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The European Neighbourhood Policy: Differentiation without Political Conditionality?

Abstract: *The aim of this chapter is to examine the way in which the EU has differentiated its relations with its Eastern and Southern neighbours, as well as the basis for such differentiation. The analysis shows that differentiation lies at the heart of the EU relations with these countries, and also describes factors that have led to 'differentiation' in the context of the ENP. The deepening of the cooperation with the ENP countries is not always and only due to political conditionality; it is linked to ex post rather than ex ante conditionality. The high level of variable geometry in the ENP does not, however, concern EU restrictive measures. The EU has adopted a fairly uniform policy in this area and has imposed restrictive measures vis-à-vis neighbour countries, regardless of their different geopolitical position and specific relations with the EU. In the near future, the level of variable geometry in the ENP is likely to grow: new contractual arrangements will be offered to Armenia and Azerbaijan; and differentiation and flexibility are the hallmarks of the 2015 review of the ENP. The question arises: Can the ENP remain a single policy framework, considering the high degree of differentiation? It is submitted herein that the ENP should remain the overall framework for the EU-ENP relations, since this counters the risk of a re-nationalization of this policy. A different issue is whether the EU's choice of engaging with countries which have rejected EU values, in whole or in part, can be reconciled with a value-based foreign policy.*

Keywords: European Neighbourhood Policy, EU values, political conditionality, EU external relations

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Introduction

The principle of ‘differentiation’ may not only be applied to intra-European Union relations but also in the context of its external policy. The idea of differentiating the European Union (EU)’s contractual obligations with third countries is not mentioned in article 21 of the TEU, which defines the principles and objectives of the EU’s action on the international scene. However, adoption of a differentiated approach depending on the partner countries is inherent in the foreign affairs of any international actor, including the EU. This ‘pick-and-choose’ exercise, which consists of selecting those partners with which the EU wants to develop cooperation, quite naturally depends on the geopolitical context in which they are placed as well as on the EU’s economic and political interests in creating bilateral contractual relations. In addition, since the EU upholds and promotes its values, including respect for democracy, human rights, the rule of law and other interests outside its borders, it has striven to make the establishment of contractual obligations subject to respect for these universal values by its partner countries. This technique is referred to as the principle of political conditionality.¹ The EU’s relations with its Southern and Eastern neighbours are no exception in this regard.

The European Neighbourhood Policy (ENP),² which comprises 16 countries,³ is perhaps the component of EU external policy in which differentiation is most visible.⁴ The EU neighbours are characterised by a high degree of economic and political heterogeneity. Indeed, amongst

¹ See, amongst others, E. Riedel and M. Will, *Human Rights Clauses in External Agreements of the EC* in: *The EU and Human Rights*, Ph. Alston (ed.), Oxford 1999, pp. 723–756; L. Bartels, *Human Rights Conditionality in the EU’s International Agreements*, Oxford 2005.

² For legal monographs dedicated to this policy, see B. Van Vooren, *EU external relations law and the European neighbourhood policy: a paradigm for coherence*, London 2012; N. Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU: A Legal Analysis*, Oxford 2014; and of the same author, *The European Neighbourhood Policy: More than a Partnership?* in: *Developments in EU External Relations Law*, M. Cremona (ed.), Oxford 2008, pp. 244–299.

³ These are: Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, the Republic of Moldova, Morocco, the Occupied Palestinian Territories, Syria, Tunisia and Ukraine.

⁴ With the exception of the sector of restrictive measures. See section n. 2. For reference studies on the ENP and the principle of differentiation, see A. Łazowski, *Flexibility and homogeneity: two uneasy bedfellows* in: *Differentiated Integration in the EU: From the Inside Looking Out*, S. Blockmans (ed.), CEPS, Brussels 2014, pp. 37–45; P. Van Elsuwege, *Variable Geometry in the European Neighbourhood Policy: The Principle of Differentiation and its Consequences* in: *The European Neighbourhood Policy’s Challenges*, E. Lannon (ed.), Bruxelles, Bern, Berlin, Frankfurt am Main, New York, Oxford, Wien 2012, pp. 59–84.

the Eastern neighbours⁵ one may find European countries with an EU membership aspiration (Georgia, Moldova and Ukraine), as well as others such as Armenia (as of 2013), Azerbaijan and Belarus that do not have such an interest. By contrast, the Southern neighbours do not have a European Union membership perspective but have the common aspiration of greater market access to the EU internal market.

One may logically ask how the EU could not differentiate in its relations with countries that belong to such a heterogeneous group as those of the European Neighbourhood Policy (ENP)? Bilateralism and differentiation seem to be the most appropriate method and principle, respectively, to develop the EU relations with individual ENP partners.

The aim of this chapter is to examine how the EU has differentiated in its relations with its Eastern and Southern neighbours, as well as the basis for such differentiation. Section 1 kicks off with the typology of different relationships that can be found in the ENP. Sections 1.1 and 1.2 identify two different concentric circles amongst the countries of the Eastern partnership, and the motivations and reasons leading to the placement of countries in the same circle; the possibilities that these circles will change or break down in the near future is also considered. In particular, attention is drawn to the lesser importance of the political conditionality principle for the development of a new type of EU relationship with Azerbaijan, Armenia, and Belarus. Section 1.3 considers the highly differentiated landscape of EU relations with its Southern neighbours and why it is such a difficult task to identify concentric circles with regard thereto. These sections also describe the factors that have led to 'differentiation' in the context of the ENP. It is shown that the deepening of the cooperation with ENP countries is not always and only due to political conditionality. Section 2 highlights how, in contrast, the EU's approach in adopting restrictive measures *vis-à-vis* ENP countries is characterised by uniformity rather than differentiation, given that the governmental leadership of these countries and other non-state actors are sanctioned for their breaches of democratic rules, human rights and international law. This approach marks a striking contrast with the preponderant degree of differentiation in the other contractual relations with ENP countries. The concluding section demonstrates that the level of variable geometry is likely to grow as a result of the review of the ENP; this may lead to doubt whether the ENP can remain a single policy framework, which in turn leads to the question: Should the EU not abandon the ENP and clearly state that its relations with neighbouring Eastern countries

⁵ For an insight on the EU-Eastern partners relations, see, amongst others, E. Korosteleva, *The European Union and its Eastern Neighbours: Towards a More Ambitious Partnership*, London 2012.

are strictly bilateral in nature, considering the level of fragmentation that characterises such relations? Finally, the issue is raised whether the ENP, with its layers of relations with neighbour countries, is coherent with the EU's value-based foreign policy.

1. Differentiation as a principle underlying the ENP and its practice

When the ENP was launched in 2003, the EU's aim was to promote greater stability, security and prosperity in the neighbourhood.⁶ It was (wrongly)⁷ assumed that the role of stabilizer and provider of greater well-being – a role which the EU had played in the context of the upcoming 2004 enlargement – could be replicated *vis-à-vis* other EU neighbours. The Commission made clear its intention to differentiate in its relations with the ENP countries, depending on the progress achieved in commonly defined targets. The methodology chosen to guide and reflect the state of the European Union's relations with the respective countries was that of drawing up country-specific action plans, agreed upon with each respective neighbour (on the basis of the principle of joint ownership).⁸ These soft law measures were the instruments to be used to carry out reforms promising democracy, good governance, and respect for human rights in the ENP partners since, in principle, the articulated political and economic changes were fundamental to ensure long-term stability. The action plans were also supposed to lay the grounds for new bilateral Neighbourhood Agreements in which the greatest opportunities would be offered to those countries most willing and able to follow the EU political and economic model. Thus, the idea of 'different speeds' has been entrenched in the ENP since its origin.

The proclaimed basis for this differentiation was the principle of political conditionality. Following the Arab Spring, the principle of 'more for more' best captured the idea of differentiated treatment. The second 'more' of the dyad 'more for more' means that ENP partners have

⁶ See the Communication from the Commission to the Council and the European Parliament, *Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, COM(2003) 104 final, 11.04.2003.

⁷ For more details, see 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 2008.

⁸ Commission, Communication 'European Neighbourhood Policy' (Strategy paper), COM(2004) 373 of 12 May 2004, p. 8. For a study on the action plans, see B. Van Vooren, *A case-study of "soft law" in EU external relations: the European Neighbourhood Policy*, "European Law Review", No. 5/2009, pp. 696–719.

to move in the right direction by undertaking political reforms which deepen democracy and enhance respect for human rights.⁹ As already mentioned, this was not really new. But the EU placed more emphasis on political conditionality as the basis for its relations with Southern neighbours in an attempt to rehabilitate its normative image, which had been damaged by its past practice of cooperating with, and in some cases even strengthening, authoritarian regimes.¹⁰

The EU offered a series of incentives to its partners, in exchange for their commitment to undertake the difficult path of domestic reform. The EU promised a ‘stake in the internal market’ to these countries in order to increase their prosperity. The greater well-being in the neighbour countries was expected to also yield positive effects in terms of stability and the level of security. The idea of gaining greater access to the EU internal market was appealing to both the Southern and Eastern neighbours.¹¹ The EU made clear that agreements dubbed ‘free trade agreement plus’ (deep and comprehensive free trade agreements) could be concluded with all ENP partners.¹² Later, the concept of an ‘Economic Neighbourhood Community’ amongst the EU and *all* neighbours was introduced as a long-term prospect.¹³ This was the ENP’s *finalité économique*.¹⁴ The core of this area would be Free Trade Agreements (‘FTAs’). The EU also committed to assist the ENP countries’ efforts at reform¹⁵ through specific

⁹ However, in the current practice the second ‘more’ does not refer to the progress in political reform. N. Ghazaryan, *op.cit.*, p. 171.

¹⁰ For more along these lines, see N. Ghazaryan, *The fluid concept of ‘EU values’ in the neighbourhood: a change of paradigm from East to South?* in: *The European Neighbourhood Policy: Values and Principles*, S. Poli (ed.), Oxon, New York 2016, pp. 11–32.

¹¹ However, the position of Eastern and Southern neighbours was different, since most of Southern neighbours already had contractual relations aimed at establishing a free trade area. See section n. 1.3. By contrast, the PCA agreements with the Eastern neighbours had not so clearly envisaged the creation of a free trade area.

¹² G. Meloni, *Is the same toolkit used during the enlargement applicable to countries of the new Neighbourhood? A problem of mismatching between objectives and instruments* in: *The European Neighbourhood Policy: A Framework for Modernisation?* M. Cremona and G. Meloni (eds.), “EUI Working Paper-Law,” No. 21/2007, p. 100.

¹³ Communication from the Commission to the Council and the European Parliament on Strengthening the European Neighbourhood Policy, COM(2006) 726 final, Brussels, 4.12.2006, p. 5.

¹⁴ For comments on the ambiguous concept of a neighbourhood economic community, see S. Gstöhl, *What is at stake in the internal market? Towards a neighbourhood economic community* in: *The European Neighbourhood Policy’s...*, *op.cit.*, pp. 85–108.

¹⁵ Under art. 4 of the European Neighbourhood Instrument (Regulation (EU) No 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument, 2014 OJ L77/27), factors affecting the disbursement of funds include: the population and the level of development, commitment to and

financial instruments which, however, overall were modest considering the ambition of promoting wide-ranging domestic reform.¹⁶

Although great emphasis was placed on bilateral relations with ENP countries, the 'Wider Europe' Communication of 2003¹⁷ also envisaged efforts to promote regional and infra-regional cooperation amongst the neighbours. The idea was that 'enhanced interdependence – both political and economic – can itself be a means to promote stability, security and sustainable development, both within and without the EU'.¹⁸ Over time the institutional establishment of both the Union for the Mediterranean (2008)¹⁹ and the Eastern Partnership (2009)²⁰ were used to hold multilateral discussions with partners every two years, as a complement to the bilateral relations of the respective members with the EU. In the former context, the Heads of State and Governments' political declarations after each meeting identified a list of concrete regional projects on issues of mutual interest.²¹ In the latter regional framework, the meetings of the Parties served the purposes of creating greater ties amongst the participants, exchanging information on the partner countries' steps towards transition, reform and modernisation, and on how to proceed on regulatory approximation of their legal systems to that of the EU.²² In addition, the Black Sea Synergy was created in 2008 at the initiative of the Commission.²³ Its primary objective is to further cooperation within the Black Sea region and between the region as a whole and the EU. The areas identified for

progress in implementing mutually agreed political, economic and social reform objectives, as well as commitment to deep and sustainable democracy.

¹⁶ COM(2006) 726 final, op.cit., p. 12.

¹⁷ COM(2003) 104, op.cit., p. 8.

¹⁸ Ibidem, p. 4.

¹⁹ This includes the 43 countries of euro Mediterranean region. 'Barcelona Process: Union for the Mediterranean', Communication from the Commission to the European Parliament and the Council, COM(2008) 319, 20.05.2008.

²⁰ 'Eastern Partnership' Communication from the Commission to the European Parliament and the Council, 3 Dec 2008, COM(2008) 823 final; Joint Declaration of the Prague Eastern Partnership Summit, doc. ref. 8435/09 (Presse 78), 7.05.2009.

²¹ Joint Declaration of the Paris Summit for the Mediterranean, Paris, 13.07.2008, p. 13.

²² Joint Declaration of the Prague Eastern Partnership Summit, cit., p. 8. The areas of cooperation of the Eastern partnership are: democracy, good governance and stability, economic integration and convergence with EU sectoral policies, energy security, and contacts between people.

²³ This initiative was proposed by the Commission in 2007. See COM(2007) 160 final. It was formally launched at a joint meeting of European Union and Black Sea Foreign Ministers in Kiev in February 2008. This regional initiative includes the EU members Bulgaria, Greece, and Romania, the candidate country Turkey, Russia and ENP partners Armenia, Azerbaijan, Georgia, the Republic of Moldova, Ukraine.

cooperation are the environment, maritime affairs, fisheries, maritime transport, energy, education, civil society, cross border cooperation, and research fields.²⁴

Today, thirteen years after the start of the ENP, the landscape of EU relations with its neighbour countries is heavily differentiated. The following aspects of differentiation may be identified. First of all, differences in the EU relations with partner countries are inherent in the very existence of bilateral contractual relationships with them. This element in itself shows that both parties consider that there is a mutual interest in cooperation. By contrast, a lack of contractual relations (or the fact that they are outdated) shows that a particular country is unwilling (as a result of its political choice) or unable (due to its instability) to develop closer relations.

A further layer of differentiation concerns the type of contractual arrangement and its content. Contractual relations may be based on a European Neighbourhood Agreement, which is integration-oriented, *and* on sector-related agreements. The conclusion of the latter is particularly significant when the agreement favours the convergence toward the EU *acquis*. Indeed, this means that the EU partner country has a clear interest in getting closer to the EU. By contrast, looser forms of relations rest upon sector-related agreements *only* and outdated framework agreements.

A third factor of differentiation centres around the financial assistance offered to partner countries. The EU, on the basis of the principle of differentiation, disburses more money to partners that are on the path towards democratic transition and less money to countries that are hesitating to adopt that path. This means that the question of ‘more money’ or ‘less money’ depends on the undertaking of domestic reforms.²⁵ However, given the modest amounts of such an assistance, it is submitted here that the differences in the financial support offered are not sufficient to determine the scope of political/economic changes in the assisted countries.

1.1. The First Concentric Circle amongst Eastern Neighbours

In light of the parameters identified above, Georgia, Moldova and Ukraine predictably fall within the same, inner, concentric cycle. The EU has established the closest forms of cooperation with these countries as a result of the 2014 association agreements.²⁶ Their conclusion marked

²⁴ Commission/HR JOINT staff working document ‘Black Sea Synergy: review of a regional cooperation initiative’, SWD(2015) 6, 20.1.2015, p. 1.

²⁵ Commission/HR Communication ‘A response to a changing neighbourhood,’ COM(2011) 303 25.5.2011, p. 28.

²⁶ For relevant comments, see G. Van der Loo, P. Van Elsuwege and R. Petrov, *The*

the final material outcome of the vague notion of ‘enhanced agreement’, as mentioned in the Ukraine and Moldova action plans. The position of these three countries is undifferentiated with respect to their perspective of membership. None of them has a concrete perspective of EU membership in either the short- or medium-term.²⁷

However these three association Treaties,²⁸ which differ little in terms of content, bring the three countries closer to the EU than any other neighbour and deepen the relations previously established under the previous Partnership and Cooperation Agreements (PCAs).²⁹ Based on a mixture of CFSP and non-CFSP legal bases (Articles 217 TFEU and Articles 31(1) and 37 TEU), these Treaties innovate inasmuch as they include the ambitious objective of establishing a Deep and Comprehensive Free Trade Area (DCFTA), whereby the partner countries will gradually be integrated into the EU internal market if they comply with the conditions set forth in the Treaties.³⁰ They are characterised by a strong emphasis on regulatory convergence between the parties, which

EU-Ukraine Association Agreement: assessment of an innovative legal instrument, “EUI Working Papers-Law”, No. 9/2014.

²⁷ This is not stated explicitly but may be deduced from the statement: ‘Although the large scope of the relationship is far from exhausted in any of these [three] cases, there is an aspiration on their side to set a further horizon beyond their Association Agreements/DCFTAs.’ See Joint consultation paper, ‘Towards a new European Neighbourhood Policy,’ JOIN(2015) 6 final, 4.3.2015, p. 7.

²⁸ For the text of the association agreements with Georgia, Moldova and Ukraine, see OJ 2014 L 261/4, L 260/4 e L 161/3.

²⁹ These were less far-reaching than the Euro-Mediterranean agreements concluded with Southern neighbours, both with respect to the objectives of the cooperation – the establishment of a free trade area was not envisaged in clear terms – and the powers of the bodies created by these agreements – no legally binding decisions could be taken. P. Van Elsuwege, *op.cit.*, p. 60.

³⁰ In June 2015 the Council decided in favour of the provisional application of the EU-Ukraine agreement, with the exception of the provisions dedicated to the DCFTA, whose application was delayed until 1st January 2016. This move was made as a result of Russia’s pressure and economic concerns over the impact of the agreement on its economy. This implied that Ukraine would not be obliged to align its domestic legislation to that of European technical standards with respect to the products covered by the agreement. However, in December 2015 the EU decided that the suspension was no longer justifiable. Russia’s reaction was to withdraw trade preferences for Ukrainian goods. The provisions of the agreement with Ukraine on the DCFTA have now been in force since January 2016, despite Russia’s opposition. See the document ‘Trilateral meetings on EU-Ukraine DCFTA – distinguishing between myths and reality’ available at: http://trade.ec.europa.eu/doclib/docs/2015/december/tradoc_154127.pdf (last visited 10.03.2016).

is particularly necessary for the functioning of an integrated trade area. It will be possible for the Parties to implement most of the EU *acquis* within the Ukrainian, Moldovan and Georgian legal orders.³¹ The spectrum of the cooperation is broad and includes both the Common Foreign and Security Policy (CFSP) as well as cooperation in the area of freedom, security and justice. For example, the agreement with Ukraine provides for ‘gradual convergence on foreign and security matters with the aim of Ukraine’s ever-deeper involvement in the European security area’.³² Emphasis is also placed on the participation of Ukraine in EU-led civilian and military crisis management operations. Although the EU has not yet clearly specified whether this form of contractual relations will lead to EU membership, neither is this prospect excluded. As stated in the preamble, ‘This Agreement shall not prejudice and leaves open future developments in EU-Ukraine relations’.³³ Whether the final goal of EU cooperation with these countries is EU membership largely depends on the stability of the countries themselves, currently torn by conflicts with Russia, as well as on Russia’s position toward their accession.

It is interesting to dwell on the basis for the opening of negotiations concerning these association agreements. In these three cases the upgrading of their EU relations was not linked to political conditionality; ‘the DCFTA appears to be being extended to the eastern neighbours primarily for political reasons, rather than reflecting their trade salience for the EU’.³⁴ The opening of the negotiations of the enhanced framework agreement and its trade component was linked to the completion of the accession process to the WTO.³⁵ The undertaking of domestic reforms leading to consolidation of democracy and respect of human rights was not *the* reason justifying this opening of the negotiations. However, *ex post* conditionality (meaning respect for common values after the conclusion of the agreement) is considered important in the text of the agreement.³⁶

³¹ R. Petrov, *EU Values in Integration oriented Agreements with Ukraine, Moldova and Georgia* in: *The European Neighbourhood Policy: Values and Principles*, S. Poli (ed.), Oxon, New York 2016, pp. 99–111.

³² See title II of the association agreement Council Decision 2014/295/EU 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, OJ 2014 L161/1.

³³ Similar expressions were used in the other two agreements.

³⁴ K. Wolczuk, *Ukraine and the EU: turning the Association Agreement into a success story, CEPS policy brief*, 23 April 2014.

³⁵ Ukraine-country strategy paper (2007–2013), p. 28.

³⁶ The EU–Ukraine agreement also includes a new form of conditionality – market

Before the association agreements were concluded, the EU had established special contractual arrangements with Ukraine, Moldova and Georgia in the area of justice and home affairs,³⁷ in particular as far as migration and mobility are concerned. These are areas in which the principle of differentiation fully operates.³⁸ Mobility partnerships were concluded with Moldova and Georgia in 2008 and 2009.³⁹ The proposal to negotiate such a partnership⁴⁰ is presented only after a certain level of progress has been achieved in the migration and mobility dialogues, also taking into consideration the broader economic, political and security context'.⁴¹ Mobility partnerships envisage (or are followed by) visa facilitation and readmission agreements, which enter into force on the same day. Ukraine had concluded both agreements earlier than Georgia and Moldova (2007).⁴²

In exchange for these three countries' commitments to domestic reforms and the strengthening of their capacity to manage migration flows, the EU also envisaged setting up a visa free regime with each country. The EU has opened 'Visa Liberalisation Dialogues' with each of the three countries and has defined action plans on visa liberalization. The EU has provided the benchmarks which these countries should attain in order to be ready for the lifting of visa requirements, and is monitoring the progress of each country toward those benchmarks. The Commission presented the Visa Liberalization Action Plan (VLAP) to the Ukrainian authorities in 2010, to the Moldovan authorities in 2011, and to the Georgian authorities in

access conditionality – 'implying that Ukraine, Moldova and Georgia will only be granted additional access to a section of the EU Internal Market if the EU decides, after a strict monitoring procedure, that these countries have successfully implemented its legislative approximation commitments.' See R. Petrov, *op.cit.* The authors refers to the monitoring procedure set out by Art. 475 (2) EU-Ukraine AA; Art. 451, 452 EU-Moldova AA; and Art. 419 (2) EU-Georgia AA.

³⁷ Visa facilitation and readmission agreements have been concluded with Ukraine, OJ 2007 L 168/11, Moldova, OJ 2007 L168/3, and Georgia, OJ 2013 L 52/34. The visa facilitation agreements with Ukraine and Moldova were amended and upgraded in 2013.

³⁸ 'The principle of differentiation means that the EU will seek closer cooperation with those partners that share interests with and are ready to make mutual commitments with the EU and its Member States.' See Communication from the Commission to the European Parliament and the Council "Global Approach to Migration", COM(2011) 743, p. 7.

³⁹ See IP/09/1853 of 30.11.2009, IP/08/893 of 5.06.2008.

⁴⁰ These measures are designed to ease legal migration as soon as these countries have the institutional capacity to manage migration.

⁴¹ COM(2011) 743, *op.cit.*, p. 10.

⁴² OJ 2007 L 168/11.

2013. At the moment such a regime is operative for Moldova,⁴³ since this country has satisfied the conditions and benchmarks set and monitored by the EU.

The three associated countries also have close links with the EU in the field of energy. They are part of the Energy Community (or, in the case of Georgia, will soon accede to it).⁴⁴ This is an international organisation founded on the basis of the Energy Community Treaty, which entered into force in July 2006. The Parties to this Community are the European Union and eight Contracting Parties from South East Europe⁴⁵ and the Black Sea region. Ukraine⁴⁶ and Moldova acceded in 2009 and 2010. Armenia currently has an observer status, with a lack of voting rights in the representative bodies.

It should be noted that the expansion of the Energy Community to other neighbours is not excluded.⁴⁷ Recently, the High Level Reflection Group charged with identifying the changes that should be introduced in this Treaty stated that that ‘no geographical limitations should be imposed with regard to the Community’s territorial range’ and has advocated for a variable geometry.⁴⁸ This means that potentially the Community is

⁴³ As of 28 April 2014, the visa obligation for citizens of Moldova who hold a biometric passport and want to travel to the Schengen zone for a short-stay was abolished.

⁴⁴ Commission Communication ‘On security of energy supply and international cooperation – The EU Energy Policy: Engaging with Partners beyond Our Borders,’ COM(2011) 539, p. 6.

⁴⁵ Albania, Bosnia and Herzegovina, Kosovo, former Yugoslav Republic of Macedonia and Serbia.

⁴⁶ Ukraine is a country of energy transit. Approximately 20 per cent of the EU’s gas supply passes through Ukraine. COM(2011) 539, op.cit., p. 5.

⁴⁷ For example, the European Parliament has advocated a ‘further expansion of the Energy Community via the Eastern Neighbourhood Policy in line with the objectives of the Energy Community on the basis of mutual interest’. See European Parliament resolution of 15 December 2015 on Towards a European Energy Union (2015/2113(INI)), P8_TA-PROV(2015)0444, par. 18.

⁴⁸ ‘With the Energy Community becoming the main multilateral instrument for organizing the European Union’s external energy relations, a variable geometry should be introduced which would allow Europe to effectively spread its key principles and rules beyond its current sphere of influence. Countries acceding to the Energy Community have a continuous and strong interest in applying European rules. This interest may not be as evident on the periphery of Europe as it is for countries with a concrete and imminent EU accession perspective. The same is true for upstream countries, i.e. countries producing oil and gas. To accommodate them, the new Energy Community Treaty should envisage flexibility in the sense that countries may opt for applying only a certain core set of EU rules and retain more sovereignty in certain areas.’ See Report of the High Level Reflection Group, *An energy Community for the future*, 2014, p. 17 available at: https://www.energy-community.org/portal/page/portal/ENC_HOME/DOCS/3178024/Energy_Community

open not only to other Eastern partnership countries but also to Southern neighbours and even ‘neighbours of neighbours.’

The current objective⁴⁹ of this organization is to extend the EU energy *acquis* to the contracting parties. The Community is defined as ‘the main framework for cooperation with the eastern partners’.⁵⁰ It is intended to export the EU energy *acquis* to partner countries, thus promoting a European Pan-energy area. Parties are required to enact binding legislation converging toward the EU energy, competition and selected pieces of environmental *acquis*. The lack of implementation, which is a recurrent problem, may be sanctioned at the political level by the suspension of the partner’s rights within the Community. However, there are no judicial bodies entrusted to enforce the obligations of the parties. This organization can be considered the first building block⁵¹ toward the achievement the ‘Neighbourhood Economic Community’.⁵² It should be noted that no clear strategy on how to achieve this goal was identified in the early ENP policy documents. The only known element in this area is that a network of FTAs would be at its core.⁵³

Accession to the Energy Community Treaty is not based on political conditionality.⁵⁴ At the same time, the obligations to converge toward the

munity_HLGR_Report_FINAL_WEB.pdf (last visited 30.12.2015).

⁴⁹ The initial objective was establishing an integrated market in natural gas and electricity among the Parties.

⁵⁰ Joint communication (Commission/HR) “Neighbourhood at the Crossroads: Implementation of the European Neighbourhood Policy in 2013,” JOIN(2014) 12, 27.3.2014, p. 15.

⁵¹ The phenomenon of encouraging sector-related differentiation in the EU-Eastern partners relations has been defined as ‘Sectoral multilateralism.’ This is considered a promising strategy to achieve the Economic Neighbourhood Community. See S. Blockmans and B. Van Vooren, *Revitalizing the European “Neighbourhood Economic Community”: the case of legally binding sectoral multilateralism*, “European Foreign Affairs Review”, No. 4/2012, pp. 577–604.

⁵² This concept has not been re-branded by the EU institutions. In its conclusion on the review of the ENP the Council refers to the achievement ‘in the long term of a *wider area of economic prosperity* (emphasis added) based on WTO law rules and sovereign choices throughout Europe and beyond.’ Council Conclusions on the review of the Neighbourhood policy, press release 926/15, 14.12.2015.

⁵³ For a more detailed analysis, see S. Gstöhl, *op.cit.*, pp. 85–108.

⁵⁴ However, the European Parliament seems to take a different view. ‘[...] The EU should promote the development and deepening of energy policy cooperation with third countries which share the same values and are willing to engage in democratic reforms and the promotion of the values upon which the EU is founded,’ European Parliament resolution of 12 June 2012 on Engaging in energy policy cooperation with partners beyond our borders: A strategic approach to secure, sustainable and competitive energy supply, doc. ref. 2012/2029(INI), P7_TA(2012)0238, par. 50.

EU energy, environment and competition *acquis* imply adaptation costs for the ENP partners, and no financial assistance is provided by the EU in this area. This may also explain the difficulties in implementing the obligations of the agreement.⁵⁵ The differentiated approach in this area reflects the degree of willingness of the countries to approximate their regulatory framework to the EU⁵⁶ and is strongly linked to the conclusion of a FTA.⁵⁷

Finally, the EU relations with Georgia, Moldova and Ukraine are special with respect to other ENP countries also on account of their cooperation with the EU in the area of CFSP. The EU concluded framework agreements on participation in CSDP missions with these countries.⁵⁸ Ukraine was the first neighbour to engage with the EU (in 2005) and has participated in a number of missions; in Macedonia, Bosnia Herzegovina and in the anti-piracy mission Operation Atalanta,⁵⁹ as is the case for the acceding countries. Finally, the three associated countries often align with the CFSP declarations and EU sanctions.⁶⁰

1.2. The Second Concentric Circle amongst Eastern Neighbours

The second concentric circle is formed by the non-associated Eastern neighbours: Azerbaijan, Armenia and Belarus. Their common roof is the lack of an association agreement, including a DCFTA, with the EU. However, despite this commonality there are many differences amongst these countries. Their position *vis-à-vis* cooperation with the EU is different, ranging from a complete lack of interest (Belarus)⁶¹ to selective

⁵⁵ R. Petrov, *Energy Community As a Promoter of the European Union's 'Energy Acquis' to Its Neighbourhood*, "Legal Issues of Economic integration?", No. 3/2012, p. 349.

⁵⁶ COM(2011) 539, op.cit., p. 6.

⁵⁷ 'Widening the Energy Community could be considered for countries that have concluded or envisage to negotiate a Free Trade Agreement with the EU and demonstrate both willingness and ability to implement relevant EU legislation.' Ibidem, p. 13.

⁵⁸ Agreement between the European Union and Ukraine establishing a framework for the participation of Ukraine in the European Union crisis management operations, OJ 2005 L 182/29. 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 operations, OJ 2013 L 8/2. Agreement between the European Union and Georgia establishing a framework for the participation of Georgia in European Union crisis management operations, OJ 2014 L 14/2.

⁵⁹ M. Cremona, *The ENP and Multilateralism in: The European Neighbourhood Policy: Values and Principles*, S. Poli (ed.), Oxon, New York 2016, pp. 81–98.

⁶⁰ Ibidem.

⁶¹ Š. Füle, 'Towards a European future for the citizens of Belarus,' SPEECH/11/861 of 7 December 2011. He argues that Belarus is the only partner country that is not interested in the prospect of greater mobility for its citizens.

interest (Azerbaijan and Armenia). Neither Belarus nor Azerbaijan satisfy international standards as far as respect for democracy and human rights are concerned. However, whereas Belarus has not even agreed an action plan with the EU,⁶² Azerbaijan has implemented the EU recommendations contained in its action plan, albeit to a limited extent. This country aligns itself with the EU declarations on CFSP, but less often than Armenia and the countries of the first concentric cycle. As to the negotiations over an association agreement, which were opened in 2010, they are obstructed not only by a lack of genuine commitment towards political reforms but also by the lack of interest of Azerbaijan in a swift conclusion of this process. At the same time, the negotiation of a DCFTA cannot start while Azerbaijan has not acceded to the WTO. At the moment this process is also going at a slow pace. A final specific aspect of EU-Azerbaijan relations which make them different from other Eastern neighbours is that, crucially, the EU is the priority destination for Azerbaijan's energy exports.⁶³

Armenia distinguishes itself from Azerbaijan and Belarus. Up until 2013 it could even have been placed in the same concentric circle as Moldova, Georgia and Ukraine for its European aspirations. In 2010 the negotiations over an association agreement, including a DCFTA, were started. It has often aligned itself with the CFSP declarations. Yet, after negotiating the envisaged agreement, in 2013 it announced its intention (achieved in January 2015) to join the customs union established in 2010 by Russia, Belarus and Kazakhstan. This decision was due to the pressure put on it by Russia, a pressure that was difficult to resist considering its economic and military dependence on Russia.⁶⁴ This also meant by implication the reversal of Armenia's European choice.

Although the three above-mentioned countries have not carried out domestic reforms along the lines agreed upon in their action plans, nonetheless the EU has concluded Mobility partnerships with Armenia (2011) and Azerbaijan (2013) and a discussion on this topic was opened with Belarus (2015) as well.⁶⁵ Visa liberalization and readmission agreements were also concluded with Armenia and Azerbaijan in 2012 and 2013.⁶⁶ One may ask how such an upgrade of the contractual relations

⁶² JOIN(2014) 12, op.cit., pp. 5, 7. Belarus is the only Eastern Partnership country with which there are no pending negotiations of an association agreement.

⁶³ Joint staff working paper, Implementation of the European Neighbourhood Policy in 2010 Country report: Azerbaijan, SEC(2011) 640, 25.05.2011, p. 12.

⁶⁴ N. Ghazaryan, *The European Neighbourhood Policy...*, op.cit, p. 185.

⁶⁵ Council meeting-environment of 6.03.2015, p. 10.

⁶⁶ On the possibility of concluding mobility partnerships with the Southern neighbours, see section 1.3.

can be explained and justified? Why does the EU favour people-to-people contacts in the absence of genuine commitments towards domestic reforms? In principle, the mobility partnership is designed to ‘bring [...] together all the measures to ensure that migration and mobility are mutually beneficial for the EU and its partners, including opportunities for greater labour mobility’.⁶⁷ The conclusion of visa liberalization agreements (‘the carrot’) is subject to conditions (the ‘stick’) – but are they political or simply technical conditions? This is quite ambiguous. The decision to conclude a mobility partnership is made on the basis of ‘the efforts and progress made in all areas (migration, mobility and security) [by the concerned third country], and will take into account also progress made in *governance-related areas* (emphasis added)’.⁶⁸ What does ‘governance’ mean? A plausible answer is that the country should prove it has the capacity to cope with irregular migration and that it is sufficiently equipped for that purpose. Hence, political conditionality is apparently excluded.

A further explanation of the EU’s willingness to conclude these partnerships despite the lack of progress of the contracting party in political reforms is that these partnerships focus more on ‘migration management’ than on opportunities for legal migration from third countries. The EU and its Member States are more interested in making the return of illegal immigrants more effective than in facilitating the legal migration of third country nationals. Indeed the parties, by signing the partnership, commit to signing a readmission agreement, by which the ENP partner concerned agrees to readmit not only its own citizens but also those of third party states who have transited through its territory and who are caught illegally entering or residing in the EU. Thus in conclusion, when the decision to set up a mobility partnership is made on a bilateral basis this does not mean that the EU is rewarding the partner country for its progress towards building democracy and respecting human rights.

In the near future the EU will further differentiate its relations with countries of the second concentric circle. Indeed, in 2015 it was announced that a comprehensive framework agreement would be negotiated between the Commission and the High Representative (on behalf of the EU) and Armenia. This Treaty will be deprived of the chapters on approximation of the regulatory system leading to FTA plus. The EU has agreed to a new format of cooperation with Armenia because of its decision to participate

⁶⁷ COM(2011) 743, op.cit., p. 10.

⁶⁸ COM(2011) 292, op.cit., p. 8.

to the Eurasian Economic Union.⁶⁹ Armenian officials confirmed their readiness to sign the ‘political component of the Association Agreement’ (also referred to as ‘AA light’).⁷⁰ It is also possible that Armenia will engage in sector-related cooperation designed to foster trade in specific sectors.⁷¹

As to Azerbaijan, this country has demonstrated an interest in negotiating a ‘Strategic Modernisation Partnership agreement with a weaker normative base’⁷² in lieu of an association agreement including a DCFTA. The EU has agreed to discuss this new form of agreement, despite the fact that the political situation in Azerbaijan continues to raise concerns.⁷³ If signed, this agreement will create a further example of a contractual relationship with an Eastern partner which is distinct with respect to the others.

Finally, some changes are also announced in the EU-Belarus monolithic relations. In accordance with Article 29 of the Joint Declaration of the Eastern Partnership Summit in Vilnius, the Belarusian government and EU institutions launched the first round of consultations ‘with a view to determining the best future form of co-operation on modernisation issues’.⁷⁴ The EU’s opening towards this country, with its undemocratic and oppressive governmental regime, is the best example that the principle of differentiation in the ENP is evolving. It is no longer based on adherence by ENP partners to EU values, but has a more pragmatic foundation. At the same time, the turn towards pragmatism is difficult to reconcile with the principle of political conditionality.

1.3. The many faces of differentiation in EU relations with its Southern neighbours

Turning to the EU relations with its Southern neighbourhood, these are heavily fragmented due to differences in individual third countries’ economic and political situations and, more generally, in their level

⁶⁹ Press Release 151207_04_en, 7.12.2015.

⁷⁰ <http://www.eap-index.eu/armenia2014> (last visited 31.12.2015). Recently, the Commission has also recommended to the Council the issuance of authorisations to negotiate comprehensive EU-level air transport agreements with Armenia.

⁷¹ JOIN(2015) 50, op.cit., p. 8.

⁷² <http://www.eap-index.eu/azerbaijan2014> (last visited 31.12.2015).

⁷³ For example, there are no improvements in the Nagorno-Karabakh conflict. See Joint staff working document, ‘Implementation of the European Neighbourhood Policy in Azerbaijan progress in 2014 and recommendation for actions,’ SWD(2015) 64, 25.3.2015, pp. 1–2.

⁷⁴ <http://www.eap-index.eu/belarus2014> (last visited 31.12.2015).

of (in)stability following the Arab Spring. Against this backdrop, it is difficult to identify concentric circles consisting of more than one country. A broad distinction can be made between partners that have contractual relations in the form of an action plan on the one hand, which implies the existence of an legally binding agreement with the EU (be it a PCA or a Euro-Mediterranean agreement), and those lacking any form of modern legal foundation for their relations with the EU on the other. Most Southern neighbours have concluded association agreements within the framework of the Barcelona process between the 1990s and the beginning of the 2000s. The exceptions are Libya and Syria.⁷⁵ Although the position of these two countries with respect to the EU is different from the legal point of view, they can be placed in the same concentric cycle for their lack of willingness or their inability (due to instability) to find sufficient common interests with the EU to develop a modern form of cooperation.⁷⁶

Before turning to the issue of the EU's differentiated approach toward the Southern countries associated with the EU, it is necessary to dwell on the content of the euro-Mediterranean agreements envisaged by the Barcelona process. These Treaties cover many different areas of cooperation and envisage the establishment of a free trade area for industrial products⁷⁷ through the creation of a network of bilateral free trade agreements between the EU and twelve Mediterranean partners. This was perhaps the most important objective and has been attained. However, the impact of the bilateral association agreements on trade flows has been disappointing.⁷⁸ Attempts to enhance South-to-South economic

⁷⁵ The negotiation of an association agreement with Libya was started but suspended in February 2011 due to the outbreak of the conflict. As for Syria, an association agreement was negotiated between 1997 and 2004 but it never entered into force due to the lack of Assad's signature. In 2009 Member States agreed to re-propose the signature of the agreement to the Syrian government (the content was substantially the same as that negotiated in 2004), but no positive answer was received.

⁷⁶ A special mention should be made of the situation of Algeria. By contrast with Libya and Syria this country is linked to the EU through an association agreement concluded in 2002 replacing that of the 1970s. Yet, Algeria could not agree on the content of the action plan which would have defined the objective for its cooperation with the EU in the context of the ENP. As a result there are no progress reports are issued by the Commission to assess the progress of the reforms carried by Algeria. Yet, the EU has quite negatively assessed this country's situation as far as the pace of constitutional reforms and respect for human rights are concerned. See Memo n. 14/219, 27.3.2014 available at http://europa.eu/rapid/press-release_MEMO-14-219_en.htm (last visited 30.12.2015).

⁷⁷ By contrast, reduction in duties was envisaged for only a limited number of agricultural products.

⁷⁸ P. Montalbano, *The EU sees regional integration as a way to facilitate economic and*

integration amongst Mediterranean partners was a complementary component of the Barcelona strategy, but no more successful.⁷⁹ In 2004 the 'Agadir Agreement' between Jordan, Morocco, Tunisia, and Egypt⁸⁰ was concluded; other initiatives were taken by the Arab League.⁸¹ The EU supported the former Treaty since it was intended to enhance trade and investment amongst regional partners and was defined as an element of the Economic Community to be created between the partner countries and the EU.⁸² But the Agadir agreement faced obstacles,⁸³ and as a result intra-regional trade remained very low.⁸⁴

political development in: The European Neighbourhood Policy: a framework for modernization, M. Cremona and G. Meloni (eds.), "EUI working papers-Law", No. 21/2007, p. 45. The conclusion of these Treaties has led to an increase in trade only in the case of Egypt and Tunisia. Ibidem, p. 13.

⁷⁹ P. Montalbano, op.cit., p. 48.

⁸⁰ In 2004 the Parties concluded the Arab Mediterranean Free Trade Agreement (known as the 'Agadir agreement') with the aim of establishing a free trade area between the contracting parties and potentially other Arab Mediterranean countries with free trade agreements with the EU. The Treaty came into effect in 2007. 'The main, unheralded purpose of the Agadir Agreement is to promote the adherence to Pan-Euro-Mediterranean Rules of Origin, to facilitate regional trade with the EU. T. Broude, *Regional economic integration in the Middle East and North Africa: a primer*, "Research paper, Hebrew University of Jerusalem", No. 12/2009, p. 31. The Treaty is however somewhat old-fashioned since it does not cover services and investment. Indeed, 'liberalisation in agricultural goods and services proceeds according to broader liberalisation agreements – the Greater Arab Free Trade Area (GAFTA) and GATS.' See A. Willenberg, *The Promotion of Regional Economic Integration in the EU's Neighbourhood: CEFTA 2006 and the Agadir Agreement*, "BRIGG Paper", No. 5/2009, p. 6.

⁸¹ Two years after the launch of the Barcelona process, efforts to deepen regional economic integration were made in 1997 by the Economic Arab League. This organization had set the goal, with the adoption of the Agreement on Facilitating and Developing Inter-Arab Trade for Establishing Pan-Arab Free Trade Area, of achieving a Pan-Arab Free Trade Area in ten years. The Great Arab Free Trade Area was created in 2005 (2 years ahead of schedule) between seventeen out of the twenty-two members of the Arab League. The partner countries agreed to dismantle trade barriers on manufactured goods and to do the same progressively on agricultural products. In addition, the agreement included a commitment to suppress non-tariff barriers. By contrast, negotiations on reducing tariffs on trade in services were not started.

⁸² COM(2006) 726 final, cit., p. 5.

⁸³ In the progress report on Egypt of 2009, it was stated that 'The results of the implementation of the Agadir Agreement appear to be modest and trade between the four countries (Jordan, Egypt, Morocco and Tunisia) remains limited also due to the presence of non-tariff barriers.' See Commission, 'Implementation of the European Neighbourhood Policy in 2008 – Progress Report Egypt,' SEC(2009) 523/2, p. 12.

⁸⁴ P. Montalbano, *The EU sees regional integration as a way to facilitate economic and political development* In: *The European Neighbourhood Policy: a framework for modernization*, op.cit., p. 48. This is also confirmed in Report Activity of 2014 of the Union for the Mediterra-

The trend toward bilateralism was reinforced as a result of the increased instability in the Southern neighbourhood. This has induced the EU to focus its efforts on revamping the development of bilateral trade relations. On 14 December 2011 the Council authorised the Commission to open bilateral negotiations to establish DCFTAs with Egypt, Jordan, Morocco and Tunisia. It appears that this move was dictated by the need to enhance trade and foreign direct investment in the Southern Mediterranean region⁸⁵ and not much by political conditionality. The possibility of extending the scope of the existing trade area with the EU by negotiating the trade liberalization of agricultural products and services was left open in the action plans with Tunisia and Morocco, as well as with Jordan and Egypt.

The DCFTA is intended to go further than the existing FTAs and envisages the liberalization of trade in services, government procurement, competition, intellectual property rights, investment protection, and the gradual integration of the party-state's economy into the EU single market, for example in areas like industrial standards and technical regulations or sanitary and phytosanitary measures, which are generally referred to as 'behind-the-border' barriers to trade. The goal of a DCFTA is to promote the alignment of the party-state's legislation with the EU's *acquis*. It may be questioned whether, by 'going bilateral' on the model of a hub-and-spoke approach⁸⁶ rather than encouraging regional economic integration the EU is not somehow jeopardising the objective of making the neighbours more prosperous and stable.

In this context, within the group of countries having concluded a Euro-Mediterranean agreement it is possible to draw only a single concentric circle, including Tunisia and Morocco. These two neighbours can be accommodated in the same circle owing to their propensity to undertake political reforms and willingness to align with the EU. Their ambition is to gradually participate in the EU's internal market by accepting the EU *acquis* and to cooperate with the EU in different policy areas. In Tunisia democracy is taking root, as evidenced by the adoption of a new Constitution in 2014, the inclusive character of the procedure used to adopt it, and by the free political elections held since 2011, confirmed by EU Election monitoring missions. As to Morocco, the EU positively assesses

nean, available at: http://ufmsecretariat.org/wp-content/uploads/2015/04/Report_web_FINAL.pdf (last visited 31.12.2015), p. 7.

⁸⁵ Press release, 3203rd Council meeting Foreign Affairs Trade, Brussels, 29.11.2012, p. 12.

⁸⁶ S. Gsthöl, *Models of external differentiation in the EU's neighbourhood: an expanding economic community?*, "European Journal of Public Policy", No. 6/2015, p. 863.

this country's reform-course.⁸⁷ Tunisia has established a privileged relationship with the EU since 2014, whereas Morocco's relationship with the EU has been defined as 'advanced' since 2010.

The positions of the two countries are slightly differentiated. Morocco has concluded a number of sector-related agreements, including a controversial fishery agreement (2011)⁸⁸ and is negotiating a DCFTA (two rounds were held in 2014) with the EU. Negotiations have also opened on the conclusion of a framework agreement with Morocco on its participation in CSDP missions.⁸⁹ When finalised, Morocco will be the first Southern neighbour to have such an agreement with the EU. Despite the violation of international law by Morocco in relation to the situation of the inhabitants of Western Sahara, the EU relations with this country are rosy. The EU-Tunisia relations are slightly less advanced than those with Morocco. For example, the parties are preparing (but have not yet started) the negotiations for a DCFTA. The conclusion or ratification of sector-related agreements is currently envisaged: preparations for the negotiation of an aviation agreement is contemplated in the 2015 report⁹⁰ and the ratification of the Agreements on Conformity Assessment and Acceptance of industrial products (ACAA) is pending.⁹¹ The latter is particularly interesting as it is intended to promote trade in goods between the parties by aligning the legislative system and infrastructure of the country with those of the European Union. In contrast to Morocco, the EU has assisted Tunisia not only through the European Neighbourhood Instrument (ENI)⁹² but also through a macro-financial assistance programme,

⁸⁷ SWD(2015) 75, op. cit., p. 2.

⁸⁸ The General Court has struck down the EU-Morocco agreement on the liberalization measures on agricultural products, processed agricultural products and fish and fishery products (approved through Council Decision of 8 March 2012, OJ 2012 L 241/2) in case T-512/12 *Front Polisario v. Council*, 10.12.2015. This agreement also applies to the territory of Western Sahara, over which Morocco's sovereignty is not recognised by the EU and by much of the international community. The Court annulled the decision concluding the bilateral Treaty because the Council had failed to assure that the exploitation of natural resources in this occupied territory was made in the interest of the population, as required by international law. The Council has appealed the General Court's judgement. See http://eeas.europa.eu/statements-eeas/2016/160226_02_en.htm (last visited 25.02.2016) and the High Representative Mogherini has defended the legality of the agreement. See http://eeas.europa.eu/top_stories/2016/040316_morocco_en.htm (last visited 5.03.2016).

⁸⁹ *Ibidem*, p. 5.

⁹⁰ *Ibidem*, p. 14.

⁹¹ See "Document de travail conjoint des services Mise en oeuvre de la politique européenne de voisinage en Tunisie Progrès réalisés en 2014 et actions à mettre en oeuvre," (available only in French), SWD(2015) 73 final of 25.03.2015, pp. 10, 12.

⁹² Regulation (EU) n. 232/2014 of the European Parliament and of the Council of 11

intended to support this country's in its economic and political reform process after the fall of Ben Ali.⁹³

As already mentioned, the instability across the Southern Mediterranean countries caused by the 2011 events has also provided impetus to the cooperation between these countries and the EU in the area of migration. Indeed, the significant movement of people generated by conflicts in Libya and Syria have ratcheted up the migration pressure due to economic rather than political reasons.⁹⁴ In this context, the EU decided to open up the perspective of Mobility partnerships for Southern countries,⁹⁵ which were concluded with Morocco,⁹⁶ Tunisia⁹⁷ and Jordan⁹⁸ in 2013–2014. In January 2015 the EU opened negotiations on visa facilitation and readmission agreements with Morocco, following the strategy of linking the two agreements to each other, as it did with its Eastern neighbours.⁹⁹ The rationale of the proposal for cooperation in this area is the same as for Eastern Partnership countries.

A further aspect that differentiates Tunisia and Morocco from other Southern neighbours concerns the setting up of sub-committees in which respect for human rights, democratization and governance are discussed¹⁰⁰ as well as their participation in the programme *Strengthening democratic reform in the southern Mediterranean* (2012), involving the Council of Europe. The aim of these actions is to help Morocco and Tunisia to consolidate democracy, enhance the independence of the judiciary, protect human rights and fight against corruption and money laundering.

It is not possible to identify further concentric cycles in the Southern neighbourhood. The political and economic situation of the Southern

March 2014 establishing a European Neighbourhood Instrument, OJ 2014 L 77/27.

⁹³ The EU disbursed €300 million euro in favour of Tunisia. See Decision n. 534/2014/EU of the European Parliament and of the Council of 15 May 2014 providing macro-financial assistance to the Republic of Tunisia, OJ 2014 L 151/9.

⁹⁴ W. Koeth, *The 'Deep and Comprehensive Free Trade Agreements': an Appropriate Response by the EU to the Challenges in its Neighbourhood?*, EIPA, p. 26 at: http://www.eipa.eu/files/repository/eipascope/20141120085243_EIPASCOPE_2014_WKO.pdf (last visited 31.12.2015).

⁹⁵ COM(2011) 292, op.cit., p. 2.

⁹⁶ Joint declaration establishing a Mobility Partnership between the Kingdom of Morocco and the European Union and its Member States, 3.6.2013.

⁹⁷ Joint declaration establishing a Mobility Partnership between Tunisia and the European Union and its Member States, 3.3.2014.

⁹⁸ Joint declaration establishing a Mobility Partnership between the Hashemite Kingdom of Jordan and the European Union and its participating Member States, 9.10.2014.

⁹⁹ SWD(2015) 75, op.cit., p. 13.

¹⁰⁰ P. Van Elsuwege, op.cit., pp. 74–75.

neighbours and the operation of the joint ownership principle make it difficult for the EU to provide the same blanket opportunities of cooperation to its Mediterranean partners. So let us now turn to the constellation of bilateral relations.

Jordan, a key interlocutor for the European Union in the Middle East,¹⁰¹ has shared an advanced status partnership with Morocco since 2010. However, its level of cooperation with the Union does not have the same intensity as that of Morocco. Negotiations for a DCFTA have not started, although good progress on the preparatory process was highlighted in the report of 2015.¹⁰² The conflict in Syria affects Jordan's security. A number of political reforms were undertaken by the King, thus signalling a certain progress on the path towards modernization of the country. However, the situation of human rights has not improved and it is noteworthy that the moratorium on the death penalty was cancelled in 2014.¹⁰³ Jordan is however willing to cooperate with the Union in certain policy areas: an aviation agreement was concluded in 2010, and the negotiations for a mobility partnership were opened in 2014.

The position of Egypt *vis-à-vis* the Union also stands alone. This country is interested in increasing the opportunities for economic integration with the EU; in particular, the promotion of free movements of goods, services, capitals and persons and the possibility for Egypt to participate progressively in key aspects of EU policies and programmes have been highlighted as objectives of a new agreement with the EU.¹⁰⁴ The need to enhance Egypt's export potential to the EU market by upgrading the quality of Egypt's agricultural production through improvements in sanitary and phytosanitary standards and rural development was also noted in the EU-Egypt action plan.¹⁰⁵

However, the upgrade of the bilateral relations also faces considerable obstacles. No preparatory work has been done so far for the conclusion of a Deep and Comprehensive Free Trade Area. This country seems not interested in facilitating trade by converging toward the EU *acquis*. Egyptian authorities have continued to decline the offer to conclude mobility partnerships.¹⁰⁶ Given that the EU has not taken a strong stance against the numerous human right violations occurring in this country and the undemocratic ruling government, it is clear that the EU values

¹⁰¹ IP/10/1388 of 26/10/2016. This country is also part of the coalition against Da'esh.

¹⁰² SWD(2015) 67 final, 25.3.2015, p. 3.

¹⁰³ Ibidem, p. 6.

¹⁰⁴ Action plan with Egypt, p. 2.

¹⁰⁵ Ibidem, p. 4.

¹⁰⁶ SWD(2013) 89 final, 20.3.2013, pp. 10, 12.

more the ability of this country to act as a stabilising force in the region than its ranking in the democracy index. The prospect of changes in the position of the EU towards Egypt, and vice versa, seem slim.

The EU–Israeli relations are also different from those of any other Southern Mediterranean country. The high level of economic development and the homogeneity of its political system with respect to those of Western democracies make it the neighbour closest to the EU’s political and economic model. This is also confirmed by indicators such as the UNDP human development index and World Bank governance indicator and by the Freedom House assessment.¹⁰⁷ However the EU–Israel relations see-saw, depending on the state of tensions with Palestine. The EU is a supporter of the two-state solution and has often criticised Israel’s settlement policy and its disrespect of international humanitarian law.

Despite this, since the EU is Israel’s largest trading partner there is a clear common interest in facilitating trade. In 2010 the association agreement was amended to enable greater liberalisation of the trade in agricultural products and fish and fishery products. In addition, a number of sector-related agreements, including harmonization of Israel’s legislation to that of the EU, were concluded between the EU and Israel.¹⁰⁸ By contrast, there is no discussion concerning the conclusion of a DCFTA.

The relationship between the EU and the Palestinian Authority is also unique, owing to the *sui generis* nature of the contracting partner. The EU has acted to support this entity’s development toward a full-fledged State based on respect for democracy, the rule of law, and human rights. In addition, this non-state entity has been the beneficiary of considerable financial resources from the EU,¹⁰⁹ even though the level of commitment towards EU values such as democracy and respect of human rights can be viewed as modest given that, for example, elections have not been held since 2006. The EU has committed to negotiate an association agreement as soon as Palestine becomes a State. The Palestinian Authority action plan has not set ambitious economic

¹⁰⁷ SWD(2012) 122 final, 15.05.2012, pp. 11, 14, 15.

¹⁰⁸ Israel ratified the Agreements on Conformity Assessment and Acceptance of industrial products (ACAA) in 2013; in 2014 it ratified the Regional Convention on Pan-Euro Mediterranean (PEM) Preferential Rules of Origin; and an EU–Israel comprehensive air service agreement was signed in 2014.

¹⁰⁹ For more details, see the Joint staff working document ‘Implementation of the European Neighbourhood Policy’ – statistical annex SWD(2014) 98 final of 27.3.2014, p. 41 for an overview of the financial resources committed during the years 2007–2013 to all partners.

aims. It envisages the mere implementation of the Interim Association Agreement on Trade and Cooperation.¹¹⁰ However, recently Palestine ratified the Regional Convention on Pan-Euro Mediterranean (PEM) Preferential Rules of Origin¹¹¹ and has continued efforts to accede to the Agadir agreement.¹¹²

The EU relations with Lebanon are certainly less advanced than those with Israel, Morocco, Tunisia, and Jordan. The negotiation of an action plan with this country was concluded only in 2012 and its implementation has been slow. The civil war in Syria has affected the Lebanese economy, due to the high number of refugees who benefited from Lebanon's open door policy.¹¹³ The deepening of trade and economic relations with the EU is prevented by Lebanon's lack of WTO membership and by the deteriorating macroeconomic situation. The stability of the country is also jeopardised by the attacks of Syrian extremist groups.¹¹⁴ Legislative elections scheduled for November 2014 were postponed (for a second time). However, despite the lack of stability and its difficult economic situation, Lebanon is willing to enhance its trade cooperation with the Union: it signed the Convention on pan-Euro-Mediterranean preferential rules of origin in October 2014, and is preparing for the negotiation of an agreement on conformity assessment and acceptance of industrial products. In addition, a dialogue on migration, mobility and security was commenced in late December 2014.

2. Differentiation versus uniformity: the distinction with regard to EU restrictive measures

EU restrictive measures are often imposed when values and principles such as respect for democracy, human rights and international law are not assured by a third country. The EU uses these measures to put pressure on the concerned State so as to induce it to act in conformity with such values and principles.

¹¹⁰ OJ 1997 L 187/3.

¹¹¹ Regional Convention on pan-Euro-Mediterranean preferential rules of origin, approved by the Council on 26 March 2012, Brussels, doc. ref. 8128/12.

¹¹² SWD(2015) 75, op.cit., p. 11.

¹¹³ This policy was restricted in 2015. Refugees from other countries (Iraq and Palestine) are also present in Lebanon. See Joint staff working document 'Implementation of the European Neighbourhood Policy in Lebanon. Progress in 2012 and recommendation for action,' SWD(2013) 93 final, 20.03.2013, p. 3.

¹¹⁴ SWD(2015) 68, 25.03.2015, p. 2.

EU neighbours have been the addressees of various kinds of restrictive measures adopted by the EU since 2003.¹¹⁵ With the exception of measures taken *vis-a-vis* Lebanon¹¹⁶ and Libya (in part),¹¹⁷ freezing of funds and/or travel bans were imposed on the basis of Article 29 of the TEU in view of the situation in countries of the EU neighbourhood – such as Belarus, Egypt, Ukraine, Moldova, Syria and Russia – as a result of the EU's autonomous foreign policy considerations, i.e. independently of the United Nations Security Council, where countries such as Russia and China could prevent the adoption of sanctions.

Four broad categories of restrictive measures can be identified when examining those adopted in view of the situation in neighbour countries. First of all, the EU has acted to support democracy. This means, on the one hand, that failure to respect democracy has been sanctioned; and, on the other, that the EU has used restrictive measures to support democracies in transition. An example of the first situation concerns Belarus. The EU has reacted with sanctions to the violation of democratic rules in Belarus, whose political leadership has been subject to sanctions since 2006 following the fraudulent elections and referendum. In fact, however, Belarus was sanctioned even in 2004 for the disappearance of political activists. The sanctions regime was extended to include severe human rights violations involving the repression of peaceful demonstrators in the aftermath of the elections and referendum. New measures were enacted in 2011 after the presidential elections of 19 December 2010 and the violent crackdown on political opposition, civil society and representatives of the independent mass media. In 2013, another wave of restrictions was imposed when the elections of 23 September 2012 were deemed inconsistent with OSCE

¹¹⁵ Restrictive measures against the Transnistrian leadership have been in place since 2003. At that time, the legal basis for the restrictive measures was article 15 of the TEU, which was replaced with minor changes by Art. 29 of the TEU with the entry into force of the Lisbon Treaty.

¹¹⁶ Council Common Position 2005/888/CFSP of 12 December 2005 concerning specific restrictive measures against certain persons suspected of involvement in the assassination of former Lebanese Prime Minister Rafiq Hariri, OJ 2005 L 327/26.

¹¹⁷ See Council Decision 2011/137/CFSP of 28 February 2011 concerning restrictive measures in view of the situation in Libya, OJ 2011 L 58/53. This measure implements UN Security Council 1970 (2011) against Libya and imposes travel bans and freezing of financial resources against persons involved in or complicit in ordering, controlling, or otherwise directing, the commission of serious human rights abuses against persons in Libya, including by being involved in or complicit in planning, commanding, ordering or conducting attacks, in violation of international law. The Council decision also imposes additional measures with respect to those identified in the UNSC resolution.

standards.¹¹⁸ Interestingly, Ukraine and a few candidate countries aligned with the EU's restrictive measures against Belarus. Recently, some of the restrictive measures were lifted, as we have seen earlier.

While breaches of democratic rules and human rights constituted the justifications for the EU's restrictive measures against Belarus, a second example of restrictive measures adopted to consolidate democracy is represented by those enacted *vis-à-vis* Tunisia¹¹⁹ and Egypt.¹²⁰ The justification for the restrictive measures against the governmental leaders of these countries (and their close circles) was that the targeted people undermined the development of democracy and deprived the Egyptian and Tunisian people of the benefits of sustainable development of their economy and society. Restrictions consisted in the freezing of funds and economic resources against natural or legal persons identified as responsible for the misappropriation of state funds.¹²¹ The aim of the EU's actions was to assist countries that are in transition towards democracy through judicial cooperation. It should be noted that restrictive measures of this kind are rare and therefore the EU's attempt to support the newly established governments in their transition towards democracy is noteworthy.¹²²

¹¹⁸ Amongst those targeted were judges and prosecutors said to be involved in human rights violations (including the right to a fair trial for political prisoners) and military commanders said to be involved in internal repression, as well as the Rectors of Belarusian universities, military personnel, and the persons responsible for the administration of the penal colony and detention centres.

¹¹⁹ Council Decision 2011/72/CFSP of 31 January 2011 concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia, OJ 2011 L28/62. Sometimes restrictive measures include members of the governments as well as their relatives and people associated with them. For example, the former President Ben Ali, his wife Leila Trabelsi and other members and close associates of the Trabelsi families are included in the list.

¹²⁰ Council Decision 2011/172/CFSP freezing of funds and economic resources of persons identified as being responsible for the misappropriation of Egyptian State funds, and natural or legal persons, entities and bodies associated with them, OJ 2011 L 76/63, as subsequently amended.

¹²¹ The restrictions concerned 48 individuals in Tunisia and 19 in Egypt. Several of those targeted are now dead. However, the investigation into the misappropriation of funds continued within the domestic jurisdiction and EU assistance was requested so that the funds could then be returned to the new government. In 2012 'The Council took steps to facilitate the return of misappropriated funds to the Egyptian and Tunisian authorities. The new legislative framework authorises EU member states to release frozen assets on the basis of judicial decisions recognized in EU member states.' Press release no. 16078/12, 26.11.2012.

¹²² As of 2016, Egypt can no longer be defined as a democracy in transition given that it is ruled by a government which is not the result of free and fair elections; Tunisia is struggling to continue its path to democracy.

A similar type of restrictive measures consists of those adopted in March 2014 in view of the situation in Ukraine. The EU has imposed asset freezes and travel bans against some of the members of the former political leadership of Ukraine identified as responsible for the misappropriation of Ukrainian state funds. This time the reason behind the adoption of these sanctions was not to support democracy, but other EU values such as the consolidation and support of the rule of law and respect for human rights of Ukrainians. The restrictive measures hit Janukovich, his sons, and members of the government (18 people in total). These measures were later extended to other persons.

Thirdly, restrictive measures have been enacted in situations of human rights abuses. Individuals in Belarus and Ukraine were targeted for their violation of human rights and for other reasons. In a similar vein, the EU has imposed restrictive measures against Syria as a result of the government's violation of human right standards.¹²³ Minor violations of human rights were used to justify the restrictive measures in the case of the Transnistrian leadership.¹²⁴ The EU has sanctioned the separatists by imposing travels bans due to their lack of cooperation in promoting a solution to the conflict with Moldova. A second set of measures was adopted in 2004 against those responsible for the design and implementation of the intimidation and closure campaign against the Latin-script Moldovan schools in the Transnistrian region.¹²⁵

The fourth category of restrictive measures sanctions breaches of international law obligations different from those stemming from human rights treaties. This is the case of restrictive measures enacted against the governmental leadership of Libya and Syria (the breach of international law consisting of repressing the civilian population in a violent manner)

¹²³ Council Decision 2011/273/CFSP of 9 May 2011 concerning restrictive measures against Syria, OJ 2011 L 121/11.

¹²⁴ Travel bans against the separatists of Transnistria were enacted by the EU few months before the launch of the ENP. Council Common Position 2003/139/CFSP of 27 February 2003 concerning restrictive measures against the leadership of the Transnistrian region of the Moldovan Republic, OJ 2003 L 53/60.

¹²⁵ Officials responsible for education were targeted by these restrictive measures. Some of these measures were selectively lifted in order to encourage progress in reaching a political settlement of the Transnistrian conflict and in restoring the free movement of persons across the administrative boundary of the Transnistrian region. In 2014–15, the restrictions were extended against both the political leadership of Moldova and the people responsible for the campaign against Latin-script schools in the Transnistrian region. Indeed, despite the EU sanctions, measures that hinder the right to education (for example, through non-justified increases in rent, measures concerning school staff, double taxation) were still in force in 2014.

while the sanctions enacted against Ukraine's secessionist Republics are a reaction to their violations of the principle of territorial integrity.¹²⁶ Last but not least, the EU has enacted a wide range of sanctions against Russia for its policy of destabilization of Ukraine.

The common feature of these sanctions is that they are enacted as a reaction to the violation of democratic rules, of human rights standards, and/or of international law and consist of targeting the governmental leadership (and their close circles) of both Eastern and Southern countries alike.

Thus, whereas the EU has differentiated its relations with neighbours, it has adopted a fairly uniform policy of restrictive measures *vis-à-vis* them, regardless of their different geopolitical positions and specific relations with the EU. Sanctions are applied in a uniform manner against the Eastern and Southern neighbours, in compliance with the EU's obligation of consistency of its external action.

Conclusions

We have seen that with the exception of EU's rather uniform approach *vis-à-vis* restrictive measures imposed on ENP countries, there is a strong level of differentiation in the EU relations with this group of States. Three Eastern associated neighbours have voluntarily committed to regulatory convergence with the EU *acquis* in various areas; Morocco and Tunisia are also poised to undertake similar efforts, although with different perspectives and expectations from the EU. Overall, differentiation lies at the heart of EU relations with these countries and it is linked to *ex post* rather than *ex ante* conditionality.

The need for greater differentiation in the EU-neighbour relations has emerged from the Report on the implementation of the ENP in 2013¹²⁷ and was acknowledged by the European Commission and the High Representative in the document launching the discussion on the new ENP in March 2015. In this latter document it is affirmed that: 'Although the concept of differentiation has been present from the start, individual

¹²⁶ Due to space constraints it is not possible to provide further details. For a more precise account of these measures see S. Poli, *Promoting EU Values in the Neighbourhood Through EU Financial Instruments and Restrictive Measures* in: *The European Neighbourhood Policy: Values and Principles*, S. Poli (ed.), Oxon, New York 2016, pp. 33–57.

¹²⁷ 'The choices made by some countries will require greater differentiation in the relations between the EU and its partners, in order to respond to the expectations and needs of each partner, while also safeguarding the EU's own strategic interests.' JOIN (2014), 12, *op.cit.*, p. 2.

countries do not always find their specific aspirations sufficiently reflected. The lack of a sense of shared ownership with partners prevents the policy from achieving its full potential.¹²⁸ A few months later the joint declaration of the Eastern Partnership Summit held in Riga in May 2015¹²⁹ re-stated the need for ‘tailored cooperation.’

In November 2015 the Joint communication on the new ENP emphasised the need for greater flexibility inasmuch as this is dictated by the rapid changes of the geopolitical contexts and also by the mutations in the level of ambitions of third countries *vis-à-vis* their relations with EU. In the future neighbour countries will be offered more flexibility as to the contractual relations they want to establish with the EU.¹³⁰ This amounts to an announcement that the EU-neighbour relations will be characterised by a wider range of different speeds than at present.

The question may be raised whether the ENP can remain within a single framework given the increasing level of variable geometry in the EU-neighbour relations. In the light of the 2015 review it is clear that the EU institutions want to keep the ENP as a single framework even if there are not many common elements in the EU-neighbour relations which could justify the existence of a single policy. The reasons for this choice are, from a legal and political point of view, clear: the ENP has its foundations in the Treaty (Art. 8 TEU); in addition, the existence of a single ENP prevents a parallel neighbourhood policy from being conducted by single Member States with neighbour countries.¹³¹ The re-nationalization of the ENP is not a viable option. Therefore, the EU should not abandon the ENP as a distinct component of its EU external relations. A different issue is whether it is credible to claim that all EU–neighbour relations are based on political conditionality. The EU has concluded or will conclude different types of agreements with countries that have openly rejected closer economic ties with the EU (Armenia) or have rejected the whole gamut of EU values (Azerbaijan). The EU is also critically engaging with Belarus and is not taking a bold stance *vis-a-vis* violations of human rights

¹²⁸ JOIN(2015) 6, op.cit., p. 4.

¹²⁹ 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/> (last visited 15.09.2015).

¹³⁰ Joint Communication HR/Commission, ‘Review of the European Neighbourhood Policy’, JOIN(2015) 50 final, p. 8.

¹³¹ Member States ‘often provide “more for less,” engaging with countries for reasons related to security, trade, or access to energy, regardless of the nature of their regimes.’ <http://www.euractiv.com/sections/global-europe/eu-urgently-needs-new-neighbourhood-policies-319568> (last visited 30.12.2015).

in Egypt. This makes it difficult to reconcile the new ENP with the EU's commitment to promote a value-based foreign policy. Providing support to civil society seems to be the only means to act as a genuine catalyst for reforms in the ENP countries, and it is to be hoped that the EU will keep its promise to do so.¹³²

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¹³² JOIN(2015) 50 final, op.cit., pp. 4–6.

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