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The European Neighborhood Policy as a Framework for Modernization

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The theme of this conference is ‘integration without EU membership in Europe’. I have been asked to speak about ‘the ENP as a framework for modernization’. In thinking therefore of the ENP in this sense as a possible model for integration without membership, two questions come to mind:

- To what extent can integration create a framework for modernization?
- To what extent does the ENP represent, provide an example of, such a framework?

Before we turn to these questions, a couple of words about the ENP.¹ The ENP is a policy framework for the EU’s relations with its eastern and southern neighbours: it is intended to cover the so-called Western NIS (Ukraine, Moldova, Belarus²), the Southern Caucasus (Armenia, Azerbaijan and Georgia) and the Southern Mediterranean (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestinian Authority, Syria and Tunisia). Sixteen States in all, of whom only six are European.

1. It is selective in the neighbours it covers: it does not include south-east Europe, nor the EFTA States, nor Russia; it does include both non-European and European States. Insofar as the ENP represents ‘integration without membership’, this is not solely a consequence of non-eligibility: some of the ENP States are eligible within the terms of Art 49 TEU. Neither is it, though, a case of integration for those States who are eligible but who prefer not to be members, in the same way as the EEA or the EU-Swiss relationship. It seems to be a case of a policy towards those neighbouring States who are either not eligible (the Southern Mediterranean) or with whom the EU does not want at present to discuss membership (the eastern neighbours).

2. What is the content of this policy? For such a high profile policy it is perhaps surprising that there is no obvious legal instrument that forms the basis for the ENP. If we look for it, we find it in a variety of places.

First, it is based on existing relationship, including treaties, with the partner States, the Euro-Mediterranean Partnership and Euro-Med Association agreements (EMAs) on the one hand and the Partnership and Cooperation Agreements (PCAs) on the other, supplemented by the GSP in the latter case. It is intended to build upon these and not replace them, although in the case of the PCAs, some are coming to a natural end and replacements are being negotiated which will reflect the objectives of the ENP (on which more later).

¹ See further M Cremona, ‘The European Neighbourhood Policy: More than a Partnership?’ in M Cremona (ed.), *Developments in EU External Relations Law*, Oxford University Press, forthcoming. Parts of this paper are drawn from this chapter.

² The ENP does not at present operate with respect to Belarus.

Second, these agreements are supplemented by instruments specific to the ENP, including:

- Commission papers
- Council and European Council Conclusions
- Letters, speeches
- Actions Plans
- The ENPI, a new financial instrument replacing TACIS and MEDA³

It is noticeable that the ‘hard’ obligations of the bilateral agreements are strengthened in order to develop this more ambitious and far-reaching policy by ‘soft’ (in the sense of non-binding) instruments such as the Action Plans, target-setting and monitoring. In due course this will change somewhat as new ‘hard’ law instruments are adopted: the ENPI has already replaced TACIS and MEDA, we will see new agreements replacing the PCAs which are nearing the end of their life, and a number of specific agreements are being concluded such as visa facilitation and readmission agreements. However the soft law framework, identifying the objectives of the policy and pulling together the diverse elements into an ‘ENP’, will remain and is a characteristic of this multi-pillar policy. It is notable, for example, that the ENPI Regulation includes a number of soft law instruments within its definition of the ‘policy framework’ for the programming of Community assistance:

‘The partnership and cooperation agreements, the association agreements and other existing or future agreements which establish a relationship with partner countries, and the relevant Commission communications and Council conclusions laying down guidelines for European Union policy towards these countries, shall provide an overall policy framework for the programming of assistance under this Regulation. Jointly agreed action plans or other equivalent documents shall provide a key point of reference for setting assistance priorities.’⁴

No legal base is needed for Council Conclusions or Commission strategy papers, and thus they are able without legal difficulty to include all the different elements of the policy, drawing together instruments from all three pillars. So, the ENP includes a wide range of instruments, bilateral agreements and contacts, both formal and informal. And alongside dedicated instruments such as the Action Plans and the ENPI, the ENP can be facilitated by the use of instruments that are not specific to ENP, such as sectoral agreements, visa policy, the Aeneas Regulation⁵ or the Stability Instrument.⁶

Modernization as an objective of the ENP

Three words – stability, security and prosperity – are constantly repeated as the key ENP objectives. Recently, for example, the European Council referred to the ENP ‘as a means to strengthen cooperation with its neighbours and expand prosperity, stability and security beyond the borders of the European Union’,⁷ and the Council spoke of ‘the crucial importance of the ENP to consolidate a ring of prosperity, stability and security based on human rights, democracy and the rule of law in the EU’s

³ Regulation 1638/2006/EC laying down general provisions establishing a European Neighbourhood and Partnership Instrument OJ 2006 L 310/1.

⁴ Regulation 1638/2006/EC, Art.3.

⁵ Regulation 491/2004/EC on financial and technical assistance in the area of migration and asylum OJ 2004 L 80/1; this Regulation has been repealed and replaced as from 1 January 2007 by Regulation 1905/2006/EC establishing a financial instrument for development cooperation, OJ 2006 L 378/41; financial and technical assistance to the ENP States in the field of migration and asylum will now fall under the ENPI Regulation.

⁶ Regulation 1717/2006/EC establishing an instrument for stability OJ 2006 L 327/1.

⁷ European Council Conclusions, 16 June 2006, para 57.

neighbourhood'.⁸ Our focus here is on modernization and thus primarily on stability and prosperity, but the ENP is notable for the way in which these aims are placed in the context of security. The Solana-Patten letter of August 2002 which launched the debate on a neighbourhood policy, for example, in seeking to identify the Union's objectives, argued, 'There are a number of overriding objectives for our neighbourhood policy: stability, prosperity, shared values and the rule of law along our borders are all fundamental for our own security.'⁹ Security, then, is the underlying rationale of the ENP.¹⁰

The security dimension of the ENP – and the breadth of the notion of security in this context – is brought out by the European Security Strategy adopted by the European Council in December 2003:

'It is in the European interest that countries on our borders are well-governed. Neighbours who are engaged in violent conflict, weak states where organised crime flourishes, dysfunctional societies or exploding population growth on its borders all pose problems for Europe. The reunification of Europe and the integration of acceding states will increase our security but they also bring Europe 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.'¹¹

The security objective depends on achieving stability and prosperity: the emphasis is on promoting stability both within and between the neighbouring States, and economic and social development leading to increased prosperity with a view to increasing security on the EU's borders.¹² As expressed by one commentator, 'The ENP reaffirms the European conviction that democracy and economic reform are essential if the deeper roots of insecurity are to be resolved effectively.'¹³

Stability is closely linked to democratisation, political reform and good governance. The first of the Copenhagen criteria refers to the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. An identical reference to the stability of institutions is used as the first priority of the ENP Action Plan for Ukraine.¹⁴ This implies that stability is a pre-condition for democracy, but there is also a sense in which both internal and regional stability and security are seen as the fruit of political modernization and democratization. The first paragraph of the Ukraine Action Plan, for example, states 'The European Union and Ukraine are determined to enhance their relations and to promote stability, security and well-being.' Stability here refers clearly not only to stability of Ukraine's political institutions, but to stability on a national and regional level; the link with security is clear. This element of the ENP triad of objectives thus clearly reinforces the political dimension of the policy, but stability also has other dimensions, including economic. Some idea of the different contexts in which stability can be appear emerges from the EU's

8 Council Conclusions 18 June 2007.

9 Solana-Patten letter, para 3.

10 See further, M. Cremona and C. Hillion, "L'Union fait la force? Potential and Limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security Policy" EUI Working Paper LAW No.2006/39, pp.3-8.

11 European Security Strategy, 'A Secure Europe in a Better World', p.7-8.

12 E. Landaburu, "From Neighbourhood to Integration Policy: Are there concrete alternatives to enlargement?" CEPS Working Document No.95, March 2006.

13 R. Dannreuther, "Developing the Alternative to Enlargement: The European Neighbourhood Policy" (2006) 11 European Foreign Affairs Rev. 183 at 201.

14 Further on Action Plans, see below. For the Ukraine Action Plan see http://ec.europa.eu/world/enp/pdf/action_plans/ukraine_enp_ap_final_en.pdf

Common Strategy on Ukraine, adopted in 1999.¹⁵ Stability is here used in the context of domestic political stability, economic stability, regional stability and international stability.

Prosperity as an ENP objective is clearly connected with economic reform, the successful transition to a market economy, and economic integration. Increased prosperity is in the EU's interests: it increases stability and reduces the 'push' factors behind illegal migration, and it helps to provide a receptive market for EU products and services. There are two interconnected dimensions to EU policy here. First is the development of the market economy in the ENP partners, including improvements in the investment climate, modernization of regulatory frameworks such as tax, financial services and company law, the opening up of the economy and accession to the WTO, and anti-corruption initiatives. In February 2008, the Council Conclusions on the ENP emphasised this aspect:

'The ENP has already proven to be an important tool for promoting reform in the ENP countries. The EU reiterates its willingness and determination to continue to assist its neighbours in sectoral reform and modernisation, in line with the ENP Action Plans, as an important step towards prosperity and stability in our neighbourhood, based on human rights, democracy and the rule of law.'¹⁶

The second dimension is participation in EU economic integration: a free trade area, possible extension of the other freedoms (although the movement of people is currently discussed only in terms of visa regimes) implying a 'stake in the internal market', legal approximation, participation in policies and programmes. The precise nature and degree of this integration is not specified in any detail, and will mean different things to the different partners. Ukraine, for example, does not yet have a FTA with the EC, so that is an initial priority, following WTO accession. The Southern Mediterranean States have FTAs but are interested in extending their scope into sensitive agricultural sectors. All are interested in liberalising the movement of people. We will look a little more closely at what this integration might mean in the final section.

The two 'economic' dimensions to the ENP (market economy reform and participation in European integration) are connected in that the EU sees the latter as a mechanism for achieving the former. Let us take this point a bit further.

Integration as a basis for modernization

Integration is not of itself an EU objective for the ENP. The EU's objectives are security, stability and prosperity, and integration is a means to achieve that objective in two ways.

First, in the sense of being the 'carrot' offered in return for meeting conditions that the EU thinks will be conducive to its own security and that of the region generally.

Second, in general terms the EU sees regional integration as facilitative of economic and political development. This is as true of its development policy as the ENP. It is a methodology that has worked for the EU Member States and, in its view, will work for others too. Thus integration is a

¹⁵ European Council Common Strategy on Ukraine, 1999/877/CFSP, 11 December 1999, OJ 1999 L 331/1. This Common Strategy expired in December 2004 and was not renewed, its place being taken by the ENP Action Plan.

¹⁶ Conclusion of GAER Council, 18 February 2008, para 5.

methodology for achieving its ENP objectives – economic and political modernization and thereby security – rather than an objective in its own right.

The link is demonstrated in a rhetorical question posed by a Commission official:

‘[H]ow we can support transition, as a goal in its own right, perhaps the most important goal of all ... How can we use our soft power, our transformative power, our gravitational influence, to leverage the reforms we would like to see in our neighbourhood? ... The answer is through the European Neighbourhood Policy (ENP), our newest foreign policy tool.’¹⁷

This account uses the concept of the EU as a normative power, its ability to attract and influence others to adopt its values and policies.¹⁸ We can note the way in which this view of ENP objectives emphasises the EU’s own perspective and the ENP as a way of achieving EU goals; there seems to be little by way of discussion of the neighbours’ own objectives. The EU operates its policy on the basis that the neighbours share its objectives as well as its values.

To a large extent these generalised objectives (security, stability, prosperity) may be shared; however when one tries to pin them down into more specific goals, it may not be so easy to define shared objectives. And as Meloni has pointed out, priorities between them may well differ: the neighbours may wish to give more weight to prosperity, or stability, for example, while as we have seen there is evidence that the EU sees security as the policy’s underlying rationale.¹⁹ Although for the ENP partners too, integration with the EU is designed ultimately to lead to economic development and stability, in some cases integration may also be seen as a goal in its own right, or as a step towards eventual membership. An emphasis on the former (economic development) invites a more critical approach to specific integration demands, the test being the extent to which they will in fact contribute to (for example) economic growth. An emphasis on the latter (membership) values the overall integrative process over an immediate balance of advantage and is perhaps more prepared to accept a longer-term perspective.

The ENP as an integration project?

The EU may see the ENP as a framework for modernization; it may also argue that integration can facilitate modernization; but is the ENP really a model of integration? And what kind of integration are we talking about, how wide is its extent and how deep is it?

The initial rhetoric behind the ENP was full of integration, with both a political and an economic dimension. In his 2002 speech Prodi developed the idea of “sharing everything” (except institutions) including as its centre-piece ‘a common market embracing the EU and its partners’, together with

17 E. Landaburu, “From Neighbourhood to Integration Policy: Are there concrete alternatives to enlargement?” CEPS Working Document No.95, March 2006.

18 On the EU as a normative power, see I. Manners, “Normative Power Europe: A Contradiction in Terms?” (2002) 40 *Journal of Common Market Studies* 235; H. Sjurgen “The EU as a ‘normative’ power: how can this be?” (2006) 13 *Journal of European Public Policy* 235. On the concept of normative power specifically in the context of the ENP, concluding that the ENP does not in fact provide convincing evidence of the EU’s normative power, see E. Johansson-Nogués, “The (Non-) Normative Power EU and the European Neighbourhood Policy: An Exceptional Policy for an Exceptional Actor?” (2007) 7 *European Political Economy Rev.* 181.

19 G. Meloni, “Is the Same Toolkit Used during Enlargement Still Applicable to the Countries of the New Neighbourhood? A Problem of Mismatching Between Objectives and Instruments” in M. Cremona & G. Meloni (eds.) *The European Neighbourhood Policy: A Framework for Modernisation? EUI Working Papers, LAW 2007/21*, 97 at 101.

common approaches to common threats (illegal migration, crime, terrorism, environmental threats), and to regional conflict. Thus, integration implies not only economic integration (a free trade area or common market) but also cooperation within foreign and security policy and JHA policy fields. He argues, 'If a country has reached this level, it has come as close to the EU as it is possible to be without being a member.'²⁰

In the early stages of the ENP, the form that enhanced economic integration would take was expressed in terms of a 'stake in the internal market' with a specific reference to the four freedoms.²¹ The Council Conclusions of 13 June 2003 refer to:

'Perspectives for participating progressively in the EU's Internal Market and its regulatory structures, including those pertaining to sustainable development (health, consumer and environmental protection), based on legislative approximation' and 'Preferential trading relations and further market opening in accordance with WTO principles.'

Despite this rhetoric it is hard to find concrete progress towards integration since 2003. The level of integration in the current PCAs is not very high. The EMAs are FTAs with provisions relating to the protection of migrant workers and they are embedded in the Barcelona Process which envisages a Euro-Mediterranean FTA by 2010, but progress has been slow. These agreements provide the institutional basis for the ENP.

Nevertheless it is clear that integration is still on the agenda. The Council in its Conclusions of February 2008 said that 'Deepened economic integration must remain an essential building block of our relations with our neighbours.' What signs are there of instruments with a distinctive focus on integration?

1. The Action Plans certainly set targets for economic, political and legal reform – modernization. They do not link this to integration, but might be seen as concerned with achieving the pre-conditions for integration.
2. The EU has concluded a number of agreements with the neighbouring States within the framework of the ENP. I would not see Readmission Agreements as specifically concerned with integration but Visa Facilitation agreements could be seen as supportive of what are called 'people-to-people contacts'. And Ukraine has concluded agreements designed to facilitate its participation – and has participated – in EU ESDP missions.²²
3. Integration into the CFSP: the eastern ENP partners have already been invited, on a case by case basis, to align themselves with EU declarations, demarches and CFSP Common Positions: Ukraine since February 2005, Moldova since June 2005, Armenia, Azerbaijan and Georgia since June 2007. The Council has said that "A similar possibility should be pursued for the EU's Mediterranean

20 Prodi, "A Wider Europe – A Proximity Policy as the key to stability", speech to the Sixth ECSA-World Conference, Brussels, 5-6 December 2002, SPEECH/02/619.

21 [The ENP partners] "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)." Commission Communication, "Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours", 11 March 2003, COM(2003)104, p.4.

22 Council Decision 2005/495/CFSP concerning the conclusion of the Agreement between the European Union and Ukraine establishing a framework for the participation of the Ukraine in the European Union crisis management operations, OJ 2005 L 182/28. The agreement sets out the general conditions for Ukrainian participation in civilian and military crisis management operations. Council Decision 2005/481/CFSP concerning the conclusion of the Agreement between the EU and Ukraine on security procedures for the exchange of classified information, OJ 2005 L 172/83.

partners”.²³ The Action Plans already contain references to alignment with EU-supported international initiatives on WMD and disarmament. Ukraine provides an illustration of the way in which operational involvement in the EU’s crisis management and conflict prevention missions may be facilitated by means of specific agreements.

4. Proposals for neighbour countries’ participation in programmes and agencies. One way in which the institutional dimension of integration can be built into the ENP – and one which is drawn from pre-accession experience – is the decision to involve ENP partners in a number of EU programmes and to contemplate their participation in certain agencies.²⁴ As the Commission points out, such participation may both serve to promote the objectives of the agencies themselves as well as supporting and encouraging domestic reform agendas and convergence with EU standards and norms.

Past experience with non-member countries has shown that participation in Community programmes can have very positive effects. At the policy and regulatory levels, such participation has promoted the development and adoption of strategies in a range of policy areas relevant to reform and transition. It has encouraged partner countries to adopt new models of consultation and involvement of the private sector. It has allowed increased access by third country policymakers to specialised networks and exposed them to practical aspects of EU policymaking. In some cases, it has led to the establishment of new institutions, in others to the strengthening of the administrative capacity and legal authority of existing ones. It has been instrumental in the transfer of best practices. Finally, such participation has also provided the European Union with greater visibility in third countries.²⁵

A certain level of multilateral institutional participation may thus emerge as more ENP partners are included in the agencies and programmes. In both cases a formal international agreement is necessary. Participation in agencies requires an agreement between the ENP partner and the agency itself. Arrangements for participation in programmes is envisaged through the negotiation of an additional Protocol to each existing PCA or EMA setting out the general principle and modalities for such participation, with the detailed arrangements for participation in specific programmes as the subject of programme-specific memoranda of understanding with the ENP partners.²⁶ These initiatives are certainly a good basis for developing a sense of involvement – and actual practice – in pre-existing EU institutional structures.

5. The ENPI Regulation was adopted in December 2006,²⁷ and affirms in its Preamble that ‘Promotion of political, economic and social reforms across the neighbourhood is an important objective of Community assistance.’ The ENPI replaces existing financial instruments (TACIS and MEDA) for the ENP regions and Russia for the period 2007-2013. It will operate alongside two other

23 GAER Council Conclusions, 18 June 2007.

24 Commission Communication on the general approach to enable ENP partner countries to participate in Community agencies and Community programmes, COM (2006) 724, 4 Dec 2006. The approach proposed here by the Commission was approved by the Council in its GAER Conclusions on 5 March 2007.

25 Ibid. p.4.

26 Ibid. p.8. On 18 June 2007 the Council agreed a mandate for the Commission to negotiate Protocols to the relevant PCAs and EMAs which would establish general principles for participation by the partner States in Community programmes.

27 Regulation 1638/2006/EC laying down general provisions establishing a European Neighbourhood and Partnership Instrument OJ 2006 L 310/1.

general financial instruments, one for pre-accession (to include the Western Balkans)²⁸ and one for development,²⁹ as well as specific instruments on democracy and human rights³⁰ and stability.³¹

Article 2 defines the overall scope of the programme:

‘Community assistance under the Neighbourhood and Partnership Instrument shall promote enhanced cooperation and progressive economic integration between the European Union and the partner countries and, in particular, the implementation of partnership and cooperation agreements, association agreements or other existing and future agreements.’

The emphasis on both integration and on the implementation of agreements is notable; the ENPI is thus closely tied to existing and future legal commitments on both sides as well as to Action Plan priorities. The Regulation then goes on to establish a long list of objectives, including: political dialogue and reform; legislative and regulatory approximation; capacity building; promotion of the rule of law, good governance and human rights; sustainable development; poverty reduction; the development of civil society; the development of a market economy; cooperation in sectoral domains such as energy, transport and telecommunications; border management; fighting terrorism and organised crime; migration and asylum policies.

From the perspective of integration as an ENP objective, an important feature of the ENPI is the inclusion among its objectives of cross-border cooperation, including that between EU Member States and neighbours. Prior to the introduction of the ENPI the position was fragmented with INTERREG (Structural Funds) covering cross-border and transnational cooperation among Member States and operations within neighbouring states covered by TACIS or MEDA. Between 2004-2006 (after the launch of the ENP but before ENPI) there was an attempt to coordinate existing programmes through the introduction of Neighbourhood Programmes (single projects operating on both sides of the border). The ENPI formalises this position, the rationale being not only administrative efficiency but also support for the overall ENP objective of avoiding the creation of new dividing lines:

‘It is important to foster cooperation both at the European Union external border and among partner countries, especially those among them that are geographically close to each other. In order to avoid the creation of new dividing lines, it is particularly important to remove obstacles to effective cross-border cooperation along the external borders of the European Union. Cross-border cooperation should contribute to integrated and sustainable regional development between neighbouring border regions and harmonious territorial integration across the Community and with neighbouring countries. This aim can best be achieved by combining external policy objectives with environmentally sustainable economic and social cohesion.’³²

Programmes may thus be country or multi-country (one or more ENP states), cross-border (between one or more ENP partners and one or more Member States and involving a shared part of the EU’s external border), or trans-regional (between one or more ENP partner and one or more Member State and addressing common challenges, taking place anywhere in the territory of participating states). The Commission is also given the power, when drawing up action programmes, to decide to include as

28 Council Regulation 1085/2006/EC of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA) OJ 2006 L 210/82.

29 Regulation 1905/2006/EC establishing a financial instrument for development cooperation, OJ 2006 L 378/41.

30 Regulation 1889/2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide OJ 2006 L 386/1.

31 Regulation 1717/2006/EC establishing an instrument for stability OJ 2006 L 327/1.

32 Regulation 1638/2006/EC, Preamble, paras 14-15.

potential participants non-ENP countries eligible under other Community external assistance instruments (such as the pre-accession or development cooperation instruments) in order to take account of the regional or cross-border nature of a programme.³³

The ENPI thus represents an innovative attempt to encourage coherence in assistance programming and to support the rhetoric of cross-border cooperation with facilitative instruments. It will be interesting to see whether these cross-border and trans-regional priorities coexist well with the bilateral priorities of the individual Action Plans.

6. New Deep Free Trade Agreements, DFTAs. Since the early stages of the ENP, references to the internal market and the four freedoms have been replaced by more general references to 'deeper economic integration'. According to the Commission, 'Deeper economic integration with our ENP partners will be central to the success and credibility of the policy.'³⁴ In its 18 February 2008 Conclusions the Council said that 'Deepened economic integration must remain an essential building block of our relations with our neighbours.'

What is deep integration? 'Deep integration' indicates integration that goes substantially beyond a classic free trade area but it does not necessarily imply an extension of the full internal market *acquis* or the four freedoms to the ENP partners; rather, it offers a degree of flexibility in the level of integration offered in different sectors. The Commission sees it as going beyond free trade in goods and services to include 'beyond the border' regulatory issues, such as consumer and environmental protection, technical standards, competition policy, intellectual property rights, company law and financial services. The degree of deep economic integration possible is also dependant on the partners' other integration commitments. For example, the CIS Single Economic Space project between Russia, Belarus, Kazakhstan and Ukraine involves the goal of a customs union; were Ukraine to go down this road, it could not envisage a separate FTA with the EU. Attempts to converge on European standards might also be affected by alternative standards (such as Russian). Conversely, were economic integration with the EU to encompass a customs union,³⁵ that would preclude the partners' participation in other regional free trade agreements.

The formal basis for deeper economic integration will take the form of enhanced bilateral agreements with the EU, which the Commission refers to as 'deep and comprehensive FTA' agreements,³⁶ now abbreviated as DFTAs. What legal form will these new agreements take? Under the Treaty of Lisbon a specific legal base would be introduced into the TEU for neighbourhood agreements,³⁷ but (some of) these agreements are likely to be negotiated before the Treaty of Lisbon enters into force. Existing possibilities include a cooperation agreement under Article 181a EC but this would not be seen as great step forward from the existing PCAs, and the Mediterranean States already have Association Agreements. An alternative would therefore be an Association Agreement under Article 310 EC.³⁸

These existing legal bases are all found in the EC Treaty and would not therefore in themselves cover the second and third pillar (JHA and CFSP) aspects of the agreement. These CFSP and JHA provisions are likely to be of a framework nature with specific initiatives dealt with under separate

33 Regulation 1638/2006/EC, Art. 27.

34 Commission Communication on Strengthening the ENP, COM (2006) 726, p.4.

35 As is the case for Turkey, but which has not been suggested – and is not a likely scenario – for the ENP partners.

36 Commission Communication on Strengthening the ENP, COM (2006) 726, p. 4.

37 A new Article 8 to be added to the TEU under the Treaty of Lisbon; formerly Article I-57(1) of the Constitutional Treaty.

38 On this see further C Hillion, 'Mapping out the New Contractual Relations between the European Union and its Neighbours: Learning from the EU-Ukraine "Enhanced Agreement"' (2007) 12 EFA Rev 169.

agreements, as happens already. There are three possibilities here: (i) a standard mixed agreement with the Member States' participation addressing the second and third pillar dimensions; (ii) a mixed pillar agreement, using Articles 24 and 38 TEU as well as Article 310 EC; (iii) separate agreements based on Article 310 EC (or perhaps Article 181a EC) and Articles 24 & 38 TEU respectively. Of these, the second would be the most innovative and would allow the EU to claim that these agreements offer a new step forward in levels of integration. However although the mixed pillar model has been used for a sectoral agreement (the EU/EC Agreement with Switzerland on the Schengen acquis³⁹) and its use proposed for a framework agreement on partnership and cooperation with Thailand, it was eventually decided to use the traditional mixed agreement formula for the latter. An inter-pillar agreement raises issues of compliance with Article 47 TEU to ensure that the exercise of second pillar powers does not "encroach" upon first pillar competence.⁴⁰

These bilateral instruments will allow for differentiation between partners in terms of the speed of the integration process, but the Commission argues that all the ENP partners should have 'the same perspective' in terms of regulatory convergence and market access, thus supporting the cohesion of the ENP framework and more specifically allowing for the possibility that what is at present a series of bilateral agreements might in due course evolve into a Neighbourhood Economic Community.⁴¹

For the PCA states, the immediate goal would be to move towards a free trade agreement. The negotiating mandate for such an agreement with Ukraine, to replace the existing PCA, has been agreed and its likely scope provides an indication of the shape a new "neighbourhood" agreement might take: the Council has said that 'certain aspects of [the agreement with Ukraine] could serve as a model for other ENP partners in the future'.⁴² Although the EU is ready to negotiate a FTA with Ukraine (and Russia) following WTO membership,⁴³ it is not yet ready to do so with Moldova or the southern Caucasus partners,⁴⁴ which are likely to remain with enhanced autonomous trade preferences for a while yet.⁴⁵

The Mediterranean partners, as we have seen, already have free trade agreements with the EU, so any new agreements with these partners would offer enhanced integration by way of further liberalisation of the agriculture and fisheries sectors, services, establishment and capital movements, and stronger commitments towards regulatory convergence in key sectors (financial services, transport, telecommunications), and fields of economic governance (taxation, company law, competition, state

39 Signed on behalf of the EC by Council Decision 2004/860/EC OJ 2004 L 370/78, and on behalf of the EU by Council Decision 2004/849/EC OJ 2004 L 368/26.

40 C-176/03 *Commission v Council (Environmental Penalties)* [2005] ECR I-7879. On mixed pillar agreements see further C. Hillion and R.A. Wessel, "Restraining External Competences of EU Member States under CFSP" in M. Cremona and B. de Witte (eds), *EU Foreign Relations Law - Constitutional Fundamentals*, Oxford: Hart Publishing, forthcoming.

41 Commission Communication on Strengthening the ENP, COM (2006) 726, p.5. See further Commission non-paper on ENP – A Path Towards Further Economic Integration, available on http://ec.europa.eu/world/enp/strengthening_en.htm

42 GAER Council Conclusions, 18 June 2007. Negotiations with Ukraine were launched in February 2007, see GAER Council Conclusions of 22 January 2007. See further M. Emerson (ed.), *The Prospect of Deep Free Trade between the EU and Ukraine* (CEPS 2006); 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 Rev* 169; C. Hillion, "A New Framework for the relations between the Union and its East European Neighbours" in M. Cremona & G. Meloni (eds.) *The European Neighbourhood Policy: A Framework for Modernisation?* EUI Working Papers, LAW 2007/21..

43 Once Ukraine becomes a member of the WTO the existing trade provisions in the PCA will add little.

44 In February 2008 the Council said that 'As for the possible start of negotiations on DFTAs with Georgia and Armenia, the Council will decide on the basis of the Commission's recommendations that will include, inter alia, the results of the ongoing feasibility studies.'

45 These states come within the EU's Generalised System of Preferences; see Council Regulation 980/2005/EC applying a scheme of generalised tariff preferences, OJ L 169/1.

aids). The Council has indicated the areas of priority for the EU: ‘The scope of existing free trade agreements with ENP partners should be deepened where possible. ... The Council emphasises the importance of concluding agreements with the ENP partner countries of the Mediterranean region on the liberalisation of services, trade in agricultural products and the right of establishment.’⁴⁶ In some areas the *acquis* could be effectively extended to the neighbour States (e.g. aviation, energy) via sectoral agreements connected to the overall agreement.

It is notable that despite the early references to the four freedoms already mentioned, discussion of the movement of people in EU documents on the ENP is framed in terms of migration policy rather than economic integration. Unsurprisingly perhaps, no concrete proposals have been made to establish free movement of persons as a goal of the ENP. Instead the focus is on visa facilitation, readmission, cooperation on border management and illegal immigration. The EU seeks to negotiate readmission agreements side by side with visa facilitation agreements (the latter with an emphasis on facilitating short-term travel).⁴⁷ Dialogue on migration issues takes place within the framework of the ENP Action Plans. In June 2007 it was agreed that the Global Approach to Migration should be extended to the eastern and south-eastern neighbours.⁴⁸ This will entail enhanced cooperation between Member States, dialogue with neighbouring states, inter alia on visa issues, the possibility of mobility partnerships, information and cooperation on legal migration, and cooperation involving FRONTEX on integrated border management systems, and the establishment of a ‘regional Black Sea Cooperation Platform’ including Member States and other Black Sea littoral states, EU agencies, and regional organisations such as the Black Sea Economic Cooperation (BSEC), with a view to enhancing information exchange and monitoring.⁴⁹ The emphasis then is on migration control and although reference is made to promoting legal migration opportunities and “people-to-people exchanges” there is no discussion of enhanced access to labour markets. A number of the existing EMAs contain commitments on the legal position of legally resident migrant workers, including provisions on social security and non-discrimination in relation to conditions of employment. Although it is possible that a perspective of deep integration might envisage a standardisation of such provisions across all enhanced ENP agreements in terms (for example) of the Europe Agreement model, at present it does not appear that the Commission’s aim of granting the ‘same perspective’ for economic integration to all ENP states extends to the social integration of migrant workers.

Alongside migration policy, the agreement for ‘deep integration’ will extend cooperation further into Justice and Home Affairs issues, including cooperation relating to organised crime and international terrorism, anti-corruption (closely connected with promotion of the rule of law), cooperation on modernisation of the judicial and criminal justice systems. An agreement between Europol and Ukraine is envisaged. Ultimately the extension of aspects of the JHA *acquis* such as the European Arrest Warrant might be considered.

The political dimension of deep integration is reflected in an increased emphasis on cooperation in relation to the CFSP and security and defence policies. In terms of contractual commitments, this will build upon the provisions already in the PCAs and EMAs on political dialogue, together with stronger references to the ENP aims of cooperation in the field of regional security.

46 Council Conclusions, 18 February 2008.

47 Visa facilitation and readmission agreements have been concluded with Ukraine and Moldova and are being negotiated with Morocco. The first common visa application centre was established in Chisinau, Moldova in April 2007; see IP 07/561/ 25 April 2007.

48 Commission Communication on “Applying the Global Approach to migration to the Eastern and South-Eastern regions neighbouring the European Union” COM(2007) 247, 16 May 2007; GAER Council Conclusions on extending and enhancing the Global Approach to migration, 18 June 2007.

49 See Annex on priority actions to GAER Council Conclusions on extending and enhancing the Global Approach to migration, 18 June 2007, Council doc no. 10746/07.

Underpinning both economic and political aspects of integration is the notion of shared values. In bilateral agreements these are given expression through ‘essential elements’ clauses. Alongside the key values (democracy, the rule of law, good governance and respect for human rights) and principles (market economy, free trade, sustainable development and poverty reduction) a new enhanced agreement may well include a reference to shared commitments in relation to a number of what the EU has called its ‘essential concerns’: the fight against terrorism, non-proliferation of weapons of mass destruction and efforts towards the peaceful resolution of regional conflicts as well as cooperation in justice and home affairs matters.⁵⁰

The common thread running through all these different aspects of ‘deep integration’ is the concept of convergence with EU norms and values, including the promotion by the EU of existing international norms. The export by the EU of (parts of) the *acquis* to the partner States has been categorised by Lavenex as a form of external governance.⁵¹ The EU attempts to spread its own concepts of governance, not only economic governance but also in fields such as environmental protection, external border controls and the rule of law. The methodologies it uses to do this may combine specific commitments in bilateral agreements, more general clauses on legal approximation, extensions of the *acquis* in specific sectors through bilateral or multilateral agreements, the use of non-binding instruments such as Action Plans, conditionality, technical assistance for capacity-building and training, and both formal and informal dialogue. In different ways they all contribute to the conception of the ‘soft power’ or ‘transformational diplomacy’ of the EU, a power of persuasion rather than coercion, of which it is argued the ENP is a prime example in current EU external policy.⁵² Commissioner Ferrero-Waldner, for example has spoken of using ‘our soft power to leverage’ reform: ‘the European Neighbourhood Policy is about helping our neighbours towards their own prosperity, security and stability, not by imposing reforms, but by supporting and encouraging reformers.’⁵³ While based on co-option (joint ownership), this exercise of soft power is clearly recognised as serving the EU’s own interests (its interest in its own security, stability and prosperity). It is nevertheless also increasingly recognised that those interests are to an ever greater extent bound up with those of its neighbours, and the process of deepening integration will enhance that inter-dependence. Integration will thus provide a mechanism for furthering the EU’s interests (its ENP goals), and will also lead to a convergence, not only of regulatory norms but also of interests.

Conclusion

The ENP also represents a genuine attempt to bridge the gap between Members and non-Members. Certainly it is not entirely successful in this respect, but it is worth making the experiment, in emphasising that the EU does not see itself as an exclusionary club whose privileges are reserved for Members only, but rather an enterprise in which others can also participate. Innovations in this respect include the ability to finance cross-border and cross-regional projects under the ENPI and the proposal

⁵⁰ GAER Council conclusions on European Neighbourhood Policy - 14 June 2004.

⁵¹ S. Lavenex, “EU External Governance in Wider Europe”, (2004) 11 (4) *Journal of European Public Policy*, 680, arguing that “the EU’s move towards external governance is conditioned by the resurgence of its fundamental identity as a ‘security community’”.

⁵² On soft power see for example E. Tulmets, “Is a Soft Method of Coordination Best Adapted to the Context of the EU’s Neighbourhood?” in M. Cremona & G. Meloni (eds.) *The European Neighbourhood Policy: A Framework for Modernisation?* EUI Working Papers, LAW 2007/21. On transformational diplomacy see R. Dannreuther, “Developing the Alternative to Enlargement: The European Neighbourhood Policy” (2006) 11 *European Foreign Affairs Rev.* 183.

⁵³ B. Ferrero-Waldner, “The European Neighbourhood Policy: The EU’s Newest Foreign Policy Instrument” (2006) 11 *European Foreign Affairs Rev.* 139 at 139 and 140.

to open up certain agencies and programmes to ENP partners. The increased willingness to expand policies such as energy and transport to non-Members (while clearly in the interests of the EU itself) is important and could be extended; why not consider ENP participation in the European Defence Agency, for example?

The emphasis within the ENP on adoption of the *acquis*, the use of pre-accession methodology and the possibility of ENP partners' participation in agencies and programmes leads to increased contact between officials in Brussels, the Member States and the neighbour countries, resulting in increased levels of understanding, realism and trust building. In this way, the instruments of the ENP might well contribute to shifting perceptions on each side: what it means to join the Union, on the one hand, and a greater readiness to see these countries as potential candidates on the other. As Lynch has said "The only way to blur EC membership is by creating real proximity, based on daily engagement and constant presence".⁵⁴

More could be done to identify specific projects of genuinely common interest, including multilateral projects, to build on the idea of joint ownership as a genuinely innovative form of 'integration without membership'.

⁵⁴ D. Lynch, "The New Eastern Dimension of the Enlarged EU" in *Partners and Neighbours: A CFSP for a Wider Europe*, Chaillot Papers No.64, Institute for Security Studies, 2003, 34 at 58.

