability to meet law approximation requirements and their willingness to improve public administration to gradually achieve compliance with EU technical standards and procedures. The scope of approximation is determined in Annexes to the Agreements. The parties also agree to conclude</p>

⁶⁹⁷ Duty free quotas are set for products eggs, poultry, grain to meet requirements imposed by the mechanism of the Common Agriculture Policy, Dabrowski, Taran, (469) 20.

⁶⁹⁸ European Commission, ‘EU-Ukraine Deep and Comprehensive Free Trade Area’ (Brussels, 2013) 1.

⁶⁹⁹ Article 44 of the Association Agreement. This provision is considered to be a result of successful lobbying of Ukrainian car industry, Dabrowski, Taran (n 469) 20.

⁷⁰⁰ Article 53 of the EU-Ukraine Association Agreement, Article 45 of the EU-Georgia Association Agreement and Article 171 of the EU-Moldova Association Agreement.

		Agreements on Conformity Assessment and Acceptance (ACAAs) of Industrial Products, which means that trade in goods in the sectors that these ACAAs cover will take place under the same conditions as those applying to trade in such goods between Member States of the European Union. ⁷⁰¹
4	Sanitary and Phytosanitary Measures (SPS)	These chapters contain challenging objectives to ensure full transparency of sanitary and phytosanitary measures applicable to trade, further implementation of the principles of the SPS Agreement, ⁷⁰² establishment of a mechanism for the recognition of equivalence of sanitary or phytosanitary measures and establishment of mechanisms and procedures for trade facilitation. The approximation of the Ukrainian, Georgian and Moldovan legislative systems to that of the EU will play the vital role in the process.
5	Customs and trade facilitation	In these chapters conditions to enhance cooperation in relation to customs, their simplification as well as establishment of mechanisms to enable parties to prevent fraudulent acts ⁷⁰³ are outlined. They depend on progress of all three countries with gradual approximation of their legislation to EU customs legislation. ⁷⁰⁴
6	Establishment, Trade in Services and Electronic Commerce	These chapters provide for progressive reciprocal liberalisation of conditions for establishment, trade in services and for cooperation on e-commerce. ⁷⁰⁵ The scope of these provisions differ from similar provisions in traditional free trade agreements as it not only covers freedom of establishment in services and non-services sector, but it also gives Ukraine, Georgia and Moldova an opportunity to have access to the Internal Market once relevant EU acquis is adopted and implemented. ⁷⁰⁶ This is a novelty in terms of progressive integration that is offered to an ENP country. Section 2 of the Chapter contains a list of

⁷⁰¹ Article 57 of the EU-Ukraine Association Agreement, Article 48 of the EU-Georgia Association Agreement, Article 174 of the EU-Moldova Association Agreement.

⁷⁰² Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures, contained in Annex 1A to the WTO Agreement < http://www.wto.org/english/docs_e/legal_e/15sps_01_e.htm> accessed 10 September 2018.

⁷⁰³ Article 75 of the EU-Ukraine Association Agreement, Article 66 of the EU-Georgia Association Agreement and Article 192 of the EU-Moldova Association Agreement.

⁷⁰⁴ Article 84 of the EU-Ukraine Association Agreement, Article 75 of the EU-Georgia Association Agreement and Article 201 of the EU-Moldova Association Agreement.

⁷⁰⁵ Eg Article 114 of the EU-Ukraine Association Agreement, Article 113 and 122 of the EU-Georgia Association Agreement and Article 240 of the EU-Moldova Association Agreement.

⁷⁰⁶ EU-Ukraine Deep and Comprehensive Free Trade Area, European Commission, Brussels 2013, p. 4.

		economic activities not covered by the right of establishment. ⁷⁰⁷ This Chapter also enables liberalisation entry measures applied to certain categories of independent professionals e.g. legal services, architectural services and translation services. Article 114 (Postal and Courier Services), Article 124 (Electronic Communications), Article 133 (Financial Services), Article 137 (Transport) set rules of regulatory approximation that will start on the date of signing of the Association Agreements.
7	Current Payments and Movement of Capital	These chapters outline rules of free movement of capital.
8	Public Procurement	Here rule of reciprocal access to public procurement markets. Ukraine, Georgia and Moldova are obliged to progressively approximate their legislation on public procurement to EU legislation and use terms and definitions used in Directive 2004/18/EC and Directive 2004/17/EC. ⁷⁰⁸ They also need to identify authorities that would be in charge of consistent policy on public procurement covering law harmonisation as well as guaranteeing independent and transparent management of the public procurement sector. ⁷⁰⁹ This is an unprecedented provision in an agreement that will be concluded with a non-EEA country.
9	Intellectual Property	These chapters aim at facilitation of production and commercialisation of innovative and creative products and achievement of adequate and effective level of protection and enforcement of intellectual property rights (copyright, trademarks, designs, patents and geographic indications).
10	Competition	These provisions provide for elimination of anti-competitive practices based on respect of fairness. Ukraine needs to adopt EU legislation in relation to competition as well as establish a system of control of state aid mirroring EU standards in the field.

⁷⁰⁷ There are five groups of activities and include *inter alia* mining and processing of nuclear materials, production of or trade in arms, munitions and war material, audio-visual services, domestic and international air transport services.

⁷⁰⁸ In December 2011 the Commission commenced the programme of revision of both directives to reform legislation on public procurement. This reform is one priority actions of the Twelve projects for the 2012 Single Market: together for new growth, European Commission Press Release IP/11/1580, Brussels 20 December 2011.

⁷⁰⁹ Sushko and Zielinska (eds), *EU-Ukraine Association Agreement: Guideline for Reforms* (n 526) 30.

11	Trade-related Energy	These chapters are a new characteristic of DCFTA and have not been present in free trade agreements. It is the very first group of free trade agreements containing chapters dedicated to energy. ⁷¹⁰ It is equally a confirmation of the external dimension of the EU's energy policy. ⁷¹¹ The EU has an interest in modernisation, stabilisation and regulation of all three countries energy sector driven by the objectives of the policy expressed in the Europe 2020 Strategy ⁷¹² but also by interests of the Member States depending on energy transiting Ukraine. ⁷¹³ Chapter's provisions cover electricity, gas and crude oil and sets measures to be applied in case of disruptions in supply of energy. It also provides for domestic price regulation, sets up an early warning mechanism,
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⁷¹⁰ For instance, in the Europe Agreements contained general provisions devoted to energy that identified the scope of cooperation enabling parties to develop progressive market economy integration, including aspects of the energy policy that parties should focus on, e.g. the environmental impact of energy production and consumption, see Article 78 of the EA with Poland. The Euro-Mediterranean Association Agreements provide a very limited provision on cooperation in relation to energy. Article 57 of the Agreement with Morocco provides a list of areas that parties need to focus their cooperation on, such as renewable energy and promotion of energy saving. The EU-Chile Association Agreement also contains a general provision on energy. Article 22 of the Agreement names the consolidation of economic relations in key sectors such as hydroelectricity, oil and gas, renewable energy, energy-saving technology and rural electrification as the aim of the cooperation on energy. It also provides a non-exhaustive list of objectives of cooperation in the energy sector.

⁷¹¹ R Petrov, 'Energy Community as a Promoter of the European Union's 'Energy Acquis' to Its Neighbourhood' (2012) 3 *Legal Issues of Economic Integration* 333.

⁷¹² Energy 2020. A strategy for competitive, sustainable and secure energy, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2010) 639 final, Brussels, 10 November 2010.

⁷¹³ 'Ukraine is the most important country in the world for gas and oil transit. Around 80% of Russian gas exports and around 15% of Russian oil exports to Europe transit the country', see further A Mayhew, 'The Economic and Financial Crisis: impacts on an emerging economy – Ukraine' (Brighton, University of Sussex, Sussex European Institute, SEI Working Paper No 115, 2010) 31. Nevertheless a rather surprising insight can also be found: 'individual governments of the EU Member States often favour increasing Russia's control over transit on Ukrainian territory with the aim of avoiding possible conflicts and interruptions in the supply of gas. Russian influence on the modernization of Ukrainian GTS is very strong politically, which leads to growing Russian control over economic and political developments in Ukraine', A Duleba, V Bilčík (eds), 'Taking stock of the Eastern Partnership in Ukraine, Moldova, Visegrad Four, and the EU' (Bratislava, Slovak Foreign Policy Association, 2011) 41.

		encourages transit facilitation (consistent with the principle of freedom of transit as well as GATT and the Energy Charter Treaty rules) and domestic energy pricing to be transparent and market driven. All three countries are obliged to have an impartial and independent regulatory authority that will be empowered ‘to ensure effective competition and the efficient functioning of the market.’ ⁷¹⁴ They also required to set up an appeal mechanism for those affected by the decision of a regulatory authority. The Chapter of the EU-Ukraine Association Agreement also contains rules on access to and exercise of the activities of prospecting, exploring and producing hydrocarbons. ⁷¹⁵ Moreover, there are provisions on relationship between the Association Agreements and the Energy Community Treaty. ⁷¹⁶
12	Transparency	Here basis for parties to develop mechanisms ensuring transparency, including setting up and maintaining review and appeal structures are given.
13	Trade and Sustainable Development	These chapters aim to ensure that economic development, environmental and social policies are mutually supportive and commits parties to respect labour standards of the International Labour Organisation and obligations stem from international agreements.
14	Dispute Settlement	These sections provide rules of settling in good faith any dispute between the parties regarding application and interpretation of provisions of the Agreement. Proposed dispute settlement mechanism is based on the WTO Dispute Settlement Understanding. Rules of consultations and arbitration procedures are provided. There is also a section on compliance with the arbitration panel ruling.
15	Mediation mechanism	This chapter of the EU-Ukraine Association Agreement establishes a mediation mechanism.
15	General provisions on approximation	In the EU-Georgia and EU-Moldova Association Agreements Chapter 15 is devoted to provide general framework for law approximation.

⁷¹⁴ Article 215 of the EU-Georgia Association Agreement, Article 353 of the EU-Moldova Association Agreement and Article 277 of the EU-Ukraine Association Agreement.

⁷¹⁵ Articles 279-280 of the EU-Ukraine Association Agreement.

⁷¹⁶ Article 218 of the EU-Georgia Association Agreement, Article 354 of the EU-Moldova Association Agreement, Article 278 of the EU-Ukraine Association Agreement.

Chapter VI
Law approximation

1. Introduction

Approximation of laws can be described as a reforming tool of the legal systems that, in case of the European Neighbourhood Policy (ENP) countries, leads not only to in-depth reforms of the laws but also to transformation of economies, strengthening of democracy and modernisation.⁷¹⁷ Law approximation is regarded as completed once these legal orders are substantially similar to the EU legislation.⁷¹⁸

There is no one size fits all approach to approximation in EU external relations. The EU has developed several frameworks to accommodate different models of integration offered to neighbouring countries: from progressive integration and accession to the EU (enlargement process),⁷¹⁹ through establishment of the European Economic Area (EEA)⁷²⁰ to less stringent

⁷¹⁷ K Wolczuk, L Delcour, R Dragneva, K Maniokas, D Žeruolis, 'The Association Agreements as a Dynamic Framework: Between Modernization and Integration?' (Berlin, EU-STRAT Working Paper Series No 6, 2017) 13.

⁷¹⁸ G Harpaz, 'Approximation of Laws in the EU-Med Context: A Realist Perspective' (2007) IX(3) European Journal of Law Reform 394. Aaron Matta provides conceptual origins and legal context of the term 'approximation,' A Matta, 'Differentiating the methods of aquis export: the case of the Eastern neighbourhood and Russia' in P Van Elsuwege, R Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union. Towards a Common Regulatory Space?* (London-New York, Routledge, 2014) 21.

⁷¹⁹ See eg A E Kellermann, J Czuczai, S Blockmans, A Albi, W Douma (eds), *The Impact of EU Accession on the Legal Orders of New EU Member States and (Pre-) Candidate Countries* (The Hague, TMC Asser Press, 2006).

⁷²⁰ See eg C Archer, *Norway outside of the European Union* (London-New York, Routledge, 2005).

models envisaged by the Partnership and Cooperation Agreements (PCAs)⁷²¹ and the Euro-Mediterranean Agreements.⁷²²

The most recent addition to this catalogue of different models of law approximation is encapsulated in the new generation of Association Agreements (AAs). The details of the law approximation model used in the AAs were addressed in Ch V, and therefore in order to better understand the nature of this model of approximation, it is fitting to review it against other models of approximation; eg the pre-accession and the EEA models. The comparative elements of this Chapter are based on a similar approach to that applied in Chapter II, where forms of the EU's relations with its neighborhood are reviewed to identify the place of the new generation of Association Agreements within the framework of the bilateral agreements concluded by the EU with its neighbours. This approach offers the foundations for a critical review of this model of law approximation. The Chapter does not offer a comprehensive assessment of all aspects of the law approximation requirements of the AAs. This would go beyond the scope of this work. Instead, the focus is on carefully selected features of this model of approximation and its feasibility in the three associated countries.

The Chapter is organised in the following order. After the introductory remarks, the notion of law approximation is discussed in Section 2. It is followed by a section dedicated to the role of approximation of laws as a conditionality tool. Section 4 is devoted to the law approximation requirements laid down in the new generation of Association Agreements. Its subsections provide

⁷²¹ See eg R Dragneva and K Wolczuk, 'Russia, the Eurasian Customs Union and the EU: cooperation, stagnation or rivalry?' (London, Chatham House, Briefing Paper, 2012); Hillion, 'Russian Federation' (n 183) 463.

⁷²² See eg Pieters, 'The Mediterranean Countries' (n 142) 391; K Pieters, *The Integration of the Mediterranean Neighbours into the EU Internal Market* (The Hague, TMC Asser Institute, 2010).

examples of different types of law approximation methods employed by the agreements. Section 5 offers conclusions.

2. Notion of law approximation

Any analysis of law approximation for the purposes of EU law and its external dimension, cannot start without recognition of the inquiries into the semantic meaning of 'law'.⁷²³ A central concern of indeterminacy of law not only contributes to the uncertainty and its implications deriving from the nature of defining, it also contributes a rather fundamental feature to the art of law approximation. The adoption of legislation without external influence can raise a number of socio-political as well as legal challenges.⁷²⁴ While reliance on external factors may seem as a facilitator of legislative process, it also imposes an additional burden on all three branches of power in the three associated states. Furthermore, the changes of national laws require social understanding and support that prove to be difficult to achieve, bearing in mind the frail character of democracy, civil awareness and weak financial situation of these three ex-Soviet Union republics.⁷²⁵

The EU has been developing its presence on the international scene for decades, turning the promotion of its norms and values into the core of its external action (see further Chapter 4

⁷²³ See eg J Raz, 'Two Views of the Nature of the Theory of Law. A Partial Comparison' in J L Coleman (ed), *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (Oxford, Oxford University Press, 2001) 1; F Schauer, 'The Limited Domain of the Law' (2004) 90 *Virginia Law Review* 1909.

⁷²⁴ See eg P Mindus, 'Axel Hägerström on Law-Making' (2013) 1(1) *The Theory and Practice of Legislation* 7.

⁷²⁵ The State of implementation of the associations and free trade agreements with Ukraine, Georgia and Moldova, Policy Department, Directorate-General for External Policies, EP/EXPO/B/AFET/2017/05, Brussels 2017

of the Thesis).⁷²⁶ Associated countries, just like candidate countries, must respect the EU values such as democracy, the rule of law and human rights that are listed in Article 2 TEU. This a confirmation that the foundations of the relations with the ENP countries are designed, if not borrowed, from the accession process.⁷²⁷ Nevertheless, there is the key difference when it comes to the outcomes of these two processes. The enlargement policy facilitates the accession process, with EU membership as its *finalité*, while the similarly laborious association process offers a much less attractive incentive to Georgia, Moldova and Ukraine. Although the EU would like third countries to perceive this form of association as an attractive alternative to EU membership, its appeal factor remains limited (see further Ch V).

Focussing strictly on the law approximation components of the AAs, it is worth pointing out that the approximation model envisaged for these countries sits well with the legal drafting technique of ‘borrowing from another legal system’ that is recognised as ‘the most common form of legal change’.⁷²⁸ There is also another perspective on normative transplants, where some observers argue that ‘the new and extensive normative output in global governance is pour[ed] into old bottles labelled ‘treaty’, ‘custom’, or (much more rarely) ‘general principles’.⁷²⁹ This is one

⁷²⁶ M Cremona, ‘Values in EU Foreign Policy’ (n 28) 275; P Koutrakos, ‘Primary Law and Policy in EU External Relations: Moving Away from the Big Picture?’, (2008) 33 *European Law Review* 666.

⁷²⁷ The promotion of EU values goes beyond its relations with the neighbourhood, see eg T Dolle, ‘Human Rights Clauses in EU Trade Agreements: The New European Strategy in Free Trade Agreement Negotiations Focuses on Human Rights—Advantages and Disadvantages’ in N Weiss and J-M Thouvenin (eds), *The Influence of Human Rights on International Law* (Heidelberg, Springer, 2015) 213.

⁷²⁸ A Watson, *Legal Origins and Legal Change* (London, Hambledon Press, 1991) 73; H Xanthaki, ‘Legal Transplants in Legislation: Defusing the Trap’ (2008) 57(3) *International and Comparative Law Quarterly* 569; B Kviatsek, *Explaining Legal Transplants, Transplantation of EU Law into Central and Eastern Europe* (Oisterwijk, Wolf Legal Publishers, 2015).

⁷²⁹ J Pauwelyn, R A Wessel and J Wouters, ‘Informal international law as presumptive law. Exploring new modes of law-making’ in R Liivoja and J Petman (eds) *International Law-making, Essays in Honour of Jan Klabbers* (London and New York, Routledge, 2014) 76; J Alvarez, *International Organizations as Law-Makers* (Oxford,

of the ways of approaching the new generation of Association Agreements. They operate with the tested mechanisms applied during preparation for membership, however, their benefits for the associated countries remain uncertain.

As observed by Allan Tatham, effective harmonisation lies at the heart of the internal development of the EU.⁷³⁰ At this point of the analysis, it is fitting to recognise the lack of terminological rigour. The terms such as approximation of laws or law harmonisation are used interchangeably in the Treaties. There are sufficient resources and practice to justify it for the internal purposes of the EU.⁷³¹

The matter tends to be more complex, as the lack of clear use of terminology extends to the new generation of Association Agreements. It can be argued that there is no consistency, which is much needed by the associated countries. They are exposed to a completely new form of law making, and therefore clear use of terminology as well as availability of definitions would facilitate a better understanding of the requirements and effectively would contribute to a more efficient implementation of the agreements. It can be considered that the absence of legal precision was intentional to slow the association process for political reasons.⁷³²

It can be argued that, for the purposes of the AAs, the distinction should be drawn between approximation and harmonisation. The former to be defined as the process that the associated countries need to adopt. It would not only contribute to the modernisation of their legislation, but

Oxford University Press, 2005) 217.

⁷³⁰ Tatham, *Enlargement of the European Union* (n 23) 332.

⁷³¹ See eg S Weatherhill, 'Harmonisation and the Distribution of Competence to Regulate the Internal Market' in C Barnard and J Scott (eds), *The Law of the Single European Market* (Oxford-Portland, Hart Publishing, 2002) 41.

⁷³² This argument is based on an interview conducted in Georgia, on file with the author.

more importantly it would help these countries to meet the conditionality requirements laid down in the AAs.⁷³³

This process is asymmetrical as the associate countries do not participate in the legislative process when the EU secondary legislation is being adopted. It differs from the process of harmonisation within the EU, which constitutes a participatory process fully involving the EU institutions and its Member States.⁷³⁴

It should also be observed that law approximation models fit between coordination, cooperation and unification. These three frameworks differ; however, they have in common the influence they make on modifications of existing national laws⁷³⁵ and adoption of new legislation. The approximation process allows a degree of flexibility, for example by allowing a third country a higher level of autonomy when selecting the best form of giving effect to EU law. However, there are other aspects of the model of approximation selected for the new generation of Association Agreements that make their implementation challenging. These demands are explained below.

Where the EEA facilitated the establishment of a common regulatory space between the EEA/EFTA and EU countries, and full approximation and application of legal acts listed in the

⁷³³ D Kochenov, 'The issue of values' in P Van Elsuwege and R Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood. Towards a Common Regulatory Space?* (London and New York, Routledge, 2014) 46, at 60-62.

⁷³⁴ A Dashwood, 'Hastening Slowly: The Communities' Path Towards Harmonisation', in H Wallace, W Wallace, C Webb (eds), *Policy Making in the European Communities* (Chichester, John Wiley and Sons, 1997) 289.

⁷³⁵ See eg A Weyembergh, 'Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme' (2005) 42 *Common Market Law Review* 1567.

EEU guarantees participation in the internal market. The model of the new generation of AAs introduces the notion of implementation. The associated countries are required to implement new laws giving effect to EU law enlisted in the agreements, for example Article 55 of the EU-Georgia Association Agreement confirms Georgia's obligation to approximate its sanitary and phytosanitary legislation to the relevant provisions of EU law. Furthermore, the associated countries are also expected to introduce measures that will help them to complete domestic reforms, for example Article 4 of the EU-Georgia Association Agreement states that Georgia ought to effectively implement the relevant international instruments such as the United Nations Convention Against Corruption (2003). This requirement indicates that the design of the conditionality bar for the associated countries is set high, making, therefore, their access to the internal market extremely difficult to achieve.

It is also worth noting the distinction between approximation *sensu stricto* and *sensu largo*. The former covers compliance with the particular pieces of EU secondary legislation, whereas the latter covers compliance with general principles laid down in Association Agendas. It also extends to the institutional setting. As an example, approximation *sensu stricto* facilitates coherence between domestic laws of the associated countries in the area of competition law and state aid. Approximation *sensu largo*, on the other hand, includes changes in the institutional setting that enable their national competition authorities to prepare for their cooperation with the European Competition Network.⁷³⁶

There is another classification of approximation models that is relevant to the AAs, namely between full and partial approximation models. The theoretical understanding of the partial

⁷³⁶ M Emerson and V Movchan (eds), *Deepening EU-Ukrainian Relations* (Brussels-Kiev-London CEPS, IER and Rowman & Littlefield International, 2016) 118.

approximation would suggest its definition as transitional situation between full approximation and its complete absence. The process of establishing the scope of the partial model raises concerns as it is frequently used but its meaning remain unclear.⁷³⁷ It can be argued, using an example from Georgia, that the AAs provisions are unclear. Georgia's legislation adopted the text of Directive 2000/43 into a national law without taking into consideration the relevant case-law of the Court of Justice of the EU. The Agreement refers only to the Directive, however, applying a very strict interpretation of full approximation, would suggest that the full approximation of this area of law has not been completed.⁷³⁸

3. Law approximation as a conditionality tool of the new generation of Association Agreements

The interdependence between internal reforms, socio-economic transformation and democratisation of the EU's neighbouring countries and the enhancement of relations between the EU and its European Neighbourhood Policy partners form one of the main characteristics of the ENP (see further Ch III). The concept of conditionality is not new and above all its origins were developed for the enlargement process before they were adopted for the ENP purposes.⁷³⁹ It needs to be firmly criticised that mechanisms should not be transferred from one policy to another, particularly when they have such significantly different objectives. '[I]mpartial analysis of conditionality demonstrates that the Union's self-congratulatory approach cannot always boast

⁷³⁷ See eg Methodology for Law Approximation in the Republic of Moldova, Chisinau, 2010, available at <https://isturzu.files.wordpress.com/2010/09/methodology_final_eng_secured.pdf> accessed 10 September 2018.

⁷³⁸ Georgia - Directive on equality, on file with the author.

⁷³⁹ K Inglis, 'Pre-Accession Strategy and the Accession Partnerships', in A Ott and K Inglis (eds), *European Enlargement Handbook* (The Hague, Asser Press, 2002) 103; Kochenov, *EU Enlargement and the Failure of Conditionality. Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (n 27).

solid foundations'.⁷⁴⁰ Despite criticisms of the application of conditionality within the ENP framework (see further Ch III), shared values conditionality forms an indispensable part of contractual relations between the EU and its neighbours.⁷⁴¹

Furthermore, the new Association Agreements reflect the new form of conditionality framed as 'more-for-more': '[t]he more and the faster a country progresses in its internal reforms, the more support it will get from the EU.'⁷⁴² It is also a clear confirmation that only compliance with listed *acquis* guarantees access to the internal market for Georgia, Moldova and Ukraine.

The foundations of the trade-related sections of the agreements are based on conditionality in its more-for-more form. The Agreement with Ukraine can serve as an example. Its Chapter on Technical Barriers to Trade (Title IV of the EU-Ukraine Association Agreements) provides for 'the preparation, adoption and application of technical regulations, standards and conformity assessment procedures as defined in the Agreement on Technical Barriers to Trade'⁷⁴³ that may affect trade in goods between parties.⁷⁴⁴ Ukraine is obliged to gradually achieve conformity with the EU technical regulations and EU standardisation, accreditation, conformity assessment procedures and the market surveillance system and to follow the principles and practices laid down in relevant EU decisions and regulations.⁷⁴⁵

⁷⁴⁰ D Kochenov, 'Overestimating Conditionality' in I Govaere, E Lannon, P Van Elsuwege, S Adam (eds), *The European Union in the World. Essays in Honour of Marc Mareseau* (Leiden-Boston, Martinus Nijhoff Publishers, 2014) 541.

⁷⁴¹ *ibid.*

⁷⁴² Joint Communication by the High Representative of the Union for Foreign Affairs and Security Policy and the European Commission, 'A New Response to a Changing Neighbourhood, a review of European Neighbourhood Policy' (n 160) 3.

⁷⁴³ < http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf > accessed 10 September 2018.

⁷⁴⁴ Article 53(1) of the EU-Ukraine Agreement.

⁷⁴⁵ Article 56(1) of the EU-Ukraine Association Agreement. The following are identified in the Agreement's

Furthermore, once Ukraine meets all conditions specified in Annex III to the Agreement, the parties agree to add an Agreement on Conformity Assessment and Acceptance (ACAA) of Industrial Products.⁷⁴⁶ It will be a protocol to the EU-Ukraine AA. There is a stringent set of conditions that Ukraine is required to meet prior to the phase when an ACAA can be negotiated and concluded.⁷⁴⁷ This will be possible once the Ukrainian sectoral and horizontal legislation, institutions and standards have been fully aligned⁷⁴⁸ with those of the EU.⁷⁴⁹ Although conditionality is strictly formulated, there are significant flows in the language applied. Annex III to the Agreement does not identify a list of EU legislation. Instead, as observed by Guillaume Van der Loo, it refers to ‘sectors’ of horizontal framework legislation and vertical sectoral legislation.⁷⁵⁰

Overall, it is difficult to disagree with Peter Van Elsuwege and Roman Petrov, who note that, ‘[d]espite the rhetoric of joint ownership, it is obvious that the Union is the dominant party in a relationship that is characterised by a strict conditionality approach.’⁷⁵¹

provision: Decision No 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products [2008] OJ L263/12; and repealing Council Decision 93/465/EEC and Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 [2008] OJ L218/30.

⁷⁴⁶ Article 57 of the EU-Ukraine Association Agreement.

⁷⁴⁷ European Commission, ‘Agreements on Conformity Assessment and Acceptance of Industrial Products’ SEC (2004) 1071, Brussels, 25 August 2004.

⁷⁴⁸ This is another example of mixed terminology used in the new generation of AAs. Alignment to EU legislation instead of approximation.

⁷⁴⁹ Article 57(1) EU- Ukraine AA.

⁷⁵⁰ G Van der Loo, ‘The EU-Ukraine DCFT’ in P Van Elsuwege and R Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood. Towards a Common Regulatory Space?* (London and New York, Routledge, 2014) 72.

⁷⁵¹ Van Elsuwege and Petrov, ‘Article 8...’ (n 20) 694.

4. *Unpacking law approximation*

The Association Agreements model of approximation requires that the three countries move from voluntary approximation, established by the Partnership and Cooperation Agreements, to obligatory one, where they ‘will carry out gradual approximation [emphasis added] of its legislation to EU law referred to in Annexes.’⁷⁵² These provisions establish a stronger obligation than the one imposed on the Western Balkans countries,⁷⁵³ despite the clear objective of the Stabilisation and Association process to prepare these countries for the prospective EU membership.⁷⁵⁴ This provides further confirmation that the three associated countries are required to do more in return for a much less attractive form of integration with the EU.

Unlike other Association Agreements, with the exception of the EEA, the new generation of Association Agreements provide lists of legislation to comply with (or envisage adoption of such lists by common agreement on both sides). In principle, having such lists should make planning of approximation easier, since the associated states have taken on an enormous task.

⁷⁵² Article 417 of the EU-Georgia Association Agreement, Article 448 of the EU-Moldova Association Agreement and Article 474 of the EU-Ukraine Association Agreement.

⁷⁵³ Article 70 (1) of the Stabilisation and Association Agreement with Albania states: ‘The Parties recognise the importance of the approximation of Albania's existing legislation to that of the Community and of its effective implementation. Albania **shall endeavour to ensure** [emphasis added] that its existing laws and future legislation shall be gradually made compatible with the Community acquis. Albania shall ensure that existing and future legislation shall be properly implemented and enforced.’

⁷⁵⁴ Objective of the Stabilisation and Association process was presented in 2003: ‘The European Council, recalling its conclusions in Copenhagen (December 2002) and Brussels (March 2003), reiterated its determination to fully and effectively support the European perspective of the Western Balkan countries, which will become an integral part of the EU, once they meet the established criteria.’ European Council, Presidency Conclusions 11638/03, Thessaloniki, 19-20 June 2003, 12.

Unfortunately, the agreements operate with different models of listings of the required EU legislation, hence making the process confusing and laborious. The new agreements not only require approximation but also implementation.

In the case of implementation requirements, the EU wishes to see the implementation process of the new laws. The implementation requirement may be costly, as giving effect to the new laws requires significant changes going beyond the enactment of new laws. The study commissioned by the European Parliament suggests that the EU has put emphasis on the long-term benefits of the DCFTA ‘while ignoring the short-term costs to industry and failing to support its modernisation.’⁷⁵⁵ There is also another argument that would suggest that the omission on the EU part was premeditated. The financial difficulties of the three states combined with the growing disappointment of their business communities and growing tax burden imposed on individuals⁷⁵⁶ slows down the implementation of the AAs. This way the EU can, in political terms, claim that it is committed to the process while the responsibility for the failure to meet the requirements lies with the associated countries. Furthermore, legal conditionality is turning into a de facto barrier to entry the internal market.

László Burszt and Julia Langbein also identified another difference between candidate countries and the three associated states working to the disadvantage of the latter. They do not benefit from the structural and cohesion funds to accommodate law approximation and the

⁷⁵⁵ The State of implementation of the associations and free trade agreements with Ukraine, Georgia and Moldova, Policy Department, Directorate-General for External Policies, EP/EXPO/B/AFET/2017/05, Brussels 2017, p. 6.

⁷⁵⁶ Eg the re-capitalisation of PrivatBank in Ukraine have been shifted onto taxpayers, *ibid* 10. In the Ukrainian case the implementation of the AA is also affected by the on-going financial losses due to the Russian aggression in Donbas and annexation of Crimea.

opening of their markets.⁷⁵⁷ This is yet another confirmation of the differences between prospect of acceding to the EU and the new association model, where the extensive demands come with limited financial support and questionable benefits in the future since access to the internal market is becoming unlikely.

The Association Agreements provide for the approximation of the three countries' legislation in areas directly required for them to enter broad based trade and investment integration with the EU through establishment of the Deep and Comprehensive Free Trade Areas. The legal approximation imposed on them is influenced by the pre-accession model,⁷⁵⁸ however its scope is limited, as it does not cover the EU *acquis* in its entirety. The areas of approximation are identified in three titles of the Agreements and the relevant EU legislation is identified in Annexes, as well as in the main body of the Agreements. The main characteristic of this model is its asymmetry, which translates here into different models of identification of the EU legislation to which Georgia, Moldova and Ukraine need to approximate their legal systems.⁷⁵⁹

The analysis of the AAs enables identification of different categories of law approximation mechanisms. Van der Loo notes that this feature of the AAs makes them 'fascinating', however the first years of the application of the agreements show that it adds to the complexity and makes the approximation process challenging.⁷⁶⁰

⁷⁵⁷ L Bruszt, J Langbein, 'Varieties of Dis-Embedded Liberalism. EU Integration Strategies in the Eastern Peripheries of Europe' (Berlin, Free University Berlin, MAXCAP Working Paper No 26, 2016).

⁷⁵⁸ Delcour and Wolczuk, 'Approximation of the national legislation of Eastern Partnership countries... (n 622) 9.

⁷⁵⁹ Also there is asymmetry between these three countries. For instance, Ukraine has to approximate with *acquis* falling under competition law. Georgia does not, it only has a vague provision in its Association Agreements.

⁷⁶⁰ G Van der Loo, 'The EU-Ukraine DCFT' (n 750) 63.

4.1. Policy dialogue, flexible law approximation, time frames selected à la carte (agricultural and rural development chapters)

The general provisions on law approximation in the area of agricultural and rural development are presented in the main body of the EU-Moldova and EU-Ukraine Agreements, while the relevant EU legislation and regulatory standards are listed in annexes. The cooperation to promote agricultural and rural development depends on gradual approximation of Moldovan and Ukrainian policies and legislation to those of the EU⁷⁶¹ listed in Annex VII and Annex XXXVII respectively.⁷⁶² In case of Ukraine (Annex XXXVII) there is no specific time frame for approximation in this area, while Moldova is given a time frame for the law approximation in this area within 3-5 years of the entry into force of the Association Agreement. It is one of the areas indicating Moldova's ambitions to approximate their legal system in the area of agriculture relatively fast. The chapter on agriculture and rural development in the EU-Georgia Association Agreement (Chapter 10 of Title VI) does not contain a provision on law approximation, and there is no list of relevant legislation. There is only a general provision binding the parties to cooperate to promote agricultural and rural development through 'progressive convergence of policies and legislation.'⁷⁶³ This is a reflection of the underdeveloped character of the Georgian agricultural sector, which would not benefit from law approximation.

⁷⁶¹ Article 70 of the EU-Moldova Association Agreement, Article 403 of the EU-Ukraine Association Agreement.

⁷⁶² List of legal acts in Annex XXXVII includes EU Regulations, Directives, Decisions, Recommendations and Communications as whole acts as well as selected provisions of relevant acts.

⁷⁶³ Article 332 of the EU-Georgia Association Agreement.

This sector is particularly important to the economic development of Moldova, hence their ambitious yet not realistic timetable accepted by the EU (in this case it was Moldova forcing strict deadlines). Ukraine opted for a more flexible approach that may prove to be more beneficial in mid- and long-term. However, political tensions in both countries contribute to the disruptions of the agricultural reforms.

4.2. Strict approximation requirements, clear timelines (environment chapters)

In case of environmental legislation all three countries are obliged to approximate their legal systems with the relevant EU *aquis*⁷⁶⁴ listed in the annexes to the Agreements.⁷⁶⁵ They are given a timeframe of 2 to 10 years from the entry into force of the Association Agreements to complete the process.⁷⁶⁶ The Moldovan timeframe also includes a reference to the timeline agreed within the framework of the European Energy Community Treaty.⁷⁶⁷ This area of law may be particularly difficult to modernise, and will require considerable financial investments and a cultural change.

⁷⁶⁴ Article 306 of the EU-Georgia Association Agreement, Article 91 of the EU-Moldova Association Agreement and Article 363 of the EU-Ukraine Association Agreement.

⁷⁶⁵ Annex XXVI to the EU-Georgia Association Agreement, Annex XI to the EU-Moldova Association Agreement and Annex XXX to the EU-Ukraine Association Agreement.

⁷⁶⁶ For example provisions on taking measures in order to maintain/improve air quality in respect of the relevant pollutants of the Directive 2004/107/EC relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air are set to be implemented within five years of the entry into force of this agreement on the basis of an existing situation in Ukraine. In addition, the Association Council is given the task to define a timetable for implementation upon the entry into force of the Agreement to enable Ukraine to fully comply with the requirements of the Directive.

⁷⁶⁷ In relation to Article 4(2) of Directive 2009/147/EC on the conservation of wild birds (establishment of special conservation measures to protect regularly occurring migratory species).

It is worth comparing these requirements to those given to the EU candidate countries and newest Member States. The example of Croatia's accession shows that the country, now a Member State, negotiated derogations that are more generous than the timetables given to the three EaP countries. The waste management serves as a good example. Moldova is given up to seven years to apply selected provisions of the Council Directive 1999/31/EC on the landfill of waste as amended by Regulation (EC) No 1882/2003, while Croatia was granted transitional period until 2019 and derogation until 2021.⁷⁶⁸ The results of the approximation process in this area will only be visible in the long term. However, the financial implications of the approximation may significantly slow the process.

4.3. Pre-approximation requirements, imperfect drafting of the AAs provisions (public procurement chapters)

There are two elements of law approximation in the area of public procurement, namely a pre-approximation requirement and reference to secondary EU legislation in the main text of the Agreements, which make this process particularly challenging. The Association Agreements identify an obligation that all three countries are required to meet before the legislative approximation commences. The provisions setting up the objectives of reciprocal and gradual opening of the parties' procurement markets⁷⁶⁹ state that the progressive approximation of Georgian, Moldovan and Ukrainian public procurement legislation with EU public procurement acquis needs to be accompanied by an institutional reform and creation of effective public

⁷⁶⁸ Information on EU-Croatia Negotiations, Chapter 27: Environment, Brussels November 2011.

⁷⁶⁹ Article 141 of the EU-Georgia Association Agreement, Article 268 of the EU-Moldova Association Agreement and Article 148 of the EU-Ukraine Association Agreement.

procurement structures (approximation *sensu largo*).⁷⁷⁰ They need to be founded on the principles governing the EU public procurement system based on terms and definitions set out in Directive 2004/18/EC⁷⁷¹ and Directive 2004/17/EC.⁷⁷² Both directives are listed in the main text of the Agreements. This method had not been used in the past,⁷⁷³ and the developments in this area of EU law confirm that it should not be used in the future. Both directives already have their successors and currently Member States are transposing them to their legal systems.⁷⁷⁴

Furthermore, all three countries are required to prepare a comprehensive roadmap for the implementation of the chapters on public procurement. They ought to be detailed and contain timetables and milestones, which should include all legislative approximation and the capacity building reforms.⁷⁷⁵ Moreover, these roadmaps are expected to cover ‘all aspects of the reform,

⁷⁷⁰ Article 143 of the EU-Georgia Association Agreement, Article 270 of the EU-Moldova Association Agreement and Article 150 of the EU-Ukraine Association Agreement.

⁷⁷¹ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114.

⁷⁷² Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L134/1.

⁷⁷³ There was no such reference in agreements such as the Europe Agreements and Stabilisation and Association Agreements.

⁷⁷⁴ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance [2014] OJ L94/65; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC Text with EEA relevance [2014] OJ L94/243. There is also a question whether a new concession directive will be taken into consideration by the Association Councils, Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance [2014] OJ L94/1.

⁷⁷⁵ Article 145 of the EU-Georgia Association Agreement, Article 272 of the EU-Moldova Association Agreement and Article 152 of the EU-Ukraine Association Agreement.

and the general legal framework for the implementation of public procurement activities, in particular: legislative approximation for public contracts, contracts in the utilities sector, works concessions and review procedures; strengthening of the administrative capacity at all levels including review bodies and enforcement mechanisms.⁷⁷⁶

Even more complexity, if not confusion, is added in the field of procurement by Article 146 of the EU-Georgia Association Agreement, Article 273 of the EU-Moldova Association Agreement and Article 153 of the EU-Ukraine Association Agreement. These provisions start with a general principle that all three countries are obliged to ensure that their existing and future legislation on public procurement will be gradually approximated to the EU public procurement acquis. Nonetheless, the second paragraph introduces the limits to the scope of approximation by referring to annexes that list the EU legislation to which the three countries need to approximate their public procurement law. They also name annexes where non-mandatory pieces of legislation are listed and do not have to be transposed⁷⁷⁷ and annexes with EU acquis outside the scope of legislative approximation.⁷⁷⁸ It is a curious choice, as ‘EU public procurement acquis’ from Article 146 (1) of the EU-Georgia Association Agreement, Article 273 (1) of the EU-Moldova Association Agreement and Article 153 (1) of the EU-Ukraine Association Agreement would indicate the whole EU legislation in the area of public procurement in its current body and future additions. Then the annexes listing parts of the existing EU legislation that will be outside the framework of approximation.

⁷⁷⁶ Article 152 (2) of the EU-Ukraine Association Agreement. Similar wording is applied in the EU-Georgia Association Agreement (Article 145) and the EU-Moldova Association Agreement (Article 272).

⁷⁷⁷ Annexes XXI-F and XXI-I to the EU-Ukraine Association Agreement.

⁷⁷⁸ Annexes XXI-K to XXI-N to the EU-Ukraine Association Agreement.

The above inconsistency raises a question about the rationale for this choice. It may well be that the negotiating teams of the EaP partners requested lists of provisions excluded from the scope of approximation to be added as annexes to the Agreements. Nevertheless, having the lists of the EU legislation outside of the scope of approximation seems doubtful in the light of the following provision on legislative approximation: ‘In this process, due account shall be taken of the corresponding case law of the Court of Justice and the implementing measures adopted by the European Commission as well as, if this should become necessary, of any modifications of the EU *acquis* occurring in the meantime.’⁷⁷⁹ At this stage of analysis it is helpful to take a closer look at Article 6 of the EEA Agreement, which provides that ‘without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice given prior to the date of signature of this Agreement’. This is a clear confirmation that the law makers of the three countries must be aware of the relevant case-law of the CJEU and its interpretative contribution to the evolution of EU law.⁷⁸⁰

⁷⁷⁹ Article 146 (3) of the EU-Georgia Association Agreement, Article 273 (3) of the EU-Ukraine Association Agreement and Article 153 (2) of the EU-Ukraine Association Agreement.

⁷⁸⁰ See eg R Petrov, ‘Legislative approximation and application of EU law in Ukraine’ in P Van Elsuwege, R Petrov (eds), *The Application of EU Law in the Eastern Neighbourhood of the EU. Towards a Common Regulatory Space?* (London and New York, Routledge, 2014) 137; G Gabrichidze, ‘Legislative approximation and application of EU law in Georgia’ in P Van Elsuwege, R Petrov (eds), *The Application of EU Law in the Eastern Neighbourhood of the EU. Towards a Common Regulatory Space?* (London and New York, Routledge, 2014) 179.

4.4. Transition from voluntary to obligatory approximation, strict obligations, timeframes and special monitoring mechanism (sanitary and phytosanitary chapters)

The approximation in this area takes standards originally introduced by the Partnership and Cooperation Agreements⁷⁸¹ and developed within the Partnership and ENP frameworks⁷⁸² into a new dimension of standard setting. This new phase is marked by the entry into force of the Association Agreements and transition from the voluntary approximation to the strict obligations laid down in the Agreements. The approximation of Georgian, Moldovan and Ukrainian legislation and the implementation of the SPS Agreements⁷⁸³ is driven by the fulfilment of obligations given in Annexes to the Agreements.⁷⁸⁴ The weight of SPS legislation is recognised at the institutional level, which offers SPS Sub-Committees of the Trade Committees that are given the task to monitor developments in this area.⁷⁸⁵ The rigorous character of the obligations imposed on Georgia, Moldova and Ukraine is visible in the detailed timeframe and scope of approximation as

⁷⁸¹ Under Article 55 of the PCA with Georgia, Article 59 of the PCA with Moldova and Article 60 of the PCA with Ukraine, the three countries were asked to take on the gradual voluntary approximation of its standards to the EU technical regulations concerning industrial and agricultural food products including sanitary and phytosanitary standards.

⁷⁸² Delcour and Wolczuk, 'Approximation of the national legislation...' (n) 10.

⁷⁸³ Article 50 of the EU-Georgia Association Agreement, Article 176 of the EU-Moldova Association Agreement, Article 59 of the EU-Ukraine Association Agreement.

⁷⁸⁴ Annex IV to the EU-Georgia Association Agreement, Annex XVII to the EU-Moldova Association Agreement and Annex IV to the EU-Ukraine Association Agreement.

⁷⁸⁵ The SPS Sub-Committee will be established by the Trade Committee to monitor the implementation of the Chapter on sanitary and phytosanitary measures and consider any matter relating to this Chapter, and examine all matters which may arise in relation to its implementation; to review the Annexes to this Chapter, notably in the light of progress made under the consultations and procedures provided for under this Chapter; to modify, by means of a decision, relevant annexes to this Agreement; Article 65 of the EU-Georgia Association Agreement, Article 191 of the EU-Moldova Association Agreement and Article 74 of the EU-Ukraine Association Agreement.

well as in the requirement to build the necessary administrative capacity.⁷⁸⁶ The SPS Sub-Committees will monitor the implementation of the approximation as set out in the Annexes. Furthermore, all three countries are obliged to submit to the SPS Sub-Committees comprehensive strategies for the implementation of the chapters no later than three months (in case of Moldova and Ukraine) and six months (in case of Georgia) after entry into force of the Agreements.⁷⁸⁷

This chapter holds a political and economic value. Once associate countries approximate their legislation with EU acquis, the EU should open its market to food products from these countries. There is an important economic incentive for the associated states and their economies.

4.5. Pan-European energy community aspirations of the EU (energy chapters)

The Treaty of Lisbon introduced an energy specific provision – Article 194 TFEU – which sets EU’s objectives on energy.⁷⁸⁸ Although there is no reference in the above provision to the external dimension of the energy policy, Article 3(2) TFEU endows the EU with necessary powers to adopt international agreements that are required to meet internal objectives. This development is reflected in the Association Agreements, which contain a number of provisions on energy cooperation. It reflects the Union’s policy objective to create a pan-European energy

⁷⁸⁶ Article 55(2) of the EU-Georgia Association Agreement, Article 181(2) of the EU-Moldova Association Agreement and Article 64(2) of the EU-Ukraine Association Agreement state that ‘the parties shall cooperate on legislative approximation and **capacity building** [emphasis added].’

⁷⁸⁷ Article 55 of the EU-Georgia Association Agreement, Article 181 of the EU-Moldova Association Agreement and Article 64 of the EU-Ukraine Association Agreement.

⁷⁸⁸ L Hancher, F M Salerno, ‘Energy Policy after Lisbon’ in A Biondi, P Eechhout, S Ripley (eds), *EU Law after Lisbon* (Oxford, Oxford University Press, 2012) 367.

community with countries that share EU rules as well as its internal market legislation.⁷⁸⁹

The approximation of laws envisaged in the Association Agreements in the energy sector has a three-fold character based on the provisions on energy-trade related issues,⁷⁹⁰ provisions on energy cooperation⁷⁹¹ and their relation with Georgia, Moldova and Ukraine's obligations arising from their membership in the Energy Community.⁷⁹²

⁷⁸⁹ P Van Elsuwege, 'The challenges of the 'rule-based market approach,' in D Kochenov and F Amtenbrink (eds), *The European Union's Shaping of the International Legal Order*, (Cambridge, Cambridge University Press, 2014) 221.

⁷⁹⁰ Chapter 11 (Title IV) of the EU-Georgia Association Agreement, Chapter 11 (Title V) of the EU-Moldova Association Agreement, and Chapter 11 (Title IV) of the EU-Ukraine Association Agreement.

⁷⁹¹ Chapter 2 (Title V) of the EU-Georgia Association Agreement, Chapter 14 (title IV) of the EU-Moldova Association Agreement, and Chapter 1 (Title V) of the EU-Ukraine Association Agreement, which also covers nuclear issues.

⁷⁹² The Energy Community Treaty ([2006] OJ L198/18) was signed on 25 October 2005 by the then European Community and Albania, Bosnia and Herzegovina, Croatia, former Yugoslav Republic of Macedonia, Montenegro, Serbia and the United Nations Interim Administration Mission in Kosovo. It entered into force on 1 July 2006. The Treaty establishes an Energy Community with an aim laid in Article 2 of the Treaty 'to create a legal and economic framework in relation to Network Energy (including the electricity and gas sectors falling within the scope of the European Community Directives 2003/54/EC and 2003/55/EC) in order to create a stable regulatory and market framework capable of attracting investment in gas networks, power generation, and transmission and distribution networks, to enable all parties to have access to the stable and continuous energy supply that is essential for economic development and social stability; create a single regulatory space for trade in Network Energy that is necessary to match the geographic extent of the concerned product market; enhance the security of supply of the single regulatory space by providing a stable investment climate in which connections to Caspian, North African and Middle East gas reserves can be developed, and indigenous sources of energy such as natural gas, coal and hydropower can be exploited; improve the environmental situation in relation to Network Energy and related energy efficiency, foster the use of renewable energy, and set out the conditions for energy trade in the single regulatory space, develop Network Energy market competition on a broader geographic scale and exploit economies of scale.' 16 Member States opted to participate in works of the Energy Community (legal basis of the right to participate in the Ministerial Council, the Permanent High-Level Group and the Regulatory Board are given to the EU Member States in Article 1 and 95 of the Treaty): Austria, Bulgaria, Croatia, Cyprus, the Czech Republic, France, Germany, Greece, Hungary, Italy, Romania, Slovenia,

Given their membership of the Energy Community, it is worth providing a brief assessment of the obligations of these countries under the Energy Community Treaty as they have direct influence on the duties imposed by the Association Agreements. The Energy Community is an example of sectoral multilateralism⁷⁹³ and a model of Europeanization aiming at offering to third countries a stake in the EU Internal Market once their legislation is approximated with the EU sectoral acquis.⁷⁹⁴ The main feature of this model is the third countries' obligation to apply the EU energy acquis.⁷⁹⁵ The Community's institutions are given decision-making powers and legal instruments for the extension of the acquis⁷⁹⁶ on energy⁷⁹⁷ as well as related areas of environment,⁷⁹⁸ competition,⁷⁹⁹ renewables⁸⁰⁰ and generally applicable standards.⁸⁰¹ Furthermore, the Treaty imposes further obligations on Moldova and Ukraine in relation to application of fundamental principles of EU law⁸⁰² and implementation of the Community measures implementing developments of the EU acquis.⁸⁰³

Slovakia, Poland, the Netherlands, the United Kingdom. Moldova joined the Community in 2010 and Ukraine in 2011.

⁷⁹³ S Blockmans and B Van Vooren, 'Revitalizing the European 'Neighbourhood Economic Community': The case for legally binding sectoral multilateralism' (2012) 17 *European Foreign Affairs Review* 577.

⁷⁹⁴ R Petrov, 'Energy Community ...' (n 711) 332.

⁷⁹⁵ Article 12 of the Energy Community Treaty provides that 'Each Contracting Party shall implement the *acquis communautaire* on Environment in compliance with the timetable for the implementation of those measures set out in Annex II.'

⁷⁹⁶ Title II of the Energy Community Treaty.

⁷⁹⁷ Articles 10-11 of the Energy Community Treaty.

⁷⁹⁸ Articles 12-17 of the Energy Community Treaty.

⁷⁹⁹ Articles 18-19 of the Energy Community Treaty.

⁸⁰⁰ Article 20 of the Energy Community Treaty.

⁸⁰¹ Articles 21-23 of the Energy Community Treaty.

⁸⁰² See Petrov, 'Energy Community ...' (n 711) 339.

⁸⁰³ Article 25 of the Energy Community Treaty.

5. Conclusions

This chapter demonstrated the complexities of law approximation, as envisaged by the new generation of Association Agreements. It showed the breadth of change that the EU requires from the neighbouring countries in return for partial access to the internal market, only with a vague promise of the European perspective. Law approximation, as a normative term, has to be interpreted broadly and includes not only compliance with hundreds of listed EU legal acts but also with EU values (which, paradoxically, are not always complied with by the Member States themselves).

The Association Agreements require dynamic approximation. This notion, at least so far, remains largely *lettre morte*. Only a handful of revisions have been made although a large proportion of listed *acquis* is no longer in force. This leaves the associated countries with a difficult choice whether to proceed with new legislation or whether to stick to the letter of the Association Agreements (or other international treaties with the EU which require approximation).

Law approximation has been adopted as a conditionality tool. In the case of the new generation of Association Agreements an enhanced conditionality framework is used on an unprecedented scale. It could be argued that this is yet another example of the EU aiming to act as a normative power. However, when the AAs conditionality is examined against the objectives of Article 8 TEU, this exercise leaves no doubt that the EU is not keen on accepting the failure of adoption and implementation of rules reflecting EU law by its partners. At the same time, it is a clear indication that the EU is fading as a normative power as it is unable to provide an alternative to EU membership that would be fitting for its neighbours and contributing to the EU security.

The associated countries have shown during the initial phase of application of the agreements that they have limited capabilities to meet all of the AAs requirements. Frequently political declarations of Ukrainian, Georgian and Moldovan leaders do not translate into actions and robust approximation efforts. The review of the legal complexities of law approximation, its economic impact and the volatile political climate proves to be yet another example of failure of conditionality.

Chapter VII

Conclusions

This thesis has argued that there are significant discrepancies in the area of EU relations with its neighbours. The European Neighbourhood Policy was launched lacking solid foundations that could address the increasing complexity of the EU's neighbourhood. Furthermore, inability of the EU's institutions, in particular the European Commission, to develop instruments that could serve the specific needs of the ENP countries has raised questions regarding the future operation of this Policy.

The tools adopted from the enlargement process, especially the principle of conditionality in its initial form, have failed to serve the EU's relations with its ENP neighbours. However, the shift towards the model of conditionality that offers partner countries a feasible option of gaining access to the internal market has significantly changed the dynamics of the EU relations with its ENP partners, in particular Georgia, Moldova and Ukraine. The new generation of Association Agreements concluded with these countries has opened a new chapter in the EU's presence in its neighbourhood. Having led to the above conclusion, five main concluding points emerge from the analysis in the thesis.

Firstly, the new generation of association model follows well-established tradition of association offered in the past, for example to Greece. Certainly, the new model brings a new quality regarding institutional relations between the EU and its partners, and more importantly the association model is driven by complex and demanding law approximation.

Therefore, the importance of law approximation cannot be underestimated. On the one hand, the agreements provide partner countries with a clear set of conditions and requirements. The three countries are currently conducting significant and often ground breaking legal reforms that also require administrative and cultural changes. The association conditions are clear, however, their strict character can also work to the EU's disadvantage. Since the neighbouring countries are

frail economically, weakened by geopolitical struggle to maintain their independence and protect their borders, there is a risk that after the initial willingness, if not enthusiasm, these three countries will lose interest in the complex legal reforms. This may potentially bring the collapse of the association process and lead to negative developments that could effectively threaten the stability of the EU's ENP neighbours. Therefore it is in the EU's interest to support the partner countries and encourage them to continue the reform process.

Secondly, the initial phase of the implementation of the Association Agreements provisions suggests that the bilateral agreements are the best way for the EU to design and build its relations with its neighbourhood. Despite the challenges facing these three eastern European countries, they are in a better position to pursue the reforms required by the Agreements. It was a radically different setting, when the principle of conditionality was applied only within the framework of the ENP. This may be viewed as a clear indication that the Policy can soon be made redundant. Alternatively, it would require significant reforms.

In particular for the ENP, or its new reincarnation, to remain in force it should become a framework neighbourhood policy. This way the EU would gain a comprehensive policy approach to its neighbourhood as whole. Furthermore, it could facilitate a spectrum of all categories of relations with the neighbourhood.

Thirdly, the reinvented ENP should only play a supportive role. The main structure of the EU relations with its neighbours should be based on bilateral or multilateral agreements. The experience of the EFTA EEA model indicates that the EU should focus its efforts on similar setting of relations with other neighbours. Clearly, the new model of association should be explored further.

Moreover, the new generation of association agreements could address the challenges of the future relations of the EU with the countries withdrawing from it. There are indications that the UK is considering this model as a potential setting of its relations with the EU in the future.

Fourthly, such developments could be based on Article 8 TEU. The provision entered into force in 2009, however, its potential has not been fully explored. It is now a good opportunity to apply this provision as *lex specialis* of Article 21 TEU, and offer EU's neighbours a strong message of support. By building and reinventing the future relations with the neighbours based on a general TEU provision would definitely strengthen the consistency and clarity of the EU's role on the continent.

Finally, the significant role played by law approximation must be recognised. The experience of the enlargement process and the more-for-more conditionality are definitely the best instruments of strengthening the EU's position as a normative power. Continuation of the promotion of EU law outside of the EU borders seems like the best scenario for actively enhancing the stability to the EU's neighbourhood.

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