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FOREWORD

This report aims to disentangle the web of mainly bilateral agreements between the EU and its neighbouring countries. These agreements are, *inter alia*, central to the European Neighbourhood Policy but differ in form and substance thus creating a highly complex state of cooperation that might, it is argued, lead to a substantial capability-expectations gap. The rationale of the report has been to bring analytical and factual clarity to the present situation and outline possible future developments in the contractual relationships between the European Union and its neighbours.

SIEPS conducts and promotes research and analysis of European policy issues within the disciplines of political science, law and economics. SIEPS strives to act as a link between the academic world and policy-makers at various levels. By issuing this report, SIEPS hopes to make a contribution to the debate on the foreign policy instruments of the EU as well as on how the EU can create and manage neighbourly relations.

Stockholm, November 2006
Jörgen Hettne
Acting Director
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ABBREVIATIONS

ACP	Asia Caribbean Pacific
CCP	Common Commercial Policy
CFSP	Common Foreign and Security Policy
CIS	Commonwealth of Independent States
CMEA	Council of Mutual Economic Assistance
CSCE	Conference on Security and Cooperation in Europe
CU	Customs union
EC	(Treaty establishing the) European Community
ECB	European Central Bank
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEA	(Agreement on the) European Economic Area
EEC	(Treaty establishing the) European Economic Community
EFTA	European Free Trade Association
EMA	Euro-Mediterranean Agreement
ENP	European Neighbourhood Policy
EPP	European People's Party
ESDP	European Security and Defence Policy
ESS	European Security Strategy
EU	(Treaty on) European Union
FSJ	(Area of) Freedom, Security and Justice
JHA	Justice and Home Affairs
JLS	Justice, Liberty and Security
NATO	North Atlantic Treaty Organisation
NIS	Newly Independent States
NTB	Non-tariff barriers
PCA	Partnership and Cooperation Agreement
PES	Party of European Socialists
PPC	Permanent Partnership Council
SAA	Stability and Association Agreement
WTO	World Trade Organisation

EXECUTIVE SUMMARY

International agreements are one of the principal foreign policy instruments of the European Union (EU). The scope for concluding international agreements has been considerably expanded over the last decades alongside the development of other EU foreign policy instruments. Such agreements play a central role in relations between the Union and its neighbours, which in recent years has emerged as a specific policy distinct from the overall foreign policy of the EU, culminating in the creation of the European Neighbourhood Policy (ENP) in 2002-2005.

EU neighbourhood policy in general, and the ENP specifically, are inextricably linked to the process of EU enlargement. According to the EU, the ENP is 'membership neutral' and neither excludes or promises eventual accession for the ENP partner states. Previous attempts to create a neighbourhood policy to stave off accession requests have however all largely failed, as the results of these attempts have themselves become regarded as mere stepping-stones to accession, rather than permanent alternatives to membership.

EU neighbourhood policy has since the end of the Cold War become increasingly ambitious. It is argued that despite the further development of EU foreign policy instruments and contractual relations with neighbouring countries in the same period, a gap between expectations and capabilities still remains in EU neighbourhood policy.

A significant upgrade of contractual relations between the EU and neighbouring countries has taken place since the end of the Cold War and the establishment of the European Union. An analytical framework consisting of seven main headings – 1) Purpose and long-term goal; 2) Scope of commitments; 3) Level of commitments; 4) Legal basis; 5) Institutional framework; 6) Political dialogue; 7) Life-cycle and development – is developed in order to compare the various agreements between the EU and its neighbours.

The principal (mainly bilateral) agreements, while being quite similar in scope and institutional structures, entail quite different levels of cooperation and integration between the EU and its neighbours. The agreements with the rich non-members of Western Europe of EFTA go furthest in terms of integration with the EU, followed by the agreements with candidates for EU membership. The agreements with countries covered by the ENP are overall less extensive, although the trade component is quite advanced in the case of certain Mediterraean partners, as is the institutionalized political dialogue with certain former Soviet republics, notably Russia and (to a lesser extent) Ukraine.

The contractual relationships with neighbouring countries are becoming increasingly differentiated. This is as much a result of the growing number of more limited (mainly bilateral, but also some multilateral) sector-specific agreements concluded between the EU and its neighbours, as to differences among the principal agreements in EU neighbourhood policy. An increasingly complex system of contractual relations between the EU and its neighbours has emerged, in part due to the three-pillar structure of the Union. This complexity is further exacerbated by the still extensive use of mixed agreements, which makes the EU a more cumbersome international actor and more difficult interlocutor for non-member states, creating uncertainty on issues of liability, interpretation and legal effects. The consensus among legal scholars seems to be that even though mixed agreements constitute an "unnecessary burden", they are used more extensively than the scope of agreements require.

In the absence of the Constitutional Treaty, this legal complexity could become increasingly problematic for the EU, leading for instance to more institutional turf-fights. This is already in evidence in connection with the new comprehensive agreements to be negotiated with Russia. Such comprehensive agreements will in all likelihood have to be adopted by unanimity in the Council and require approval by the European Parliament and all of the national parliaments in the (growing number of) EU member states. This introduces considerable elements of the so-called Community method into a CFSP which according to the Treaty on European Union should be governed by an intergovernmental approach.

The current agreements with neighbouring countries roughly correspond to the priorities of EU neighbourhood policy. It may however be argued that the gradual differentiation in EU neighbourhood policy is less pronounced than political, economic and social developments among neighbouring countries and their overall relationships with the EU should entail. With the exception of 'pariah states' such as Belarus and Libya (and previously also Yugoslavia), the much-touted policy of conditionality plays a less prominent role in determining contractual relations between the EU and its neighbours than official documents claim, as it is not applied consistently over the life-cycle of the agreements, from the launch of negotiation to implementation. While it is frequently applied during negotiations and in the ratification process, with temporary suspensions and concomitant delays before entry into force, the EU has been very reluctant to interrupt the smooth functioning of agreements already entered into force in order to comply with the principle of conditionality also in practice. The EU has for instance never made use of the human rights clauses inserted into all of

the principal agreements with neighbouring countries, in spite of numerous obvious breaches of the political commitments made by neighbours in their agreements with the EU.

Indeed, the vicissitudes of contractual relations seems to be determined less as a result of an EU strategy towards the region than to other EU developments such as the relevant *acquis* and EU policies at the time of negotiations, the internal political dynamics in the EU and the wishes of individual member states, and the limits set by other external restraints, for instance the issue of WTO membership in connection with preferential trade arrangements.

But despite the deepening of relations and new agreements negotiated over the last fifteen years with neighbouring countries, the EU is far from having exploited the full potential of international agreements in its EU neighbourhood policy. This is in part due to the state of political and economic development and institutional and administrative capacities of the neighbouring countries themselves, as well as various 'external' restraints. But in other cases, for instance as concerns participation of non-member states in EC/EU agencies and programmes, the possibilities of participation in 'decision-shaping,' and the scope for political dialogue and association with other EU policies such as the CFSP, the full potential of EU neighbourhood policy in general, and international agreements in particular, are far from being exhausted.

1 INTRODUCTION

International agreements are one of the principal foreign policy instruments of the European Union (EU). They play a central role in relations between the Union and its neighbours, which in recent years has emerged as an increasingly well-defined policy distinct from the overall foreign policy of the EU.

European integration has had an external dimension right from the beginning more than fifty years ago. The development of relations with countries in close geographic proximity was one of the main expressions of this, with the conclusion of various association and free trade agreements with a number of Mediterranean and Western European states from the early 1960s onwards.

Initially, closer relations with EU neighbours focused primarily on economic relations, reflecting the competences of the predecessors of the Union.[1] The growing EU powers in other areas have broadened the scope of the relationships, with new agreements and dialogues of co-operation and integration in the fields of justice and home affairs (JHA)[2] and the Common Foreign and Security Policy (CFSP), creating an increasingly differentiated and complex system of relations with its neighbours.

The process of establishing close institutionalised relationships with its neighbours moving from more traditional forms of international co-operation towards real integration has been greatly expanded since the end of the Cold War. Through the 1990s, the EU deepened and widened its relations successively with the EFTA countries, the countries in Central and Eastern Europe, the former states of the former Soviet Union, the Southern Mediterranean neighbours, and the countries of the Western Balkans, through contractual agreements, political dialogue and financial and technical assistance programmes. This allowed for varying degrees of bilateral cooperation, inclusion in EU policies, participation in EU programmes and association with the growing number of EU agencies.

The principal issue in most of these relationships has of course been the question of membership, with three EFTA countries acceding in 1995, eight Central and Eastern European countries and two Mediterranean countries becoming members in 2004, with a further two Black Sea littoral states set to join in 2007. While the further development of the EU has

[1] The European Coal and Steel Community (ECSC), the European Economic Community (EEC) and the European Community (EC).

[2] Now also known as Justice, Liberty and Security (JLS), or Freedom, Security and Justice (FSJ). The terms will here be used interchangeably.

provided the Union with a growing arsenal of foreign policy tools, international agreements arguably remains the principal instrument in the relationships between the Union and neighbouring countries. The main goal of this paper is to survey and compare these agreements.

The second section will provide the background and context for the analysis, setting out the goals of EU neighbourhood policy and the instruments to achieve them, in the latter case focusing on the ability of the EU to conclude international agreements with non-member states. The third section will provide a survey of the principal international agreements between the EU and neighbouring countries, comparing them across various dimensions. The fourth section will aim to combine the previous two sections by assessing whether these agreements have contributed to the EU's goal vis-à-vis its neighbours. The final section will provide some concluding remarks on the use of international agreements as instruments of EU neighbourhood policy.

2 MEANS AND OBJECTIVES OF EU NEIGHBOURHOOD POLICY

2.1 The aims of EU neighbourhood policy

The idea of a distinct and clearly-defined 'neighbourhood policy' is a recent invention, although relations with neighbouring countries have represented a particular challenge for the Union and its predecessors from the beginning of the integration process in the 1950s. This was initially of limited importance in the overall integration process and was hardly distinct from the general external policies of the EU, but has gradually taken on a more distinct quality from the general external relations of the EU.

2.1.1 The development of a distinct EU neighbourhood policy

There are no specific references to the EU's neighbourhood in articles defining aims and objectives of the CFSP.[3] Neighbouring countries and regions were, however, a priority of the CFSP since its creation at Maastricht in December 1991. The Commission Communication on the CFSP endorsed by the European Council in June 1992 set out two main geographical priorities for joint actions under the CFSP: Central and Eastern Europe and the Mediterranean.[4] The former included the former Soviet republics and the Balkans, while the latter included the Maghreb and the Middle East.

A specific policy towards neighbouring countries and regions has emerged in recent years in various contexts. Relations with neighbours were identified as a strategic objective by the European Commission in February 2000,[5] and was also given a prominent place in the European Security Strategy (ESS) adopted by the European Council in December 2003. According to the ESS, "building security in our neighbourhood" is one of the three strategic objectives of EU security policy.[6]

The issue was also discussed in the Convention on the Future of Europe, which took place between February 2002 and July 2003. The two biggest European political parties, the centre-right European Peoples Party (EPP) and the centre-left Party of European Socialists (PES), called for the development of a specific neighbourhood policy to be included in the Constitutional Treaty. According to the PES,

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[3] Articles 2 and 17 of the Treaty on European Union, hereafter referred to as TEU.
[4] European Council (1992).
[5] Prodi (2003), p.7.
[6] European Council (2003), pp. 7–8.

> [i]t would be wise to create a new status for countries that are neighbours of the EU but that do not seek EU membership. This would allow us to develop stronger political, economic and cultural links with them.

The EPP provided further details in their proposal suggesting that

> [the] EU should offer institutionalised cooperation to States which can not become members for the time being. The EPP proposes the creation of a "European Partnership", open both to Eastern Europe and to Mediterranean countries - similar to the European Economic Area - but including a political component. This would enable Europe to strengthen its institutionalised relations with countries neighbouring the Union and consequently promote peace and stability throughout the continent."[7]

The Treaty establishing a Constitution for Europe approved by EU leaders on 18 June 2004 includes a new title, Title VIII, on relations between the EU and its neighbours (see section 2.2.7 below).

2.1.2 The goals and mechanisms of the European Neighbourhood Policy

The European Neighbourhood Policy (ENP) emerged from of the process of developing a 'New Neighbourhood Initiative' launched at the official level in spring 2002.[8] In the much-quoted phrase of former Commission president Romano Prodi, the objective of the ENP is to create a "ring of friends" around the EU.[9] The new policy "is to expand the zone of prosperity, stability and security beyond [the EU's] borders."[10]

These aims are to be reached through the creation of special relationships based on shared values and common interests.[11] According to the first Commission proposals for the new policies from March 2003 – the so-called Wider Europe Communication – "the privileged relationship with neighbours will build on mutual commitment to common values," operationalised to include the rule of law; good governance; respect for human rights, including minority rights; and the promotion of good neighbourly relations. Romano Prodi has also here coined a much-quoted term, namely that the 'ring of friends' is to be created by including the ENP partner countries in *"everything but institutions"*. How such participation is to come about is determined by two key principles. The first is the principle of differentiation. Since the partner countries covered by the ENP con-

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[7] European People's Party (2002); Party of European Socialists (2002).
[8] It was known as the Wider Europe initiative in 2003-2004 until the European Neighbourhood Policy (ENP) was adopted as the name of the new policy in the spring of 2004.
[9] Prodi (2003), p. 4.
[10] Ferrero-Waldner (2006).
[11] European Commission (2003), p. 3

stitute a heterogeneous group, with different levels of political and economic development and with different aspirations vis-à-vis the EU relations between the EU and its ENP partners will be developed bilaterally.

This is linked to the second principle, namely conditionality. The pace and scope of the inclusion of the EU's neighbours in "everything but institutions" is to depend on the pace and scope of reform in the partner countries themselves: "progress is rewarded with greater incentives and benefits. Only as our partners fulfil their commitments … will we offer an even deeper relationship."[12]

2.1.3 The ENP and enlargement

EU neighbourhood policy is inextricably linked to the process of EU enlargement. The most recent enlargement in 2004 directly precipitated the debate in the EU that led to the ENP. Indeed, "[e]nlargement is the starting point for a new approach towards our relations with our neighbours." The area of stability and prosperity, expanded with enlargement, "can only be sustainable if it also extends to our neighbourhood."[13]

As the initiative was developed further in the course of 2002 and early 2003, it became clear that the new policy targeting the Eastern and Southern neighbours would be "separate from the question of EU membership" or, alternatively, "should not prejudge the question of future EU membership", as the Council concluded on 18 March and 14 April 2003 respectively, following its first debate on the Wider Europe communication. The precise relationship between the ENP and enlargement has been further elaborated in various policy documents and speeches by EU leaders. According to the Wider Europe Communication, the aim of the new policy is to provide a framework for relations "which would not, in the medium-term, include a perspective of membership."[14] The policy

> concerns countries for which accession is not on the agenda. Our neighbourhood policy does not close the door to the European aspirations of any country. … On the other hand, it is clear that the Union's neighbourhood policy cannot be based on the prospect of successive accessions of its neighbours.[15]

The ENP "is distinct from the possibilities available to European countries under Article 49 of the Treaty on European Union."[16] The link between the

[12] Ferrero-Waldner (2006).
[13] Verheugen (2003). See also European Commission (2004), p. 2.
[14] European Commission (2003), p. 5.
[15] Landaburu (2006).
[16] European Commission (2004), p. 3

ENP and membership was perhaps most memorably captured by External Relations Commissioner Benita Ferrero-Waldner in her statement in January 2005 on Ukraine's membership aspirations, stating that the "door is neither closed nor open."[17]

2.1.4 Previous neighbourhood policies and enlargement

This is not the first time the EU has faced the challenge of developing close relations with neighbouring countries as an alternative to membership. Although an explicit neighbourhood policy as such is a recent phenomenon, it can be argued that the EU has in practice had a neighbourhood policy for a long time. Previous attempts to create a neighbourhood policy to stave off accession requests have, however, all largely failed, as the results of these attempts have themselves become regarded as mere stepping-stones to accession, rather than permanent alternatives to membership.

While no foreign policy as such was initially envisaged for the European Community, external relations in a formal sense were initiated quite soon after the early treaties entered into force, including with immediate neighbours of the Community. Thus, agreements on consultations between the ECSC High Authority (later to become the European Commission) and on transit coal and steel were concluded with Switzerland in the late 1950s followed by association agreements with Greece and Turkey in the early 1960s.[18]

The two latter cases, and the first applications for membership from certain EFTA states in the same period, raised the issue of enlargement for the first time. Concern about the internal functioning and effectiveness of the EEC, the EC and now the EU has been a constant feature in the subsequent debates on enlargement. Membership of EFTA countries was in the first instance prevented by the French veto on British membership in the 1960s, while the military coup in Greece in the late 1960s led to a suspension of the relationship and put the membership issue on hold. The 1963 association agreement with Turkey, on the other hand, acknowledged in principle Turkey's potential as a future member, a decision with considerable consequences for the EU and Turkey today.

The further development of relations with EFTA from the early 1980s

[17] Ferrero Waldner (2005).
[18] See Vahl and Grolimund (2006) on Switzerland, and Phinnemore (1999) on early associations.

led to the first steps in defining the limits of integration between the Community and non-member states. In 1987, the EC adopted the so-called Interlaken principles of association:[19]

- the EC would give priority to its own integration;
- the autonomy of the EC's own decision-making should not be threatened;
- there should be a fair balance of rights and obligations.

Towards the end of the Cold War, the prospect of new applications from EFTA countries prompted the then President of the European Commission Jacques Delors to propose in early 1989 the creation of a Common European Economic Space between EFTA and the EC and its single market then still under development. Less than a year later, and faced with the prospect of further applications from the newly liberated countries of Central and Eastern Europe led French President Mitterand to suggest the creation of a European Confederation.[20] Both of these attempts to create permanent alternatives to full EU membership failed, as most of the EFTA countries and all the Central and European countries targeted by the two proposals opted for full membership. In a similar vein it has been argued that the Barcelona process was established in part to stave off possible applications for membership from Southern Mediterranean states, following the Moroccan interest in joining expressed in the late 1980s.[21]

Following the 2004 enlargement, the EU is supposed to suffer from 'enlargement fatigue.' There is widespread opposition to the accession of Turkey, with many preferring to create a 'privileged partnership' instead. The general concern about the EU's ability to take on new members are currently leading to attempts by the EU to further define its 'absorption capacity', as well as more general calls to define the final borders of the EU.[22] The development of EU neighbourhood policy is of paramount importance in this context.

2.2 Legal foundations: International agreements and other EU foreign policy tools

The EU has acquired a growing number of foreign policy instruments. Most of these are of relatively recent origin, due in large part to the establishment of the CFSP from the early 1990s onwards, but also through other parallel developments in the EU.

[19] Phinnemore (1999), pp. 38-39.
[20] Nuttall (2000), p. 44.
[21] Missiroli (2003), pp. 10-11.
[22] Grant (2006) and Aydin et al (2006).

The power to conclude international agreements has been part of the European Community's competence since the beginning, and constitutes according to one scholar "the core of external action".[23] The potential scope of such agreements has been considerably expanded since the early treaties were adopted in the 1950s, both through the case law of the European Court of Justice (ECJ) and, more importantly, the various revisions of the treaties in the last two decades.

2.2.1 The EEC Treaty: 'trade and tariff agreements' and 'associations'

International agreements are mentioned in three articles of the Treaty of Rome.[24] The first is part of the section covering the Common Commercial Policy.[25] The establishment of a customs union was a central objective of the creation of the EEC in the 1950s,[26] and the Common Commercial Policy (CCP) was in the 1960s one of the first major integration projects to be implemented. Article 133 (1) EC provides for international agreements to be concluded as part of the CCP:

> [t]he common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of *tariff and trade agreements*, the achievements of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies [emphasis added].

The other two references are in the general and final provisions of the Treaty. Article 300 EC sets out the procedures for the conclusion of international agreements by the Community (see section 2.2.6. below), while Article 310 EC provides for the conclusion of *association agreements*:

> The Community may conclude with one or more states or international organizations agreements establishing an association involving reciprocal rights and obligations, common practices and special procedures.

2.2.2 Case law of the European Court of Justice: The doctrine of implied powers

From the 1970s onwards, the ECJ has played a key role in defining the

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[23] Eeckhout (2004), p. 5.
[24] *Treaty establishing the European Economic Community.* This was superseded by the *Treaty establishing the European Community*, hereafter referred to as EC.
[25] Articles 131- 134 EC. The numbering used in this report follows the revision made in the Treaty of Amsterdam.
[26] Article 23 (1) EC.
[27] Eeckhout (2004), p. 5.

scope and nature of the Community's competence in external policy.[27] A key question has been whether EEC external actions were limited to the Common Commercial Policy, the conclusion of association agreements and cooperation with other international organizations, as explicitly provided for by the Treaties. During the 1970s the Court established the *doctrine of implied powers*, which entails that the EC has the capacity to conclude international agreements in all areas within its competence, including areas in which the Treaty does not explicitly provide for such powers.[28]

While this is of great importance as a matter of principle, in practice the ECJ has been quite restrictive in terms of how this is interpreted concerning the material scope of powers conferred on the Community in specific fields. The limits and the scope of the CCP has been a big legal battlefield between the institutions since the creation of the EEC. On the one hand, the Court established a firm doctrine of *exclusive Community competence* in the conclusion of trade agreements with third countries. On the other hand, the ECJ refused to extend the notion of commercial policy in order to cover the entire agenda of the Uruguay Round.[29] Some scholars have thus concluded that the case law on exclusive implied powers has had little impact on the Community's involvement in the conclusion of international agreements.[30]

The ECJ has also sought to define the scope of association agreements through case law, by setting a minimum and a maximum standard for their possible contents. As a minimum, an association agreement must to some extent lead to the participation of the associated state in the Community system. This is defined not as participation in the EU institutions as such, but participation in some aspects of the substantive *acquis communautaire*. The maximum scope of an association is limited only by the *acquis*.[31]

2.2.3 Revisions of the Treaty establishing the European Community

The Community's ability to conclude international agreements has been considerably expanded as a result of the various revisions of the treaties over the last twenty years. The Single European Act, which was signed in early 1986 and entered into force in July 1987, broadened the scope for the EC to conclude international agreements through the inclusion of the titles

[28] Notably the AETR case (*Case 22/70 Commission v. Council* [1971] ECR 263), and *Opinion 1/76* on the Kramer case before the Dutch Courts.
[29] See *Opinion 1/94 re WTO Agreement*, ECR I-5267.
[30] Eeckhout (2004), pp. 96-98.
[31] Lenaerts and De Smijter (1996), p. 17.

on research and technological development and on environmental policy, both of which contained an external dimension. According to Article 170 EC, the Community is to make provisions for cooperation on *research and technological development* with third countries or international organisations that may be subject to an agreement between the Community and the third party concerned. Article 174 (4) includes a similar provision on conclusion of international agreements in the field of *environmental policy*.

Further provisions for international agreements were included in the Treaty of Maastricht, which was signed in February 1992 and entered into force in November 1993. Article 111 EC sets out special procedures for the conclusion of agreements on *monetary or foreign exchange regime* matters, while Article 181 EC provides for the conclusion of international agreements on *development cooperation*. In the latter case, the Community had been engaged in such cooperation for a long time, and the treaty amendment thus represented a codification of existing practice.

The Treaty of Maastricht also calls for international cooperation by the Community in a number of new policy areas. In light of the doctrine of implied powers, the revision thus further confers on the Community the competence to conclude international agreements in areas such as *education* (Article 149(3) EC), *vocational training* (Article 150(3)), *culture* (Article 151(3)), *public health* (Article 152(3)), and on *trans-European networks* (Article 155(3)).

The Amsterdam revision of the Treaty establishing the European Community, which was signed in 1997 and entered into force in May 1999, did not provide any further express provisions on international agreements. However, a new title on *visas, asylum and immigration* was inserted into the EC Treaty, which since Maastricht had been part of the so-called third pillar on cooperation in Justice and Home Affairs. There are no explicit references to the conclusion of international agreements, despite the obvious external dimension of these policies. Indeed, these are becoming increasingly important elements of EU neighbourhood policy, notably on the issue of visas and readmission. Furthermore, and again in light of the doctrine of implied powers, the expansion of EC *social policy* through the Agreement on Social Policy (Articles 136–145 EC) confers upon the Community the competence to conclude international agreements also in this area.

The Nice amendments of the EC Treaty, which were signed in early 2001 and entered into force in February 2003, inserted a title on *economic, financial, and technical cooperation* with third countries. Article 181a EC

codified existing practice of including cooperation provisions in general agreements with non-member countries, providing, inter alia, for the conclusion of international agreements in these areas.

2.2.4 International agreements and the Treaty on European Union

The Treaty on European Union, which was agreed at Maastricht and later revised in Amsterdam and Nice, also includes provisions on international agreements beyond the competences of the European Community. The TEU as agreed at Amsterdam provides for EU agreements with third countries on *foreign and security policy* (the so-called second pillar of the EU) and in the field of *police and judicial cooperation in criminal matters* (the third pillar).

Article 24 TEU sets out the scope and procedures for the conclusion of international agreements in these areas (see further in section 2.2.6. below). This is supplemented by Article 38 in the case of agreements in the third pillar.

2.2.5 Mixed agreements

Most agreements between the EU and third countries are concluded by both the Community and the Member States, even if there are no specific provisions in the treaties for such 'mixed agreements'.[32]

The general argument in favour of concluding mixed agreements is that the scope of the proposed agreement goes beyond the competences of the Community. A more specific and much quoted reason is that mixed agreements enable the EU to conduct political dialogue – which the Community as such does not have the competence to conduct – within the framework of the agreement, although it is argued that the Community acquired more competences in this area with the Nice treaty revision, which further reduced the need to conclude mixed agreements.

2.2.6 The procedures for the conclusion of international agreements

The Treaties set out several different procedures for the conclusion of international agreements by the Community and the Union. All EU and EC agreements are negotiated on the basis of a mandate given by the Council, and international agreements are all concluded by a Council decision. There are, however, differences as regards the institution that negotiates on

[32] Eeckhout (2004), pp. 190–225.

behalf of the Union or the Community, how the Council votes on the decision to conclude an agreement and whether or not parliamentary approval, either by the European Parliament and/or the national parliaments, is required.

Community agreements

The basic rule for Community agreements is that the Commission negotiates on the basis of a mandate adopted by the Council, which subsequently concludes the agreement on behalf of the Community through a decision made by a qualified majority vote. The procedures for the conclusion of international agreements by the Community are laid down in Article 300 EC:

> 1. Where this Treaty provides for the conclusion of agreements between the Community and one or more States or international organizations, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with special committees appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it.
> In exercising the powers conferred upon it by this paragraph, the Council act by a qualified majority, except in the cases where the first subparagraph of paragraph 2 provides that the Council shall act unanimously.
>
> 2. Subject to the powers vested in the Commission in this field, the signing, which may be accompanied by a decision on the provisional application before entry into force, and the conclusion of the agreements shall be decided on by the Council, acting by a qualified majority on a proposal from the Commission. The Council shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of internal rules and for the agreements referred to in Article 310.
> By way of derogation from the rules laid down in paragraph 3, the same procedures shall apply for a decision to suspend the application of an agreement, and for the purpose of establishing the positions to be adopted on behalf of the Community in a body set up by an agreement based on Article 310, when that body is called upon to adopt decisions having legal effects, with the exception of decisions supplementing or amending the institutional framework of the agreement.
> The European Parliament shall be immediately and fully informed on any decision under this paragraph concerning the provisional application or the suspension of agreements, or the establishment of the Community position in a body set up by an agreement based on Article 310.
>
> 3. The Council shall conclude agreements after consulting the European Parliament, except for the agreements referred to in Article 133(3), including cases where the agreement covers a field for which the procedure referred to in Article 251 or that referred to in Article 252 is required for the adoption of internal rules. The European Parliament shall deliver its opinion within a time-limit which the Council may lay down according to the urgency of the matter.

In the absence of an opinion within that time-limit, the Council may act.
By way of derogation from the previous subparagraph, agreements referred to in Article 310, other agreements establishing a specific institutional framework by organizing cooperation procedures, agreements having budgetary implications for the Community and agreements entailing the amendment of an act adopted under the procedure referred to in Article 251 shall be concluded after the assent of the European Parliament has been attained.
The Council and the European Parliament may, in an urgent situation, agree upon a time-limit for the assent.

4. When concluding an agreement, the Council may, by way of derogation from paragraph 2, authorize the Commission to approve modifications on behalf of the Community where the agreement provides for them to be adopted by a simplified procedure or by a body set up by the agreement; it may attach specific conditions to such authorization.

5. When the Council envisages concluding an agreement which calls for amendments to this Treaty, the amendments must first be adopted in accordance with the procedure laid down in Article 48 of the Treaty on European Union.

6. The Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 48 of the Treaty on European Union.

7. Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on member States.

The procedures for the conclusion of international agreements under Article 300 EC have been substantially changed through the various treaty changes, growing in length from two paragraphs in the Treaty of Rome to seven in the Treaty of Nice. The changes include , for example, allowing for provisional application of parts of an agreement pending ratification by the EU, provisions on implementation and modification of existing agreements, the scope for qualified majority voting, and the possibility of suspending and terminating agreements.

The most significant development is perhaps the greater involvement of the European Parliament, although its formal role still remains quite limited. It has for instance no formal role on the decision to launch negotiations or on the specific mandate for the negotiations, and is only consulted before the conclusion of an agreement. As set out in paragraph 3 of Article 300 EC, the assent of the European Parliament is, however, required for certain agreements. Furthermore, while its formal role thus remains limited, in practice, however, the Parliament is more closely involved during the negotiation phase than the treaty text provides for.[33]

[33] Eeckhout (2004), pp. 188–189.

A different procedure is envisaged for the conclusion of international agreements on monetary or foreign exchange regime matters. According to Article 111 (3) EC:

> By way of derogation from Article 300, where agreements concerning monetary or foreign-exchange regime matters need to be negotiated by the Community with one or more states or international organisations, the Council, acting by a qualified majority on the recommendation of the Commission and after consulting with the ECB, shall decide the arrangements for the negotiation and for the conclusion of such agreements. These arrangements shall ensure that the Community expresses a single position. The Commission shall be fully associated with the negotiations.
>
> Agreements concluded in accordance with this paragraph shall be binding on the institutions of the EU, on the ECB, and on Member States.

European Union agreements

The procedures for the conclusion of Union agreements differ from those for Community agreements as to who negotiates, and includes various ratification procedures, depending on how the EU makes decisions internally on the specific subject matter of the agreement. According to Article 24 TEU:

> 1. When it is necessary to conclude an agreement with one or more states or international organisations in implementation of this title, the Council may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council on a recommendation from the Presidency.
>
> 2. The Council shall act unanimously when the agreement covers an issue for which unanimity is required for the adoption of internal decisions.
>
> 3. When the agreement is envisaged in order to implement a joint action or a common position, the Council shall act by a qualified majority in accordance with Article 23 (2).
>
> 4. The provisions of this Article shall also apply to matters falling under Title VI. When the agreement covers an issue for which qualified majority is required for the adoption of internal decisions or measures, the Council shall act by a qualified majority in accordance with Article 34(3).
>
> 5. No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall nevertheless apply provisionally.
>
> 6. Agreements concluded under the conditions set out by this Article shall be binding on the institutions of the Union.

The intergovernmental approach of the CFSP thus expresses itself in two important ways concerning the conclusion of international agreements by

the EU as such. First, negotiations are undertaken by the Presidency, whereas Community agreements are negotiated by the European Commission. Secondly, there is no role for the European Parliament on the conclusion of agreements under Article 24 TEU.

Mixed agreements
Whether or not an agreement is concluded also by the individual EU member states has significant implications on the manner in which such agreements are concluded. Mixed agreements are mostly negotiated according to the Community method, although there is no formally established practice for the negotiation of mixed agreements.[34]

However, since these agreements are also concluded by the member states themselves, mixed agreements require ratification by all the member states in accordance with their constitutional requirements (as opposed to pure Community agreements which are adopted by the member states through a Council decision). In practice, this normally means that mixed agreements need positive assent by all national parliaments in the EU, and in the case of the federal states such as Belgium and Germany, also of sub-national parliaments.

2.2.7 International agreements in the Treaty establishing a Constitution for Europe

With the Constitutional Treaty considerable changes in EU foreign policy have been made, most visibly with the creation of the 'double-hatted' EU Foreign Minister, (to a large extent) doing away with the pillar structure of the EU, and explicitly stating that the EU has a legal personality. The Treaty also makes substantial revisions concerning the conclusion of international agreements by the Union, and further strengthens neighbourhood policy as a distinct policy separate from the EU's overall foreign policy.

The Constitution includes a special chapter on international agreements, which, inter alia, reproduces existing treaty provisions on association agreements. The procedures for the conclusion of international agreements are harmonised in the Constitution, and agreements previously concluded on the basis of Article 24 TEU and Article 300 EC are to be concluded on the basis of Chapter VI, Part II, Articles III 323–326. However, the Constitution allows for special procedures for the conclusion of certain trade agreements (Article III-315). Although the procedures are harmonised, the CFSP remains a distinct policy with limited or no involve-

[34] Eeckhout (2004), p. 216.

ment of the Commission, the European Parliament and the European Court of Justice. The distinction between exclusive and shared competences is also maintained, and the practice of concluding mixed agreements would therefore continue once (or if) it enters into force.

There are in addition numerous references to international agreements in the provisions of various sectoral policies. Finally, and importantly in the context of this paper, Article I-57 of the Treaty establishing a Constitution for Europe provides for a special type of neighbourhood agreements:[35]

> 1. The Union shall develop special relationships with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterized by close and peaceful relations based on cooperation.
>
> 2. For the purpose of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.

2.2.8 Other EU foreign policy instruments

The original treaty provided a limited range of foreign policy instruments to the Community besides the ability to conclude international agreements, mainly related to the Common Commercial Policy.

Trade policy

The EU has essentially two types of legal instruments containing rules on external trade: either rules that are embedded in international agreements or those that stem from internal EU legislation. The latter are closely connected to the former, and are indeed often based on them, as in the case of the WTO, and aim to implement this and other agreements. These include the common customs tariff; the derogations from the CCP through the Generalised System of Preferences (GSP); import regulations, including anti-dumping and anti-subsidy measures; the so-called trade barriers instrument, which is used to challenge unfair trade practices; export regulations, including export controls; as well as economic sanctions,[36] including measures on capital movements and payments.

Economic and financial assistance

Economic and financial assistance has been a key element in the field of

[35] Part I, Title VIII on the EU and its Neighbours of the *Treaty establishing a Constitution for Europe*.

[36] These are introduced by using the CFSP instruments of common position or joint action, see below.

Table 1: EU development assistance by region 2001–2004

(in mill. euro)	2001	2002	2003	2004	2005
The Balkans	845	619	425	510	345
NIS	402	384	396	359	432
Mediterranean	488	707	700	1 125	1 122
Other regions	2 448	2 724	3 244	3 428	3 663
Thematic	771	815	851	790	932
Total	**4 109**	**4 630**	**5 191**	**5 701**	**6 149**
Neighbourhood % share	42	37	29	34	31

Source: European Commission (2006), p. 12.

development cooperation, which emerged in the Community long before the inclusion of a specific section in the treaties on development cooperation at Maastricht.

The EU currently provides more than half of the world's total development assistance, of which approximately one-fifth is channelled through the Community budget and managed by the Commission.[37] While the focus of EU development assistance has been the so-called ACP countries, considerable amounts – in recent years between 1.5 billion and 2 billion euros annually or roughly one-third of Community development assistance – have been allocated to the EU's neighbourhood (see Table 1).

The CFSP and JHA

However, over time, and most significantly with the establishment of the EU and the creation of the CFSP and EU cooperation on JLS, new instruments have been added to the competences of the Union and the Community. In most cases these instruments are complementary to international agreements, whereas others constitute both supplements and alternatives to international agreements.

The CFSP instruments were introduced at Maastricht, but were first enumerated (and extended to include also common strategies) by the Amsterdam revision of the Treaty on European Union. Accordingly, there are five CFSP instruments:[38]

- Principles and guidelines from the European Council.
- Common strategies

[37] European Commission (2006), pp. 2–3.
[38] Articles 12-16 TEU.

• Joint actions
• Common positions
• Information and consultation

Hundreds of common positions are adopted by the Council every year, and there is a virtually continuous flow of information and consultation between the member states and the EU institutions on CFSP.

A large number of joint actions have been undertaken since the Maastricht Treaty entered into force in November 1993. These include different types of activities covering a broad range of issues, including election monitoring and assistance, a range of measures in support for peace and stabilisation processes (convening of conferences, financial assistance, monitoring missions, etc), actions on arms control and proliferation, protection against the effects of extra-territorial legislation, counter-terrorism support, the establishment of centres and institutes, and the appointment of Special Representatives.

Since the establishment of the European Security and Defence Policy (ESDP) in 2003, the EU has undertaken more than a dozen civilian and military operations. Most of these operations have taken place in the EU's neighbourhood, including operations in Macedonia, Bosnia- Herzegovina, Georgia, the Gaza Strip, on the Moldovan-Ukrainian border, and most recently in Lebanon.

Four common strategies – on Russia, Ukraine, the Mediterranean and the Western Balkans, and thus all focused on the EU's neighbourhood – were adopted following the the Amsterdam Treaty entered into force in May 1999, but have played a limited role in the subsequent development of relations with these countries and regions.[39]

Growing EU competences in the field of justice, liberty and security also provide additional policy instruments beyond the conclusion of international agreements. Autonomous (unilateral) decisions on visa and asylum policy are a prominent example, including the determination of which country's citizens require visas to enter the EU, the possibility of imposing visa bans (often used against leaders of authoritarian regimes, including in the EU's neighbourhood), and the designation of 'safe third countries' for the purpose of return ('readmission') of asylum seekers.

[39] See Council of the EU (2000) for a first internal evaluation of the Common Strategies.

2.3 The capability-expectations gap in EU neighbourhood policy

The aims of EU neighbourhood policy are very ambitious. Few major powers today or in the past have explicitly sought the political, economic and social transformation which is at the heart of EU policy towards its immediate neighbours. These ambitions have been raised considerably since the end of the Cold War and the launch of the CFSP.

These goals are to be reached by using a foreign policy tool-kit that is much more limited than those of other major powers. The development of the CFSP, the ESDP and cooperation in the field of justice and home affairs have increased the number of foreign policy instruments available to the EU considerably over the last decade. However, the absence of common policies of relevance to its external relations remains a key obstacle to developing the EU as an international actor. One topical example is the lack of a common energy policy and how this constrains the EU in pursuing common measures to improve the security of energy supply.

Although the EU has developed new foreign policy instruments over the last 10–15 years, the scope for the conclusion of international agreements has also been broadened, and such agreements remain a central element in the future development of EU neighbourhood policy.

The EU is also constrained in the manner in which it is able to wield these instruments. The intergovernmental nature of much of EU external action and the jealousy with which the member states guard their prerogatives on foreign, security and defence policy leaves little discretionary power in the hands of EU officials charged with developing and managing the common foreign policy. The lack of adherence to common positions and policies by individual member states is a recurring problem in EU foreign policy. The intergovernmental approach is a slow process and limits the EU's ability to react quickly and coherently to international events.

The EU's room for manoeuvre is further limited by the numerous commitments made by the EU and its member states in regional and global institutions and international treaties. One example here is WTO membership, which effectively excludes preferential trading arrangements with non-WTO member states such as Russia and Ukraine.

Under such circumstances it may seem virtually inevitable that EU neighbourhood policy will in practice fall short of its stated ambitions. Indeed, the brief analysis of means and ends above provides a pertinent example of

the fact that the capability-expectations gap of EU foreign policy conceptualised by Christopher Hill in the early 1990s is a prominent feature also of EU neighbourhood policy more than a decade later.[40] While the EU's capabilities have been significantly enhanced in this period, the ambitions and expectations of EU neighbourhood policy have also risen, with the result that a capability-expectations gap remains.

[40] Hill (1993).

3 INTERNATIONAL AGREEMENTS BETWEEN THE EU AND NEIGHBOURING COUNTRIES

3.1 Chronological overview

The first comprehensive agreements concluded with neighbouring countries were the association agreements with a number of Mediterranean countries, first with Greece and Turkey in the early 1960s, then with Malta and Cyprus in the early 1970s.[41] Broader agreements, albeit focused on free trade in industrial products and concluded as 'trade and tariff' agreements in accordance with (current) Article 133 EC, were also concluded with most of the Western European states in the EFTA in the early 1970s followed by similar, though more limited cooperation agreements with a number of Southern Mediterranean and Middle Eastern countries.[42]

One of the many consequences of the loosening of Soviet rule under Gorbachev was the removal of the insistence that relations with the EC should be conducted through the CMEA[43] rather than its member states in Central and Eastern Europe. With this obstacle out of the way, trade and cooperation agreements were concluded between the Community and seven countries of the Soviet bloc between 1988 and 1991.[44]

The development of the Single Market was followed by the negotiation on a Common European Economic Space between the EC and the EFTA members, leading to the signing of the Agreement on the European Economic Area (EEA) in 1992, which superseded the free trade agreements of the early 1970s.

The end of the Cold War, the dissolution of the Soviet Union and the rise of EU membership aspirations in Central and Eastern Europe led to an upgrading of contractual relations with the countries of the former Soviet bloc from the early 1990s. Europe Agreements were negotiated with ten countries in Central and Eastern Europe between 1990 and 1995, followed

[41] Association agreements were also concluded in the early years to manage EEC relations with the former colonies of some Member States.

[42] A trade and technical agreement had been concluded with Lebanon as early as 1965. The EC concluded an Agreement with Israel in 1975. Cooperation Agreements were concluded with Morocco and Tunisia in 1976, with Egypt, Jordan and Syria in 1977, and Algeria in 1979.

[43] The Council of Mutual Economic Assistance was the institution set up to manage trade and economic cooperation within the Soviet bloc during the Cold War.

[44] Hungary, Poland, the Soviet Union, Czechoslovakia, Bulgaria, East Germany and Romania, signed between September 1988 and October 1990. See Smith (1999), p. 55.

by Partnership and Cooperation Agreements (PCA) with the 12 newly independent states of the former Soviet Union.[45]

Contractual relations were subsequently also upgraded with the Mediterranean partners through the conclusion of Euro-Mediterranean Agreements (EMA) from 1995 under the aegis of the so-called Barcelona process, later renamed the Euro-Mediterranean Partnership. The customs union envisaged in the 1963 association with Turkey became operational in 1996. A customs union agreement and a Cooperation Agreement have also been concluded with Andorra.

The conclusion of Stability and Association Agreements (SAA) has been a central element in the EU's efforts on the Western Balkans after the NATO campaign in Kosovo in 1999. Two agreements have as of mid-2006 entered into force, with negotiations on a further two in progress.[46] In most cases, the SAAs replace previous trade and cooperation agreements concluded in the late 1980s and early 1990s.

Finally, following the rejection of the EEA by the Swiss voters in 1992, a series of bilateral sector-specific agreements were concluded with Switzerland between 1994 and 2004. The first of these packages – consisting of seven agreements known as Bilateral I – entered into force in 2002.

Many of these agreements have been superseded by the accession of 19 (soon to be 21) neighbouring states in addition to the original six member states of the EEC. Table 2 lists the principal agreements with neighbouring countries currently in force or under discussion, as well as their aspirations and current status on the matter of EU membership. The comparative analysis below will focus on these agreements, but will also include, to a lesser extent, agreements that have been superseded by accession.

3.2 Analytical framework

The EU has an extensive network of international agreements with neighbouring states. The aim of this section is to survey and compare these agreements, which requires an analytical framework. There is no agreed-

[45] Europe Agreements were concluded with Estonia, Latvia and Lithuania. In January 1992 the Commission proposed that partnership and cooperation agreements be concluded with the former Soviet republics. Negotiations were launched with Russia in late 1992, followed by bilateral talks with the other 'Newly Independent States' (NIS) of the Commonwealth of Independent States (CIS). Ten of the 12 PCAs are currently in force (the exceptions are the PCAs with Belarus and Turkmenistan).

[46] This is to become three as negotiations commence separately with the newly independent state of Montenegro, as announced by the European Commission in September 2006.

Table 2: Principal agreements between the EU and its neighbours

Agreement	Country	Signed	In force	Current status
Association/ CU	Turkey	1963	1964/1996	Cand., neg. 2005–
European Economic Area	Iceland	1992	1994	Not seeking MS
	Norway	1992	1994	Not seeking MS
	Liechtenstein	1992	1995	Not seeking MS
Europe Agreements	Romania	1993	1995	Member 2007
	Bulgaria	1993	1995	Member 2007
Partnership and Cooperation Agreements	Russia	1994	1997	Not seeking MS
	Ukraine	1994	1998	Not ackn. candidate
	Moldova	1994	1998	Not ackn. candidate
	Georgia	1996	1999	Not ackn. candidate
	Armenia	1996	1999	Not ackn. candidate
	Azerbaijan	1996	1999	Not ackn. candidate
	Belarus	1995	–	Not seeking MS
Stability and Association Agreements	Macedonia	2001	2004	Candidate
	Croatia	2001	2005	Cand., neg. 2005–
	Albania	2006	–	Potential candidate
	Serbia& Monteneg.	Neg. 2005–	–	Potential candidate
	Bosnia Herzegov.	No neg. yet	–	Potential candidate
Euro-Mediterranean Association Agreements	Palestinian Auth.[47]	1997	1997	Not seeking MS
	Tunisia	1995	1998	Not seeking MS
	Morocco	1996	2000	Not seeking MS
	Israel	1995	2000	Not seeking MS
	Jordan	1997	2002	Not seeking MS
	Egypt	2001	2004	Not seeking MS
	Algeria	2002	–	Not seeking MS
	Lebanon	2002	–	Not seeking MS
	Syria[48]	–	–	Not seeking MS
CU/ Coop. agr.	Andorra	1990/ 2004	1991/ 2005	Not seeking MS
Bilateral agr.	Switzerland	1999/ 2004	2002/2005–	Not seeking MS

upon framework in the academic literature on the EU's international agreements that fully serves the purposes of this paper. Much of the work on international agreements is undertaken by legal scholars, who naturally focus on the legal aspects of the agreements and, it has been argued, have shown less interest in EU foreign policy.[49] On the other hand, political scientists, tend to treat agreements as only one element in the broader analysis of EU foreign policy and its relations with neighbouring countries,

[47] Interim Agreement.
[48] Negotiations with Syria have been concluded, but the agreement has as of autumn 2006 been initialed, but not signed.
[49] Eeckhout (2004), p. 396.

with less attention to the specific aspects of international agreements and how these are, and can be, used as instruments of EU foreign policy.

In the following section, the agreements with the EU's neighbours will be analysed and compared across a number of key issues and dimensions, based mainly on the framework used in David Phinnemore's analysis of association agreements, complemented with elements from Steve Peers' analysis of the EC-Turkey customs union, and the taxonomy of EC international agreements used by Koen Lenaerts and Eddy De Smijter.[50]

Phinnemore focuses on the four main issues where association agreements differ: 1) aims and objectives, including trade regime, 2) long-term purpose, 3) the scope and level of cooperation and commitments, and 4) institutional framework. In order to analyse the latter two more closely, the five central questions raised in Steve Peers' comparison on the system for 'external' application of EU law – 1) which law is to be followed, 2) which authority has jurisdiction, 3) how policies and legislation are to be enforced, 4) how the application of the law and policy in question are to remain consistent, and 5) how to settle disputes over consistency, jurisdiction, interpretation, enforcement – will be addressed within the analytical framework. Furthermore, the focus of Phinnemore's analysis is association agreements. As EU agreements with its neighbours are not limited to association as set out in Article 310 EC, the framework will also accommodate a comparison of the legal bases of the various agreements between the EU and its neighbours, as done by Lenaerts and De Smijter. The latter also operate with three types of agreements based on their substantive scope: 1) trade liberalisation, 2) trade liberalisation with accompanying chapters on cooperation, and 3) trade and cooperation agreements with a title on political dialogue. They further compare agreements as to the extent to which the agreements extend the *acquis communautaire* to the non-EU member state.

The various aspects noted here will be analysed under seven main headings:
- Purpose and long-term goal;
- Scope of commitments;
- Level of commitments;
- Legal basis;
- Institutional framework;
- Political dialogue;
- Life-cycle and development.

[50] Phinnemore (1999), in particular pp. 41–42; Peers (1996), and Lenaerts and De Smijter (1996).

3.3 Purpose and long-term goals

The aims of the association or partnership entered into through the conclusion of an agreement are typically set out in general terms in the preamble and in the first article(s) of the agreements.

3.3.1 The membership issue

A first key distinction among EU agreements with neighbouring countries is whether or not membership of the EU is envisaged. The objective of membership is explicitly mentioned in the early association agreements with Greece and Turkey, the Europe Agreements, and the Stability and Association Agreements, although the language used differs.

The strongest commitment towards future accession is found in the Europe Agreements with Central and East European countries, most of which became members in 2004. According to the preamble of the Europe Agreement with Poland, the two sides recognise "the fact that the final objective of Poland is to become a member of the Community and that this association, in the view of the Parties, will help to achieve this objective." Article 1 (2) states that the aim of the association is, inter alia, "to provide an appropriate framework for Poland's gradual integration into the Community." Virtually identical formulations are found in the other Europe Agreements.

The references to future accession are more limited in the Stability and Association Agreements. It is for example only mentioned in the preamble (i.e. not also in the main body of text as in the Europe Agreements) of the SAA with Macedonia, which simply "recalls" Macedonia's "status as a potential candidate for EU membership".

The formulations used in the association agreement with Turkey are even more circumspect. According to Article 28 of the 1963 agreement,

> [a]s soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting Parties shall examine the possibility of the accession of Turkey to the Community.

By contrast, membership is not mentioned in the EEA agreement, the PCAs or the EMAs. The agreements are thus ends in themselves rather than regarded as way-stations towards the ultimate goal of accession.

3.3.2 Other goals

Beyond the question of membership, a number of broader goals are shared among the five groups of agreements, although there are certain differences

and exceptions among them. All share for instance the aim of promoting trade between the EU and the partner or associate, and develop "harmonious economic relations". The establishment of a free trade area is envisaged in all major agreements with neighbouring countries, albeit with important differences as to the scope (i.e. whether or not it includes trade in services, capital and persons) and timing (immediately or gradually and/ or according to a specified timetable) of such free trade arrangements.

Naturally enough given the state of economic and political developments in the EFTA countries and their already close political relations with the Community and its member states, the EEA agreement differs from the four other types of agreements in certain respects. First, the other four all aim explicitly to foster economic development in the associate or partner country, with expressed promises of support and assistance from the EU to further political and economic reforms. This was also the case in the early association agreements with Turkey and Greece, although the more limited agreements with Cyprus and Malta did not envisage support for economic development.

However, these earlier agreements were less ambitious on the political development in the associated country than in more recent agreements with former communist countries going through political and economic transition. Here, the agreements are seen not just as tools for economic development, but also as instruments to "consolidate democracy", and to provide support for the political transition process, as in the PCA with Russia. One of the main features in the second-generation association agreements with Mediterranean partners, the EMAs, is that the political dimension is more prominent. Indeed, all agreements concluded by the EU after the early 1990s have included a human rights clause, allowing for the suspension of the agreement in case of breaches of such rights (see section 3.9.3. below).

Secondly, all of the agreements except the EEA envisage the association or partnership as providing a framework for political dialogue aimed at bringing the two sides closer politically. In the case of the EEA, however, a declaration attached to the agreement calls for a regular political dialogue (see section 3.8. below)

Only the more recent agreements – the SAAs and the EMAs – include the fostering of regional cooperation among the principal aims of the agreements, while this is more briefly mentioned in earlier agreements, for instance in the preamble of the PCA with Ukraine. The agreements also differ in terms of their stated aims on other issues. The EMAs, for instance, also aim towards harmonious social (and not just economic) rela-

tions. The PCAs with Russia and Ukraine include the goal of strengthening "political and economic freedoms," and although membership is not mentioned, the agreements also aim towards a "gradual integration/ rapprochement between Russia/ Ukraine and a wider area of cooperation in Europe."

3.4 The scope of commitments

Scope refers here to the number and breadth of policy areas and issues that are covered by an agreement. A simple comparison of the main headings and sub-headings of the various agreements indicate significant similarities among all of the five main types of agreements discussed here. All are of comparable length and have most of their headings and even sub-headings in common. Thus, most of the agreements include titles on political dialogue and trade in goods, one or more titles on business, investment, payments, capital and legislative and financial cooperation, as well as a long title on 'economic cooperation' or 'cooperation policies' setting out more than twenty areas of cooperation (see Annexes 1–6 below).

Despite these basic similarities there are also certain noteworthy differences in the scope of the various sets of agreements currently in force. While trade and economic cooperation remain central in EU international agreements, other issues have become increasingly important since the creation of the second and third pillars at Maastricht in 1991. Increasingly, agreements with third countries include provisions beyond trade and economic cooperation, as the competences of the Community have been expanded further to include, inter alia, the field of justice and home affairs. As a consequence, more recent agreements such as the SAAs are broader in scope than in older agreements such as the Europe Agreements and the EEA.[51] The agreements concluded in the early and mid-1990s contain only few provisions on JHA-related matters, notably on customs fraud and money laundering, which are closely related to EC trade policy. Although most of the recently concluded EU-Swiss agreements focus on trade and economic cooperation, the package also includes non-economic cooperation such as Swiss participation in various EC and EU programmes and agencies (research, media, etc) as well as Swiss inclusion in the Schengen and Dublin conventions on borders, immigration and asylum, none of which are included in the EEA which it replaced (although similar agreements have been concluded also with the EEA states, but separately from the EEA agreement as such).

[51] Whyte (2001).

While the Europe Agreements are more limited than earlier Mediterranean associations in terms of trade regime, which is mainly due to the state of economic development of the countries concerned at the time of the signing, the Europe Agreements provide for more extensive cooperation beyond trade than earlier association agreements, reflecting the development of EC competences between the 1970s and the 1990s.[52] Greece was in this respect an exception, as an early example of a maximalist association agreement, including the free movement of workers, transport policy, competition, agriculture and coordination of economic policy, to such an extent that some commentators have referred to the agreement as a mini Treaty of Rome.[53] The association agreement with Turkey was initially less ambitious, but the addition of protocols to the agreement as well the conclusion of the customs union agreement have upgraded the relationship considerably, to include issues such as economic policy coordination, the free movement of workers, agriculture, competition and state aid policies.

A tentative conclusion to this section is thus that the scope is primarily determined by the scope of EU competences at the time of negotiations rather than the result of a strategic or instrumental approach to international agreements. Indeed, this trend seems stronger today than it was in the early years of the Community, as the differences between the Greek and the Maltese associations indicate. There are exceptions to this 'rule' of ever-broader agreements as EU competences are increased. The EEA is for instance broader in scope not just compared with the Europe Agreements, which were negotiated in parallel, but also compared to later agreements such as the PCAs and the EMAs. In addition to internal market participation through the four freedoms, the EEA agreement sets out cooperation in flanking or horizontal issues, as well as in numerous policy areas beyond the single market.

3.5 The level of commitments

While the breadth of policy areas covered are thus roughly similar across the main agreements between the EU and neighbouring countries, there are considerable differences as to the extent or depth of the commitments entered into through these agreements. While some go very far in terms of providing for economic, political and institutional integration between the

[52] Phinnemore (1999), p. 49. The agreements with Malta and Cyprus were for instance quite limited in scope, with little economic cooperation or policy harmonization, although changes to the agreements broadened their scope over time.
[53] Phinnemore (1999), p. 50.

neighbouring country and the EU, others are looser arrangements with vaguely-worded commitments to cooperate.

This is evident on trade and economic cooperation, which, despite the growing EU external competences on non-economic issues, remains "the hard core of the EU's external action."[54] Free trade in industrial products is a key element of most EU agreements with its neighbours, with the 'most-favoured nation'-clause forming the bedrock of trade arrangements between the EU and its neighbours. All of the successive stages of economic integration known from academic literature – free trade area, customs union, single market, and monetary and economic union – are currently in operation in EU neighbourhood policy.

A first and fundamental distinction can be made between neighbours that have preferential trading arrangements and those that do not. This is determined first of all by the fact that not all EU neighbours are members of the WTO, and many that are have only recently acceded. However, most EU neighbours are members of the WTO and have negotiated preferential trade arrangements with the EU.[55] It should be noted though that this is no ironclad rule, as not all WTO members in the EU's neighbourhood have such preferential agreements with the Union. None of the three CIS countries in the WTO (Moldova, Georgia and Armenia) have for example such arrangements with the EU.

The core of these preferential trading arrangements is free trade in industrial products. however, there are important differences among these agreements as to the extent of the exceptions to free trade in goods, the extent to which trade is liberalised on the basis of reciprocity, whether trade is to be liberalised beyond trade in goods, and the extent to which approximation of legislation is envisaged.

There are often a number of exceptions to the liberalisation of trade in goods. Free trade agreements on industrial products often exclude trade in so-called 'sensitive sectors,' most often steel and other metal products, and textiles. In most cases, special arrangements are negotiated in these areas, either through protocols to the main agreements or as separate agreements. The EMAs, for instance, provide preferential tariff rates for textile products. In most cases the provisions of the trade arrangements tend to go

[54] Eeckhout (2004), pp. 55–56.

[55] The non-WTO members in the EU's neighbourhood are as of late 2006 Azerbaijan, Belarus, Russia and Ukraine in the CIS; Algeria, Lebanon, Libya, the Palestinian Authority and Syria among the Mediterranean partners; and Bosnia and Herzegovina, Serbia, and Montenegro in the Western Balkans.

beyond traditional free trade arrangements on industrial goods, broadening free trade to agriculture, services, public procurement, etc. There are significant differences concerning trade in services. The Europe Agreements go further in liberalising trade in services than for instance the EMAs.[56] Trade in agricultural and fishery products are typically subject to special, and most often more restrictive, arrangements.

While trade in goods and, to a lesser extent, services are becoming increasingly liberalised between the EU and its neighbours, the agreements with neighbours are much more restrictive as concerns the movement of labour. The agreements rarely provide for the free movement of workers, although most agreements include provisions on the conditions of workers in the EU and the partner country, calling for similar treatment of foreign legal workers as of nationals of the host country.

At the opposite end of the trade regime/ economic integration spectrum, the EEA has been described as "the most ambitious and the most complete agreement ever signed by the Community with a group of third countries,"[57] providing for the inclusion of three non-member states in the internal market of the EU. The EEA provides the most extensive form of economic integration with non-EU countries through the free movement of goods, services, workers and capital. The two sets of bilateral sector-specific agreements between Switzerland and the EU combined, initially intended as an alternative to the EEA agreement following its rejection by Swiss voters in a referendum in 1992, are generally more limited than the EEA. In many areas, however, these sector-specific agreements provide for comparable integration into the internal market as the EEA. Important areas of the internal market are, however, not covered, most notably on services, where negotiations were initiated but later abandoned and postponed indefinitely.

Neither the EEA nor the Swiss agreements call for the creation of a customs union. The establishment of a customs union, in effect allowing neighbouring countries to join the EC's own customs union, were central in the early associations concluded with Mediterranean partners in the 1960s and 1970s. Many of the early associates such as Greece, Malta and Cyprus have become full-fledged members of the EU, and none of the five principal agreements discussed here entail a customs union. As mentioned above, Turkey and Andorra, however, entered into customs union agreements with the EU in the 1990s.

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[56] Lenaerts and De Smijter (1996), p. 32.
[57] Quoted in Phinnemore (1999), p.52.

None of the extensive and ambitious agreements discussed in the last two paragraphs go as far towards integration with the EU's Economic and Monetary Union as Kosovo and now sovereign Montenegro, which have introduced the euro as their national currency, effectively joining the Economic and Monetary Union, with their monetary policy in practice determined by the ECB in Frankfurt.

The Europe Agreements, the EMAs and the SAAs are less ambitious in terms of trade and economic integration than both the EFTA agreements and those of the early associates. A gradual liberalisation of trade towards the establishment of a free trade area is envisaged in these three types of agreements, in most cases within 10 – 12 years. Among the EMAs, it is worth noting that the agreement with Syria – the last EMA to be negotiated – goes further than many of the other EMAs, including issues such as agricultural trade liberalisation, technical barriers to trade, services, procurement, and intellectual property rights which reflects neither the political relationship nor the state of economic reform and development in Syria.[58]

In contrast to many international agreements, typically based on strict reciprocity, the EU's associations and partnerships with its neighbours are in many respects asymmetric. Trade liberalisation with neighbouring countries provides perhaps the best example. The Europe Agreements, the PCAs, the SAAs and the EMAs all provide for a faster removal of EU import barriers, while allowing the partner countries longer periods for the removal of tariffs and quota restrictions on their imports from the EU. This reflects mainly the perceived inability of the partner countries to withstand the competitive pressures of full liberalisation from day one.

The agreements also differ considerably on the issue of legislative approximation and regulatory convergence. Non-tariff barriers (NTB) have been part and parcel of international trade agreements for several decades, and play a central role in trade liberalisation and integration efforts between the EU and its neighbours. Such NTBs are covered in all of the main agreements between the EU and its neighbours, although, the various agreements differ considerably as to the extent to which legislative approximation and regulatory convergence is envisaged.

Again, the EEA is the most ambitious in terms of the commitment made by non-member states to align its legislation with that of the EU. The EEA is predicated on the adoption of the internal market *acquis* by the associat-

[58] According to the description of relations with Syria on the website of the European Commission: http://ec.europa.eu/comm/external_relations/syria/intro/index.htm in September 2006.

ed states. While only certain of the EU-Swiss agreements make explicit reference to the *acquis* (notably on civil aviation and Schengen association), most of the agreements are based on the goal of 'equivalence of law' rather than the *acquis* in order not to offend Swiss political sensibilities. Adoption of the *acquis* is a key aspect in the SAAs and the Europe Agreements. The latter include a special chapter containing three articles on approximation, while an entire title of six articles dedicated to approximation to EU legislation can for instance be found in the SAA with Macedonia. In agreements with non-candidates, while the approximation of legislation is included, the provisions are much more limited. Only one article in the PCAs and the EMAs are concerned with legislative approximation.[59] While the PCAs specify more than a dozen sectors in which approximation is envisaged, the EMA with Morocco simply calls for approximation in the areas covered by the agreement.

3.6 Legal basis

The scope and level of commitments are reflected in the legal basis of the agreements concluded by the EU, and in the upgrading of bilateral relations from the first generation agreements of the 1960s, 1970s and 1980s, and the second-generation agreements of the post-Cold War period.

Most of the first-generation agreements concluded with neighbouring countries were based on the 'trade and tariff' provision of the Treaty (i.e. Article 133 EC), including the agreements with the EFTA states in the 1970s and the countries of Central, Eastern and Southeast Europe in the late 1980s and early 1990s. The principal exceptions are the various, and quite significantly different, association agreements concluded with most Southern and Eastern Mediterranean countries in the 1960s and 1970s.

By contrast, most of the principal or comprehensive agreements concluded since the early 1990s have been association agreements based on Article 310 EC. This is the case of the Agreement on the EEA, the Europe Agreements, the EMAs and the SAAs. All in all, the Community has negotiated association agreements with more than 30 neighbouring countries since the fall of the Berlin Wall, fourteen of which are in force as of mid-2006, with another eight in the process of being negotiated or awaiting ratification.[60]

[59] Article 55 in PCA with Russia, Article 51 in the PCA with Ukraine, and Article 52 in the EMA with Morocco.

[60] The EEA was negotiated with seven countries and is in force in relation with three states. Europe Agreements were negotiated with 10 countries, two of which are still in force. EMAs have been negotiated with nine countries, six of which are currently in force. SAAs are to be negotiated with six countries, two of which have entered into force.

While many of the agreements in the first set of bilateral sector-specific agreements between Switzerland and the EU were initially intended to be concluded based on sector-specific provisions in the treaties, Bilateral I was eventually concluded on the basis of Article 310 EC.[61]

Among the agreements under consideration here, the agreements with the states of the former Soviet Union (except the three Baltic states) constitute the principal exception, as the PCAs are all trade and tariff agreements based on Article 133 EC (as were the trade and cooperation agreement with the Soviet Union which they replaced).[62]

3.7 Institutional framework

Virtually all agreements between the EU and third countries provide for the establishment of institutions to manage the agreement and the relationship more broadly. In most cases, a basic set of three principal bodies are established:

- Ministerial level Council
- Senior officials Committee
- Parliamentary Committee.

The most noteworthy exception to this basic institutional framework in EU neighbourhood policy can be found in EU-Swiss relations, which are governed by sector-specific committees comprising mid-level officials and experts, without any provisions for ministerial-level meetings or parliamentary involvement.

But although virtually all of the EU's principal agreements with its neighbours have this basic framework in common, there are considerable differences as to the relative importance of the various councils and committees. One indicator of this is the frequency of the meetings of the various bodies set up to manage an agreement. In most cases, the ministerial council meets annually, or in the case of the EEA bi-annually. This provides the political impetus to the agreement and guidelines to the bilateral committee, as well as evaluating the overall functioning of the agreement, and constitutes the ultimate forum for the settlement of disputes between the parties. The senior officials-level committees typically meet more often

[61] Kaddous (2001).

[62] Another exception is the Cooperation Agreement with Andorra, which is based on various sector-specific provisions in the EC Treaty, see *Council Decision of 10 May 2005 on the conclusion of a Cooperation Agreement between the European Community and the Principality of Andorra*, (2005/398/EC), Official Journal L 135 (28/05/2005), pp.12–13.

and are in most cases regarded as the driving force of the association.[63] Thus, the EEA Committee meets on a monthly basis, and the EMA committees meet six times a year.[64] In the case of the Customs Union agreement with Turkey, however, the senior officials committee plays a more limited role, with a concomitant greater role for the ministerial council.[65] In the case of the EU-Russia PCA, and to a lesser extent the EU-Ukraine PCA, the principal driving force of the relationship are the summits (see further below),[66] with a more limited role for the annual ministerial councils and the committee of senior officials, which only meets once a year. In the case of Russia, this has been exacerbated in recent years as the senior officials committee and its various sub-committees have not been functioning as stipulated in the PCA.

3.7.1 Participation and 'decision-shaping' in the main EU institutions

Apart from the main institutions managing the agreements with neighbouring countries, certain agreements provide for the participation of officials from non-member states in the 'decision-shaping' process in the EU. Safeguarding the autonomy of the decision-making process is one of the basic principles underpinning EU association. In accordance with this, no non-EU member state representatives are allowed to participate in the decision-making process in any of the main EU institutions. There are, however, some exceptions to this principle, mainly in the Commission and the Council.

Officials and experts from the EEA states participate in the preparatory stages of the legislative process – often referred to as 'decision-shaping' – in more than 200 Commission committees on internal market issues. Their Swiss counterparts are also allowed extensive participation on topics covered by their bilateral sector-specific agreements with the EU. Through their Schengen association agreements, the four EFTA states are accorded similar participation on the development of the Schengen *acquis*.

The Schengen and Dublin association arrangements come closest to allowing for participation by non-member states in EU decision-making in the Council. Decisions on Schengen and Dublin-related matters are made in the so-called Mixed Committee, which consists of the JHA Council and the justice ministers of the Schengen associates. The chairmanship of the

[63] Phinnemore (1999), p.57.
[64] Emerson and Tocci (2003), p. 114.
[65] Peers (1996).
[66] Emerson et al (2001).

meetings rotates among all Schengen countries, and is for instance now in the second half of 2006 occupied by the non-EU member state Norway. While they thus participate in the discussions, they are, however, not allowed to vote. Furthermore, they do not partake in the decision as to whether or not new JHA legislation should be regarded as Schengen-relevant and thus be incorporated into the Schengen association agreements.

The European Court of Justice (ECJ) plays a less prominent role in the EU's relations with non-member states. In certain cases, case law is extended also to non-member states, for instance in the EEA states with respect to the internal market. The Court has also made important rulings on agreements with neighbouring states concerning the rights of citizens of these states residing in the EU, with notable cases on the agreements with Turkey and Russia. In connection with the EU-Switzerland air transport agreement, the ECJ is currently considering a case on Zurich Airport, brought to the Court by the Swiss Confederation against the European Commission. According to the first ruling on this unique case pitting a non-member state against the Commission, Switzerland is not accorded a similar status to that of the member states, but rather treated as if it was a sub-state actor (such as the German länder or the French departments).

3.7.2 Auxiliary institutions

Numerous Community agencies have been established to undertake specific technical, scientific or managerial tasks on behalf of the European Community. EU agencies have also been established under the second (CFSP) and third (police and judicial cooperation in criminal matters) pillars.[67] generally participation of non-member states remains limited in EU agencies and is in practice limited to the EFTA countries and advanced accession candidates (as of late 2006 Bulgaria, Romania and Turkey). Norway is the non-member state with the most extensive association with EU and EC agencies, and the country participates in less than half of the EC and EU agencies. In most cases, participation in the work of an agency by non-member states is as an observer or associate without the right to vote. Only one agency – the European Environmental Agency – allows full membership for non-EU member states.

Non-member state participation is more extensive in the dozens of EC programmes established across most policy areas. Cooperation with neighbouring countries is also here closest with the EFTA states of the EEA.

[67] 19 Community agencies are in operation as of autumn 2006, with the creation of an additional four agencies under preparation. There are in addition three CFSP agencies and three JHA agencies.

The latter agreement provides for the participation of these states and their citizens in dozens such programmes in areas such as the environment, research, culture, public health, SMEs, and consumer protection, among others. Other neighbouring countries participate in various ways in several of these programmes, although much less extensively than the EFTA EEA states.

It could also be mentioned that several associations from non-member states are members of the European trade unions and industry confederations, which play a formal, albeit limited, role in EU policy-making, in addition to being some of the most powerful lobbying organizations in the EU.

3.7.3 Analogous autonomous institutions

The EEA Agreement is unique in that separate multilateral institutions – managed and funded by non-EU member states – are established to manage relations between them and the EU. The EFTA Surveillance Authority monitors compliance by the EFTA states of EEA legislation, and thus performs a role similar to that of the Commission vis-à-vis the member states. The EFTA Court plays a role comparable to that of the ECJ for the EFTA members of the EEA. The EFTA Secretariat provides administrative and technical support for the EFTA states. A consultative committee of trade unions and business associations has also been created in the context of the EEA Agreement.

3.8 Political dialogue

In contrast to the scope and the level of commitments of agreements, the PCAs with Russia and Ukraine are arguably most ambitious as concerns the political dialogue. These two are the only neighbours with which the bilateral agreements call for summit-level meetings, in the case of Russia biannually and with Ukraine once a year. Here, the EU is represented by the 'troika' at the highest level, i.e. the Head of Government of the EU Presidency, the Commission President and the CFSP High Representative, rather than the Foreign Minister of the EU Presidency accompanied by the External Relations Commissioner. President Putin is to meet with all of the EU Heads of State and Government for the third time in October 2006 at the informal European Council.[68] The Russian exception was further clari-

[68] The previous occasions were the Stockholm European Council in March 2001 and during the EU-Russia summit in May 2004 held in conjunction of the St. Petersburg anniversary celebrations.

fied with the creation of the Permanent Partnership Council (PPC) in 2003/2004, which replaced the Co-operation Council established by the PCA. The PPC can in contrast to its predecessor and the other ministerial-level councils meet in various formats, along the lines of the EU's own Council of Ministers. The EU-Swiss agreements provide another exception at the other end of the spectrum, with no political dialogue envisaged and indeed no institutionalised high-level meetings provided for in any of the agreements.

But the formal institutions of the agreements between the EU and its neighbours are not the only arena for dialogue between the EU and its associates. The close political links between the EU Member States and most neighbours call for considerable political dialogue both informally and on an ad hoc basis, bilaterally with EU member states and through other international organisations. Indeed, the political dialogue provided for in the agreements is arguably a relatively minor element in the overall dialogue between the EU and its neighbours. While Norway has biannual ministerial meetings with the EU in the EEA Council twice a year, there are typically more than twenty ministerial meetings between Norwegian ministers and their EU counterparts in the course of a year, in addition to numerous meetings bilaterally between Norway and the EU member states and in other multilateral fora.[69] This pattern repeats itself in EU relations with other neighbouring countries.

It is even more blurred in the case of candidates for EU membership. Pre-accession entails virtually continuous negotiations sustained over several years, with intensive interaction and dialogue at all levels. At the political level, this is often institutionalised through political declarations. Supplementary mechanisms were progressively introduced as part of a reinforced accession strategy preparing for the 2004 enlargement. So-called 'structured relations' between the EU and the so-called Visegrad candidate countries were established, which led to more than 100 multilateral ministerial meetings between 1993 and 1997. This was later expanded to include other candidate states, given a more institutionalised structure through the creation of the European Conference in 1997, and expanded through participation also at European Councils. Finally, although all of these agreements envisage extensive political dialogue and consultation, the meetings of the bodies of the agreements typically involve little actual dialogue, and are primarily a means by which the associated states are informed of EU policy, rather than a genuine forum for policy co-ordination.[70]

[69] See „EU ikke viktig" in *Aftenposten*, 15 mai 2006.
[70] Phinnemore (1999), and Smith (1999).

3.9 Life cycle and development

The procedural aspects of international agreements between the EU and its neighbours can be divided into several stages or phases. First, there is the process of concluding an agreement, including the decision to launch negotiations, the actual negotiations themselves, the formal conclusion of the agreement by the EU, and the approval or ratification of the agreement within the EU. Secondly, there is the process of implementing an agreement, which in many cases is divided into distinct stages. Thirdly, and related to the second process, there is the matter of adapting an agreement, either by amending or updating it, or further developing the agreement by introducing new substantive elements of cooperation. Finally, there is the issue of the duration of an agreement, and the possibility to suspend or terminate it.

3.9.1 Negotiations and ratification

All of the agreements under discussion here are Community agreements, which are negotiated by the Commission on behalf of the Community on a mandate given by the Council. When negotiations have been finalized, the agreements are concluded by a Council decision. This is then followed by ratification, which in most of the cases reviewed here require endorsement from both the European Parliament and the national parliaments of the member states, after which the agreement can enter into force.

The whole process from the launch of negotiations to entry into force took approximately three and a half years with the EEA and the Europe Agreements in the early and mid-1990s, though with some differences among the latter agreements. For the agreement with Romania this process took only two years and nine months, whereas it took three years and eleven months from the beginning of negotiations to entry into force for the Europe Agreement with Slovenia. This is similar in length to the negotiation and ratification processes of the early association agreements with four Mediterranean countries.[71] More recent agreements such as the EMAs and the SAAs that have been concluded so far have taken somewhat longer to conclude, with ratification alone in most EMAs taking more than four years to complete. The PCA between Russia and the EU took almost two years to negotiate and three and a half years to be ratified. The longest period from the launch of negotiations to entry into force concerned the bilateral sector-specific agreements between the EU and Switzerland. Although negotiations were initiated as early as 1994, some of the agree-

[71] See table in Phinnemore (1999), p.73.

ments have still not entered into force, and all of the agreements originally envisaged have not been negotiated.[72]

There are a number of factors behind these time differences in the length of the negotiation and ratification processes. Such variations are sometimes simply the result of practical issues of timetables and agendas, often also reflecting the fact that there are substantial differences between agreements (more complex and extensive agreements often take longer to negotiate than shorter, more limited agreements). The entry into force of the EEA agreement was for instance postponed with one year due to the Swiss 'no' to participation, which required various, but mainly technical adaptations to the agreement. The negotiation and ratification process of the Europe Agreements with the Czech Republic and Slovakia lasted for four years and two months, much longer than the other Europe Agreements, as a result of the 'velvet divorce' in Czechoslovakia in 1993. The lengthy negotiation and ratification process entails that the goal of a Euro-Mediterranean free trade area by 2010, one of the principle goals of the so-called Barcelona process, will not be reached.[73]

The tendency towards longer ratification processes can in part be attributed also to the growing membership of the Union, as virtually all of the agreements under consideration are mixed agreements, and thus require ratification by a growing number of national parliaments.

But more often than not, delays occur as a result of political considerations, as a key mechanism of the EU's policy of conditionality. A recent example was the suspension of negotiations on the SAA with Serbia and Montenegro in May 2006, due to what was regarded in the EU as a lack of cooperation with the International Tribunal in The Hague by the government in Beograd in the search for wanted war criminals. Negotiations on the EMAs were suspended on several occasions due to political considerations in the EU. Politically motivated delays occur frequently also during the ratification processes. The PCA with Russia is a case in point. Ratification of this agreement was held up in certain EU national parliaments and in the European Parliament because of the first Chechen conflict, and the PCA did not enter into force until December 1997, three and a half years after its signature in June 1994.

[72] Vahl and Grolimund (2006).
[73] Emerson and Tocci (2003), p. 121.

3.9.2 Implementation: Stages and phases

There are few agreements in which all of the provisions are fully implemented at the time when the agreement enters into force. The EEA agreement is the main exception among the comprehensive agreements discussed here, although it provides for the dynamic development of the relationship by incorporating new *acquis* into the agreement. Most other agreements with neighbouring countries contain a number transition periods and partial exemptions and many envisage a relationship evolving in stages. There are often a set of conditions attached to the later stages, either agreed bilaterally or set (explicitly or implicitly) by one or the other party.

The associations with Central and Eastern Europe, the Southern Mediterranean, and the Western Balkans, are all to be fully realized over a transition period. Both the Europe Agreements and the SAAs envisage 10-year transition periods in two stages of five years, at the end of which a free trade area will be established. The EMAs are similar but provide for a somewhat longer period – 12 years – from entry into force to the establishment of a free trade area.

An even longer period was envisaged in the Turkey association agreement, which was to be developed in three stages: preparatory, transitional and final stage. The preparatory stage was to last for five years, but the agreement included provisions for extension unless criteria agreed in a separate protocol were fulfilled. The second transitional stage, was to last not more than 12 years, and would end with the third and final phase: the establishment of a customs union. As the agreement entered into force in 1964, the customs union could have been established in 1981, but did not, as mentioned above, enter into force until 1996.

The agreements often include a timetable for a review of the implementation process and to decide whether to initiate later stages of the agreements. The SAAs for instance call for such a review within four years after an agreement has entered into force to discuss moving on to the second stage.

The commitment to a free trade area is more vague in the case of the countries of the former Soviet Union. In most of the PCAs, free trade is not mentioned at all as a long-term goal. The agreements with Russia and Ukraine contain a rendez-vous clause to consider the feasibility of starting negotiations on an FTA in 1998, four years after the signing of the agreement. In both cases, however, this has for practical purposes been postponed until the eventual accession of these two countries to the WTO, which would be a pre-condition for the establishment of a free trade area with the EU.

3.9.3 Development: Updating and upgrading

The EU is evolving continuously. As many of the agreements envisage an approximation of rules and standards, the development of the *acquis communautaire* has important implications for the agreements. Most agreements between the EU and third states are periodically revised, but there are great differences as regards the frequency, scope and procedures for amendments to existing agreements.

The EEA is yet again the most ambitious agreement with a virtually continuous update of the agreement through adaptations to the annexes, incorporating hundreds of new legal acts into the agreement every year. The sector-specific agreements with Switzerland are also frequently updated, although the text of the agreements typically call for 'equivalence of law' rather than an explicit commitment by Switzerland to introduce new *acquis* into its legislation.

Other agreements are less frequently updated, including both substantial changes, for instance through the adoption of additional protocols to the agreements, and procedural adaptations such as amending an agreement to account for the accession of a new country to the EU (and thus also becoming party to the EU's international agreements). Changes in broader international regimes, for instance rules of international trade, also often require adaptations to be made to EU agreements with neighbouring countries.

3.9.4 Duration, suspension and termination

The Europe Agreements, the SAAs, and the EMAs are concluded for an unlimited period, whereas the PCAs were concluded for an initial ten-year period followed by an automatic annual renewal. The text of the EEA Agreement does not refer to the duration of the agreement, but it is implicitly clear that it is of indefinite duration. As the initial ten-year periods of the PCAs with Russia and Ukraine come to an end shortly (in late 2007 and early 2008 respectively), discussions on the post-PCA contractual relations have been launched (see sections 4.3.–4.5. below).

There were no provisions for suspension in the original EEC Treaty. Procedures for the suspension of international agreements were introduced into Article 300 EC in the Treaty of Amsterdam. These generally follow the procedures for the conclusion of such agreements, though without any significant involvement of the European Parliament, which is only 'immediately and fully informed" about the Council's decision to suspend.[74]

[74] Eeckhout (2004), p. 186.

The suspension procedures were inserted due to difficulties in the Community's policy on suspension, notably in the context of the Community's relations with the ACP countries under the Lomé Conventions since the 1970s. With the end of the Cold War and the break-up of Yugoslavia, the matter rose to the fore in 1991, as the Community suspended its agreement with Yugoslavia due to the latter's unwillingness to cooperate with the Community to reach a ceasefire. This decision was disputed under international law and was challenged before the ECJ. These difficulties led the Council to adopt a resolution on human rights, democracy and development in 1991, stating that the Community and its member states would explicitly introduce human rights considerations into its relations with developing countries.[75] From then on, the Community has consistently inserted human rights clauses in external agreements.

In the context of EU neighbourhood policy, this was further elaborated in a Council declaration of May 1992 on relations with states in the Conference on Security and Cooperation in Europe (CSCE). The Council underlined that respect for human rights and democratic principles formed an essential and integral part of agreements with these countries, in what is referred to as the 'essential element clause'. This was further enhanced by specific non-compliance clauses, which were first included in the trade and cooperation agreements with the Baltic States and Albania (and known as the 'Baltic clause'). This stated that the parties reserved the right to suspend the agreement in whole or in part with immediate effect if a serious breach of its essential provisions occurred. This was, however, limited to serious violations and did not include provisions on dialogue and consultation in the case of a possible non-compliance, and was therefore subsequently replaced with the so-called 'Bulgaria clause':

> If either Party considers that the other Party has failed to fulfill an obligation under the Agreement, it may take appropriate measures. Before so doing, except in cases of special urgency, it shall supply the Association Council with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties.
>
> In the selection of measures, priority must be given to those which least disturb the functioning of the Agreement. These measures should be notified immediately to the Association Council and shall be the subject of consultations within the Association Council if the other Party so requests.[76]

[75] Eeckhout (2004), pp. 467–468.
[76] Article 118 (2) of the Europe Agreement with Bulgaria.

Suspension provisions similar to those of the 'Bulgarian clause' have since the mid-1990s been the model for subsequent human rights clauses in international agreements concluded by the Community, and have, in combination with the 'essential element clause', become standard EU practice.[77]

The practice of suspending EU agreements with neighbouring countries has not followed the development of stated EU policy and law on the subject. The earliest association agreements with Mediterranean partners were in practice suspended on several occasions. Following the military coup in Greece in 1967, the association was effectively frozen and reduced to so-called *gestion courante*, which meant that all aspects of the agreements apart from the specific obligations on tariff reductions were on hold until democracy was restored seven years later. A similar 'freeze' occurred with the association with Turkey following the coup in Turkey in 1980. Even after democracy was restored in 1983-84, relations continued to be difficult, and there were for instance no ministerial level meetings between 1988 and 1991.[78]

This stands in contrast to the more recent agreements between the EU and neighbouring countries which are the focus here. None of these agreements have yet been suspended by the EU, despite numerous and in several cases egregious breaches of ostensibly binding commitments on human rights, democracy and the rule of law among the EU's neighbours.[79] Attempts were apparently made to have the PCA with Russia suspended by President Chirac of France and Chancellor Schroeder of Germany at the European Council in December 1999 as a reaction to the Russian military campaign in Chechnya. This did not receive sufficient support from the Commission, the CFSP High Representative or other member states, and more limited measures, such as the suspension of the ratification of a research agreement and the freezing of planned technical assistance, were adopted instead.[80] According to a European Parliament report,

> every cooperation and association agreement between the Union and the various countries concerned contains human rights clauses. These clauses, in what are mainly economic agreements, have not so far produced significant results.[81]

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[77] Eeckhout, p. 477– 478.
[78] Phinnemore (1999), pp. 76–77.
[79] Only agreements with the ACP countries have been suspended, see Eeckhout (2004), p. 480. The 2005 suspension of the PCA with Uzbekistan following the so-called Abidjan massacre is an exception. On the EMAs, see Emerson and Tocci (2003), p. 122.
[80] Patten (2005).
[81] European Parliament (2003), p. 4.

3.10 Parallel sector-specific agreements

The analysis has so far focused on the major types of comprehensive agreements between the Union and its neighbours; the EEA, the Europe Agreements, the PCAs, the SAAs and the EMAs. In addition to these, the EU has an increasing number of more limited sector-specific agreements alongside these principal or framework agreements. In some cases, these agreements can be quite significant, for instance the Schengen and Dublin association agreements with Iceland, Norway and Switzerland, which provide for virtually full inclusion in major EU policies. Indeed, in the extreme case of Switzerland, there is no comprehensive agreement at all providing a common framework for the management of the bilateral relationship as with the other neighbouring countries, Instead, EU-Swiss relations are conducted through several dozen sector-specific agreements, each with its own institutional framework. Russia provides a more typical example of this phenomenon, as illustrated by the list of current and planned agreements between Russia and the EU in Table 3 below.

The conclusion of such sector-specific agreements between the EU and its neighbours is not a new phenomenon. The ECSC, the EEC and the EC concluded more than one agreement with several neighbours. For instance, Switzerland, had by the end of the 1980s more then twenty bilateral sector-specific agreements with the EU, the first of which were concluded with the ECSC in 1957. The trend towards more sector-specific agreements have however accelerated with the creation of the three pillar European Union at Maastricht, with a separate treaty basis for the conclusion of international agreements under pillar 2 (CFSP) and 3 (JHA). The latter agreements, provided for by the Treaty on European Union rather than the Treaty establishing the European Community, are becoming increasingly numerous. Most are related to ESDP operations, either through arrangements with host country or with non-EU member state participation, although there are also agreements relating to the third pillar, for instance the EU-US agreement on extradition and mutual legal assistance signed in 2003.

Most of these sector-specific agreements are ‘stand-alone’-agreements, without any political and legal linkages with other agreements. An exception to this is some of the most ambitious agreements with the advanced Western European non-member states. The seven agreements between Switzerland and the EU which entered into force in June 2002 are linked through the so-called ‘guillotine clause’. This stipulates that all seven agreements must enter into force and be terminated simultaneously. Furthermore, the EU-Swiss agreement on the free movement of persons

Table 3: Agreements between the European Union and Russia, 2006

Agreements in force
- Partnership and Cooperation Agreement (Signed 1997)
- Steel (Signed October 1997, renewed 2004)
- Textiles (Signed July 1998)
- Science and technology (Signed November 1999, renewed 2003)
- Europol (Signed November 2003)

Agreements envisaged in the Road Maps for the four 'common spaces'

Common Economic Space
- Investment-related issues
- Veterinary
- Fisheries
- GALILEO/GLONASS cooperation
- Trade in nuclear materials

Freedom, security and justice
- Visa-facilitation (Signed May 2006)
- Readmission (Signed May 2006)
- Mutual legal assistance
- Europol-Russia operational agreement
- Eurojust-Russia agreement
- Judicial cooperation in civil matters

External security
- Framework on legal and financial aspects of crisis management operations
- Information protection

Other agreements under consideration in mid-2006
- An enhanced agreement to replace the PCA
- Trade in nuclear material
- A 'comprehensive' energy agreement?

and the EEA agreement are regarded as a precondition for the Schengen association agreements with Switzerland, and Norway and Iceland respectively. The Schengen association agreements are furthermore legally linked to the Dublin association agreement on asylum.

With the exception of the EEA, all of the principal agreements discussed above are bilateral. In addition to the growing number of bilateral sector-specific agreements discussed here, the EU has also concluded multilateral sector-specific agreements with its neighbours in recent years, notably on rules of origin for trade purposes through the system referred to as Pan-Euro-Mediterranean cumulation and the Energy Community between the EU and Southeast European countries.

3.11 Current contractual relations and EU neighbourhood priorities

The preceding section shows a number of developments concerning international agreements between the EU and neighbouring countries. First of all it shows that the EU has had considerably upgraded contractual relations with neighbouring countries since the end of the Cold War and the establishment of the European Union. International agreements continue to play a key role in EU neighbourhood policy, although to a somewhat lesser extent than in the past, mainly due to the development of other EU foreign policy instruments.

Reflecting the development of the EU as an international actor over the last two decades, the second and third-generation agreements are clearly more political in nature than the earlier agreements, which focused primarily on trade and economic cooperation. More recent agreements provide for considerable political dialogue, and are based on respect for basic political values as a condition for the continuation and further development of the relationship, as embodied in the human rights clauses now included in all agreements.

Contractual relations are clearly most extensively developed with the developed Western European states of EFTA, followed by the accession candidates and finally the non-candidate states in the Mediterranean and the former Soviet Union. However, there is full correlation among the various parameters in terms of the level of cooperation and integration. Some agreements with a limited level of commitment have more extensive provisions for political dialogue than agreements with much more extensive commitments (for example the PCA with Russia and the sector-specific agreements with Switzerland). In other cases agreements provide for a very broad scope but relatively more limited level of commitments, etc.

The most notable exceptions to such correlations are the two cases of Switzerland and Russia, which can, however, be attributed to the special characteristics of these countries and their relationship with the EU, rather than a lack of consistency on the part of the EU. The peculiar 'Swiss model' of contractual relations with the EU emerged as a result of the rejection of the EEA by the Swiss electorate, while the considerable political dialogue with Russia is a reflection of its status as a major international power, a status not shared by any of the other neighbours of the EU. On the whole, therefore, and in light of the various constraints, both 'external' ones and those relating to the situation in the neighbouring countries themselves, the current state of contractual relations between the EU and its neighbours seem a fair reflection of the EU's political priorities.

4 THE STATE OF THE NEIGHBOURHOOD AND THE PROSPECTS FOR NEW AGREEMENTS

4.1 Agreements as instruments of EU neighbourhood policy: Analytical challenges

There are numerous challenges to the task of evaluating whether the EU has made full and effective use of international agreements in reaching its aims vis-à-vis its neighbours. First of all, it is necessary to regard this in the broader context of EU foreign policy, as a highly ambitious policy with limited means and discretion as to how this policy is conducted (see section 2.3. above). A corollary of this is that the changes sought by the EU could emerge as the result of other external forces, which may or may not work in the same direction as EU policy. An agreement may thus be effective, but given the inherent limitations of EU foreign policy may counteract the positive effects of an EU agreement.

A second more specific challenge is the task of analytically separating the agreement instrument from other EU foreign policy tools. These other instruments are not used separately. Indeed, in many cases they are integral parts of the agreements, for instance financial and technical assistance provided to third countries. It is difficult to disaggregate the impact of an agreement from EU overall policy and from other policy instruments.

A third and key complicating factor for the analysis is of course the question of membership. It is frequently argued that enlargement is the most powerful foreign policy instrument of the Union, and that the prospect of membership as such is the principal driver of changes in neighbouring countries towards the goals of the EU, and not the agreements themselves. A corollary of this could be that the absence of a prospect of membership is the reason for the failure of agreements in reaching EU goals, and not the agreements themselves.

Yet another challenge in the analysis is the fact that many of the principal agreements under consideration have been concluded relatively recently, and some are still going through the process of negotiation and ratification. Further, most of these agreements envisage long transition periods before key provisions and objectives are reached, notably the 10 to 12-year periods for the creation of free trade areas. It is therefore impossible at the present point in time to ascertain the full impact of these agreements and by extension to attribute developments in neighbouring countries to the agreements concluded between them and the EU.

The question should perhaps be reformulated to, given these political and analytical limitations and obstacles, ask whether the EU takes full advan-

tage of the leverage it has and the potential of available policy instruments, in this case legally-binding international agreements. More specifically, has the conclusion and implementation of agreements with neighbouring countries led the EU closer to achieving the stated goals of its neighbourhood policy?

4.2 The development and state of affairs in the EU's neighbourhood

Most of the EU's neighbours are less economically developed and less democratic than the member states of the Union itself. While the 2004 enlargement created a more heterogeneous Union on these issues by including a number of poorer countries, and not forgetting the existence of highly economically developed and democratic countries in the EU's neighbourhood such as the EFTA countries, the very small states of Europe and Israel, this general observation remains a fairly accurate description of the current state of affairs.

So is there any correlation between international agreements concluded and the political and economic changes in neighbouring countries over the last ten years? The tables below set out the changes in political and economic freedom in Southern, South-eastern and Eastern neighbouring countries using the Freedom House index of political freedom and the Heritage Foundation/ Wall Street Journal index of economic freedom. While the use of the word 'freedom' may not reflect EU jargon, the indicators are good proxies for the stated EU goals of promoting democracy, the rule of law, respect for human rights and market-based economies among its neighbours. (Virtually all EU member states, including the recently acceded countries in Central and Eastern Europe, score 1 on both political rights and civil liberties and all have economies that are regarded as either free or mostly free).

Table 4 shows a positive trend as concerns the development of political freedom in the EU's neighbourhood, with the number of countries moving towards EU standards far outweighing the number of countries that have become less free during the last decade.

Secondly, improvement has by far been most marked in Southeast Europe, in countries which have been given the prospect of membership during the last 10–15 years. Table 4 gives further support to the hypothesis that the prospect of enlargement provides the EU with a powerful policy instrument. All of the six countries which have made the greatest progress towards political freedom are currently candidates for EU membership, and

Table 4: Political freedom in the EU's neighbourhood[82]

	1996/97		2006		Change 1996/97–2006	
	PR	CL	PR	CL	PR	CL
Serbia&M	6	6	3	2	-3	-4
Croatia	4	4	2	2	-2	-2
Bosnia H.	5	5	4	3	-1	-2
Turkey	4	5	3	3	-1	-2
Albania	4	4	3	3	-1	-1
Bulgaria	2	3	1	1	-1	-1
Georgia	4	4	3	3	-1	-1
Lebanon	6	5	5	4	-1	-1
Ukraine	3	4	3	2	0	-2
Algeria	6	6	6	5	0	-1
Egypt	6	6	6	5	0	-1
Israel	1	3	1	2	0	-1
Macedonia	4	3	3	3	-1	0
Morocco	5	5	5	4	0	-1
Romania	2	3	2	2	0	-1
Armenia	5	4	5	4	0	0
Azerbaijan	6	5	6	5	0	0
Libya	7	7	7	7	0	0
Moldova	3	4	3	4	0	0
Syria	7	7	7	7	0	0
Tunisia	6	5	6	5	0	0
Jordan	4	4	5	4	+1	0
Belarus	6	6	7	6	+1	0
Russia	3	4	6	5	+3	+1

Source: Freedom House (2006).

most of them were acknowledged as such during the 1996–2006 period. The remaining two candidates – Macedonia and Romania – have also made progress and their improvement is smaller on these indices mainly because of progress achieved before 1996.

[82] Scores are from 1–7, with 1 being free and 7 not free. PR: Political rights, CL: Civil liberties.

Table 5: Economic freedom in the EU's neighbourhood[83]

	1996	2006	*Change 1996–2006*
Bosnia H.	4.61	3.01	– 1.60
Azerbaijan	4.78	3.51	– 1.27
Armenia	3.50	2.26	– 1.24
Georgia	3.99	2.98	– 1.01
Albania	3.63	2.75	– 0.88
Croatia	3.58	2.78	– 0.80
Libya	4.95	4.16	– 0.79
Ukraine	4.00	3.24	– 0.76
Bulgaria	3.50	2.88	– 0.62
Macedonia	3.35	2.80	– 0.55
Israel	2.81	2.36	– 0.45
Jordan	3.15	2.80	– 0.35
Moldova	3.45	3.10	– 0.35
Algeria	3.70	3.46	– 0.24
Syria	4.15	3.93	– 0.22
Romania	3.40	3.19	– 0.21
Russia	3.70	3.50	– 0.20
Lebanon	2.91	3.00	+0.09
Turkey	2.95	3.11	+0.16
Egypt	3.40	3.59	+0.19
Morocco	2.94	3.21	+0.27
Tunisia	2.83	3.24	+0.41
Belarus	3.45	4.11	+0.66

Source: The Heritage Foundation/ Wall Street Journal (2006).

Table 5 on economic developments points in a similar direction. A majority of the countries have become more economically 'free' (or less 'unfree') over the last decade, although the correlation between economic development and EU accession prospects is not as strong as in the case of political freedom. Six out of seven candidates – the exception being Turkey – included in the survey on economic freedom have become more economical-

[83] Free: 1.99 or less; Mostly free: 2.00-2.99; Mostly unfree: 3.00-3.99; and Repressed: 4.00–4.99. Figures for Bosnia-Herzegovina and Macedonia in the 1996 column are from 1998 and 2002 respectively. Serbia and Montenegro is not included in the survey.

ly free over the ten-year period. A closer look at Turkey reveals a considerable improvement since Turkey was explicitly acknowledged as a candidate at the Copenhagen European Council at the end of 2002.[84]

Beyond the EU membership candidates, improvements towards political freedom are most notable in the countries which witnessed the much noted 'democratic revolutions' of 2003–2005, Georgia, Ukraine and Lebanon. The overall picture is, however, less clear in the case of the non-candidates, with only limited correlation between economic and political developments. Some countries, for instance Russia, have seen improvements in economic governance alongside a significant deterioration in political freedom. Other countries, for example Lebanon, have seen a considerable increase in political freedom alongside a deterioration of economic freedom.

As concerns the seven Eastern neighbours of the former Soviet Union considered here (i.e. all except the Central Asian states), the period from the second half of the 1990s has seen a growing divergence into two groups: first, countries such as Ukraine, Moldova and Georgia moving towards European standards and secondly, countries such as Russia and Belarus, which have become less free over the last ten years. Considering that the EU negotiated similar PCAs with all of these countries, it is difficult to attribute any significant effect to the agreements as regards promoting greater political freedom in the neighbourhood. Indeed, the most ambitious agreement was the one with Russia, which has seen the most marked deterioration concerning political freedom of all of the neighbouring countries included here (it is for instance the only country in the EU's neighbourhood in which civil liberties have deteriorated over the last decade).

There has thus been notable progress towards the EU's goals for its neighbourhood policy over the last decade, with its neighbours having become more politically and economically 'free'. It is, however, difficult to attribute this to the international agreements or indeed to EU policy overall, in particular in light of notable setbacks in Russia and among some Mediterranean partners.

[84] Turkey's score deteriorated from 2.68 in 2000 to 3.50 in 2003, but has since then improved to reach 3.11 in 2006, see http://www.heritage.org/research/features/index/country.cfm?id=Turkey.

4.3 International agreements in the development of the ENP

Contractual relations were discussed from the beginning in the development of what eventually emerged as the European Neighbourhood Policy (ENP). Certain neighbours, notably Ukraine and Moldova, had for years sought an upgrade of contractual relations through the conclusion of an association agreement. This was based in part on the erroneous belief that such an agreement would entail an acknowledgement by the EU of Ukraine's membership aspirations, which had been the official goal of Ukrainian and Moldovan policy since the late 1990s.[85]

The first written contribution from the Commission and the Council Secretariat – the so-called Patten/Solana letter of 7 August 2002 – did not show much enthusiasm for the conclusion of new agreements with the Southern and Eastern neighbours.[86] It started by noting first that "[t]here is already scope to upgrade relations within existing agreements*",* warning against cosmetic changes distracting attention or even becoming a substitute for substantive measures." However, it was further remarked that "specific and qualitatively enhanced objectives*"* for EU policy towards the neighbours *"*could justify a relabelling of relations," the "strong symbolism" of which "could help raise the profile of relations with the EU and thus unlock additional political will and administrative capacity." More specifically the letter envisages "an upgrading of the PCA relationships with Ukraine and Moldova as the first 'European Neighbourhood Agreements". These would be bilateral and contain clear benchmarks (possibly a free trade area as envisaged in the two PCAs) and incentives. According to the Patten/Solana letter, these agreements could, inter alia, provide for an intensified political dialogue, including on regional security and ESDP, regulatory approximation and cooperation, and access to EU programmes.

The Wider Europe communication of March 2003 also raised the matter of the future of the framework agreements currently in place (the PCAs and the EMAs):

> [T]he full implementation of and exploitation of the provisions contained in existing Agreements remains a necessary precondition for any new development. Thereafter, the EU will examine the scope for new Neighbourhood Agreements to build on existing contractual relations. These would supplement existing contractual relations where the EU and the neighbouring country have moved beyond the existing framework, taking on new entitlements and obligations. If, however, the Neighbourhood Agreements contain provisions going

[85] Vahl (2003) and Vahl (2004).
[86] Patten and Solana (2002).

> beyond those of the Euro-Mediterranean Association Agreements, similar arrangements could be offered, on equivalent terms, to the Mediterranean partners. [87]

The Council supported the main conclusions on new agreements in the Wider Europe communication. In its conclusions of 16 June 2003, subsequently endorsed by the European Council, the Council states that "[t]he new neighbourhood policies should not override the existing frameworks … as developed in the context of the relevant agreement," and that

> [i]mplementation of existing agreements remain a priority. … At the appropriate time, on the basis of implementation of existing agreements and taking into account the principle of differentiation, the EU will examine the scope for new or enhanced agreements. These would supplement existing contractual relations where the EU and the neighbouring country have moved beyond the existing framework.

This position was reiterated on numerous occasions in subsequent months by Enlargement Commissioner Verheugen, who was put in charge of the new policy initiative.[88]

The European Parliament broadly endorsed the approach of the Council. In the so-called Napoletano report of November 2003, it states that

> the prospect of an association agreement as a possible future framework for relations with the EU could here serve as a significant incentive for countries with which the EU does not currently have any such agreement." [89]

On the other hand, the report also notes that "[t]he existing agreements … offer suitable starting points for consolidating structures that have proved their worth."

While noting that "[t]he full potential of these [existing] agreements has not yet been realized," the ENP Strategy Paper of May 2004 is rather more ambitious than the earlier Wider Europe document and subsequent Council conclusions concerning the potential scope of these new agreements, and their relationship with existing agreements:

> The Action Plans will define the way ahead over the next three to five years. The next step could consist in the negotiation of European Neighbourhood Agreements, to replace the present generation of bilateral agreements, when Action Plan priorities are met. [90]

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[87] European Commission (2003), pp.15-17. The communication also includes numerous references to existing agreements or potential sector or issue-specific agreements, for instance on readmission of illegal migrants, the expansion of existing FTAs with Mediterranean partners to include trade in services, and agreements on investment promotion granting reciprocally national treatment for companies.

[88] See e.g. Verheugen (2003) and Verheugen (2004).

[89] European Parliament (2003).

[90] European Commission (2004), pp. 5 and 28.

The Strategy Paper proposes a 'mid-term' review within two years after the Action Plans have been approved and a further report within three years:

> These reports can serve as a basis for the Council to decide the next step in contractual links with each partner country. These could take the form of European Neighbourhood Agreements whose scope will be defined in the light of progress in meeting the priorities set out in the Action Plans.

According to the Action Plan with Ukraine, which was finalised in September 2004:

> Consideration will be given to the possibility of a new enhanced agreement, whose scope will be defined in the light of the fulfillment of the objectives of this Action Plan and of the overall evolution of EU-Ukraine relations. The advisability of any new contractual arrangements will be considered in due time.

In the wake of the Orange Revolution at the end of 2004, a list of additional measures was adopted alongside the Action Plan, which had been negotiated before the Presidential elections by the Yanukovich government. The text agreed on 21 February 2005 differs considerably from the first proposals of the European Commission:[91]

> To initiate early consultations on an enhanced agreement between the EU and Ukraine, to replace the Partnership and Cooperation Agreement at the end of its initial ten-year period, as soon as the political priorities of the ENP Action Plan have been addressed.

The successful conduct of the parliamentary elections in Ukraine in March 2006 entailed that these political priorities had been met. A draft negotiating mandate on a new comprehensive agreement with Ukraine to replace the PCA was approved by the European Commission in September 2006, with a view to be approved by the Council in the autumn of 2006 followed by the launch of negotiations in 2007.

4.4 International agreements and EU-Russian relations

Russia was initially included in the Wider Europe initiative, although the Commission recognised early on in the process that a "new neighbourhood policy will only constitute one pillar of the overall EU/Russia strategic partnership."[92] As late as October 2003, Commissioner Verheugen visited Moscow to discuss a possible Action Plan with Russia, stating that "[i]t is the absence of Russia from such a framework that would seem odd." On international agreements in this context, he stated that "[a]t a later stage,

[91] Annex to the *Conclusions of the EU- Ukraine Cooperation Council* of 21 February 2005.
[92] European Commission (2003), p. 5.

we could envisage upgrading the contractual framework, but we should first see that the present one is fully used."

Russia was, however, sceptical to the ENP.[93] According to Special Representative of Russia to the EU Sergei Yastremshembsky, the ENP was inappropriate for EU-Russia relations since *"*no other EU neighbour had relations as intense as Russia.*"*[94] Instead, the EU and Russia agreed to develop bilaterally four 'common spaces' in economics, internal security, external security, and in research, culture and education. Road Maps on the four common spaces were endorsed by the two sides at the EU-Russia summit in May 2005.

The Road Maps and the ENP Action Plans share many features. However, on important points, they differ substantially. One of the main differences between the Road Maps and the Action Plans is the almost complete absence of references to existing contractual relations in the former, including the issue of the future of the PCA once it expires in late 2007. However, the issue, referred to as the '2007 problem', was raised by the Russian side at the May 2005 summit at which the Road Maps were adopted. At the May 2006 summit the two sides agreed on

> … the start of negotiations for a new agreement which should provide a comprehensive and durable framework for the EU-Russia strategic partnership and agreed to allow the PCA to remain valid until a new agreement enters into force.

On 3 July the European Commission adopted draft negotiation directives for a new agreement, to be agreed with the Council and Finnish Presidency by the end of the year.

4.5 New comprehensive agreements with Russia and Ukraine[95]

The two new agreements to be negotiated with Russia and Ukraine, which could in due course be followed by further 'third generation' agreements with other neighbouring countries, pose a number of challenges to the EU, some of which are familiar in the context of EU neighbourhood policy, and yet others that are more novel. In both cases it will be necessary to decide on the numerous issues raised under the seven principal parameters described and analysed in chapter 3 above. Some of the choices to be

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[93] See e.g. statement by Russian Deputy Foreign Minister Chizov, *Mission of RF to the EU Press Release No 32/03*, November 11, 2003, and Trenin (2005).

[94] Quoted in *International Herald Tribune*, 10 November 2004.

[95] See Emerson et al (2006a) on the trade and economic aspects of a new agreement with Ukraine, and Emerson et al (2006b) on the new agreement with Russia.

made can already be anticipated on the basis of the Commission press releases of 3 July and 13 September on the new agreements with Russia and Ukraine, respectively.[96]

As far as the agreement with Russia is concerned, this will according to the Commission "provide an updated and more ambitious framework for the EU-Russia relationship … based on recognition of common values such as democracy, human rights and the rule of law". It will cover "the whole range of EU-Russia cooperation", including a "progressive deepening and development of trade relations and fair and open development of the energy relationship", as well as "ambitious objectives on political and external security cooperation".

The Commission press release on the new enhanced agreement with Ukraine states that this will be a

> comprehensive agreement covering all areas of EU-Ukraine activity. It will go beyond the existing Partnership and Co-operation Agreement wherever possible. It is to include provisions on common values, enhanced cooperation on justice, freedom and security, extensive provisions on energy, and cooperation in a broad range of areas such as transport and environment. A Free Trade Area will be one of the main elements, for which negotiations will start once Ukraine has completed its WTO accession process.

It thus seems clear that the new agreements will be comprehensive in scope. The EU has never before concluded such an ambitious agreement covering all three pillars of the EU. As seen in chapter 3 above, there are different procedures for the conclusion of Community and Union agreements, set out in Article 300 EC and Article 24 TEU respectively. The Treaties provide no clear guidelines as to how such a cross-pillar agreement should be concluded. First of all, there are no provisions in the Treaties on how the negotiations should be conducted. In order to comply with the Treaties, it would have to be negotiated by both the Commission (the normal practice for mixed association agreements) and the Presidency (which concludes Union agreements on CFSP and JHA). While the tasks could easily be divided in the negotiation of sector-specific chapters, it is not yet known, and neither previous practice nor the treaties provide any clear guidance, which institution – the Presidency, the European Commission, or another – will conduct and lead the negotiations on the common provisions (preamble, general and final provisions, institutional framework, etc).

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[96] See *European Commission approves terms for negotiating new EU–Russia agreement*, IP/06/910, 3 July 2006, and *Commission proposes negotiating directives for enhanced agreement with Ukraine*, IP/06/1184, 13 September 2006.

Secondly, and given the level of ambition and suggested scope of these agreements, it is further highly likely that they will be adopted unanimously in the Council, and require the assent of both the European Parliament and of the national parliaments of the 25 (or by then 27 or more) member states. This is not a mere technical legal matter, but goes to the heart of the debate on the policy-making method used in EU foreign and security policy. This procedure would give the European Parliament an effective veto on an EU agreement in the field of the CFSP and JHA cooperation on criminal matters, which the treaties do not provide for. Indeed, the European Parliament is not mentioned at all in Article 24 of the Treaty on European Union, the key provision concerning international agreements in these areas. Combined with the likely prominent role of the European Commission in negotiating this agreement, the procedures for its conclusion appear as a hybrid of the community method and the intergovernmental approach. It is, however, too early to tell where the precise balance will lie between these two methods.

5 CONCLUSIONS

International agreements remain a cornerstone of EU foreign policy. The scope for concluding international agreements has been considerably expanded over the last decades alongside the development of other EU foreign policy instruments. EU neighbourhood policy, which in the last few years has emerged as an increasingly distinct EU policy, has since the end of the Cold War become increasingly ambitious. Thus, a gap between expectations and capabilities still remains in EU neighbourhood policy, despite the further development of EU foreign policy instruments in the same period.

A significant upgrade of contractual relations between the EU and neighbouring countries has been taking place since the end of the Cold War and the establishment of the European Union. The principal (mainly bilateral) agreements, while being quite similar in scope and institutional structures, entail quite different levels of cooperation and integration between the EU and its neighbours. The agreements with the rich non-members of Western Europe and EFTA go furthest in terms of integration with the EU, followed by the agreements with candidates for EU membership. The agreements with countries covered by the ENP are generally less extensive, although the trade component is quite advanced in the case of certain Mediterranean partners, as is the institutionalised political dialogue with certain former Soviet republics, notably Russia and (to a lesser extent) Ukraine.

The contractual relationships with neighbouring countries are becoming increasingly differentiated. This is as much a result of the growing number of more limited (mainly bilateral, but also some multilateral) sector-specific agreements concluded between the EU and its neighbours, as to differences among the principal agreements in EU neighbourhood policy. An increasingly complex system of contractual relations between the EU and its neighbours has emerged, in part due to the three-pillar structure of the Union. This complexity is further exacerbated by the still extensive use of mixed agreements, which makes the EU a more cumbersome international actor and more difficult interlocutor for non-member states, creating uncertainty on issues of liability, interpretation and legal effects. The consensus among legal scholars seems to be that even though mixed agreements constitute an "unnecessary burden",[97] they are used more extensively than the scope of agreements require.

[97] Eeckhout (2004), pp. 223–24.

In the absence of the Constitutional Treaty, this legal complexity could become increasingly problematic for the EU, leading for instance to more institutional turf-fights. This is already in evidence in connection with the new comprehensive agreements to be negotiated with Russia.[98] Such comprehensive agreements will in all likelihood have to be adopted by unanimity in the Council and require approval by the European Parliament and all of the national parliaments in the (growing number of) EU member states. This introduces considerable elements of the so-called Community method into a CFSP which according to the Treaty on European Union should be governed by an intergovernmental approach.

It was concluded above that the current agreements with neighbouring countries roughly correspond to the priorities of EU neighbourhood policy. It may, however, be argued that the gradual differentiation in EU neighbourhood policy is less pronounced than political, economic and social developments among neighbouring countries and their overall relationships with the EU should entail. With the exception of 'pariah states' such as Belarus and Libya (and previously also Yugoslavia), the much-touted policy of conditionality plays a less prominent role in determining contractual relations between the EU and its neighbours than official documents claim, as it is not applied consistently over the life cycle of the agreements, from the launch of negotiations to implementation. While it is frequently applied during negotiations and in the ratification process, with temporary suspensions and concomitant delays before entry into force, the EU has been very reluctant to interrupt the smooth functioning of agreements already entered into force in order to comply with the principle of conditionality also in practice. The EU has for instance never made use of the human rights clauses inserted in all of the principal agreements with neighbouring countries, in spite of numerous obvious breaches of the political commitments made by neighbours in their agreements with the EU.

Indeed, the vicissitudes of contractual relations seems to be determined less as a result of an EU strategy towards the region than to other EU developments such as the relevant *acquis* and EU policies at the time of negotiations, the internal political dynamics in the EU and the wishes of individual member states, and the limits set by other external restraints, for instance the issue of WTO membership in connection with preferential trade arrangements.

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[98] See "Council and Commission clash over Russia," European Voice, Vol. 12 No. 35, 28 September 2006.

But despite the deepening of relations and new agreements with neighbouring countries negotiated over the last fifteen years, the EU is far from having fully exploited the potential of international agreements in its EU neighbourhood policy. This is in part due to the state of the political and economic development and the institutional and administrative capacities of the neighbouring countries themselves, as well as various 'external' restraints. But in other cases, for instance as concerns the participation of non-member states in EC/EU agencies and programmes, the possibilities of participation in 'decision-shaping,' and the scope for political dialogue and association with other EU policies such as the CFSP, the full potential of EU neighbourhood policy in general, and international agreements in particular, are far from being exhausted.[99]

[99] See e.g. Emerson (2004), p. 6 and Grant (2006), pp. 61–72.

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ANNEX 1: AGREEMENT ON THE EUROPEAN ECONOMIC AREA WITH ICELAND, LIECHTENSTEIN AND NORWAY

ANNEX 2: EUROPE AGREEMENT WITH POLAND

ANNEX 3: PARTNERSHIP AND COOPERATION AGREEMENT WITH RUSSIA

ANNEX 4: EURO-MEDITERRANEAN AGREEMENT WITH MOROCCO

ANNEX 5: THE STABILITY AND ASSOCIATION AGREEMENT WITH MACEDONIA

		Article	(no.)
	Preamble	**1**	(1)
Title I	**General principles**	**2- 6**	(5)
Title II	**Political dialogue**	**7-10**	(4)
Title III	**Regional cooperation**	**11- 14**	(4)
	Cooperation with other SAA countries (Art. 12)		
	Cooperation w/ other countries concerned with SAP (13)		
	Cooperation with candidates for EU accession (Art. 14)		
Title IV	**Free Movement of goods**	**15-43**	(29)
	Chapter I: Industrial products (Art. 16-23)		
	Chapter II: Agriculture and fisheries (Art. 24-30)		
	Chapter III: Common provisions (Art. 31-43)		
Title V	**Movement of workers, establishment, supply of services, capital**	**44-67**	(24)
	Chapter I: Movement of workers (Art. 44- 46)		
	Chapter II: Establishment (Art. 47-54)		
	Chapter III: Supply of services (Art. 55- 57)		
	Chapter IV: Current payments, capital movement (58-60)		
	Chapter V: General provisions (Art. 61-67)		
Title VI	**Approximation of laws and law enforcement**	**68-73**	(6)
	Competition and other economic provisions (Art. 69-70)		
	Intellectual, industrial and commercial property (Art.71)		
	Public contracts (Art. 72)		
	Standardisation, metrology, accreditation, conformity assessment (73)		
Title VII	**Justice and home affairs**	**74-79**	(6)
	Reinforcement of institutions and rule of law (Art. 74)		
	Visa, border control, asylum and migration (Art. 75)		
	Prevention, control of illegal immigration; asylum (76)		
	Combating money laundering (Art. 77)		
	Preventing, combating crime, other illegal activities (78)		
	Cooperation on illicit drugs (Art. 79)		
Title VIII	**Cooperation policies**	**80-103**	(24)
	Economic policy (Art. 81)		
	Statistical cooperation (Art. 82)		
	Banking, insurance and other financial services (Art. 83)		
	Investment promotion and protection (Art. 84)		
	Industrial cooperation (Art. 85)		
	Small and medium-sized enterprises (Art. 86)		
	Tourism (Art.87)		
	Customs (Art.88)		
	Taxation (Art.89)		
	Social cooperation (Art.90)		
	Education and training (Art. 91)		
	Cultural cooperation (Art. 92)		
	Information and communication 9art. 93)		
	Cooperation in the audio-visual field (Art. 94)		

ANNEX 6:

EU-Swiss bilateral sector-specific agreements

	Agreements	Number of articles (and annexes)	
Bilateral I	Research	14	(3)
	Technical barriers to trade	25	(2)
	Free movement of persons	25	(3)
	Air transport	36	(1)
	Land transport	58	(10)
	Agriculture	17	(11)
	Public procurement	18	(9)
Bilateral II	Processed agricultural products	6	(2)
	Statistics	14	(2)
	Audio-visual	14	(4)
	Environment	23	(4)
	Pensions	7	(0)
	Taxation on savings	22	(2)
	Schengen	18	(2)
	Dublin	17	(0)
	Fight against fraud	48	(0)

EU-Andorra Cooperation Agreement

PRINCIPLES

Article 1

AREAS OF COOPERATION

Article 2: Environment
Article 3: Communication, information and culture
Article 4: Education, vocational training and youth
Article 5: Social and health issues
Article 6: Trans-European networks and transport
Article 7: Regional policy
Article 8: Other areas of cooperation

GENERAL PROVISIONS

Article 9 (institution: Cooperation Committee)
Article 10 (settlement of disputes)
Article 11 (duration: unlimited)
Article 12 (denounciation)
Article 13 (territorial application)
Article 14 (approval and entry into force)
Article 15 (languages of authentic versions)

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