

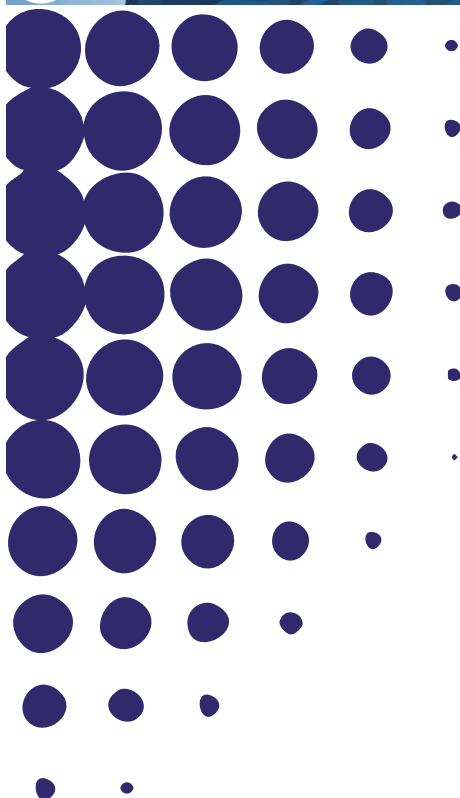
WP5/24 SEARCH WORKING PAPER

Approximation of Laws under the European Neighbourhood Policy: A

Typology of the Challenges and Obstacles that Lie Ahead

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Approximation of Laws under the European Neighbourhood Policy: A Typology of the Challenges and Obstacles that Lie Ahead

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Abstract

The completion of the two waves of enlargement of 2004 and of 2007 obliged the EU to redefine its relations with those neighbours who will not join it as Member States, at least in the short and medium term. This vision underlies the basic objective of the European Neighbourhood Policy (**ENP**). In return for enhanced trade and investment relations, with resultant improved access to the Internal Market, the ENP requires, *inter alia*, the EU's neighbouring countries (**NCs**) to align their legislation and regulatory regimes, to an extent to be negotiated, with the EU's *acquis communautaire*. The purpose of this Working Paper is to offer a typology and an analysis of the various factors that adversely affect or render it more difficult to attain this strategic objective of the ENP. The typology classifies these factors according to whether they pertain to the ENP itself (*e.g.*, lack of meaningful incentives, lack of definitiveness and weak mechanisms of conditionality), to the EU (*e.g.*, expectation-capacity gap, weakening trade prominence), to the NCs (*e.g.*, local perceptions, veto players, institutional weakness and high adaptation costs) or to the interface between the EU and its NCs (institutional and normative mismatch). The analysis focuses at times on the case study of the State of Israel, yet its findings are applicable, *mutatis mutandis*, unless otherwise stated, to the relations of the EU with all other NCs. The typology and analysis offered would add to the work of Work Package 5, which is focused on the socio-cultural and institutional environment in the NCs and the manner in which such environment affects the transformative role of the ENP.

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1. Introduction

The completion of the two waves of enlargement of 2004 and of 2007 obliged the EU to redefine its relations with those neighbours who will not join it as Member States, at least in the short and medium term. This vision underlies the basic objective of the European Neighbourhood Policy (**ENP**). The ENP was launched as a transformative instrument: in return for enhanced trade and investment relations, with resultant improved access to the Internal Market, the ENP required, *inter alia*, the EU's neighbouring countries (**NCs**) to align their legislation and regulatory regimes, to an extent to be negotiated, with the EU's *acquis communautaire*. The purpose of this Working Paper is to offer a typology and an analysis of the various factors that adversely affect or render it more difficult to attain this strategic objective of the ENP.¹ The typology will classify these factors according to whether they pertain to the ENP itself (*e.g.*, lack of meaningful incentives, lack of definitiveness and weak mechanisms of conditionality), to the EU (*e.g.*, expectation-capacity gap, weakening trade prominence), to the NCs (*e.g.*, local perceptions, veto players, institutional weakness and high adaptation costs) or to the interface between the EU and its NCs (institutional and normative mismatch). The analysis focuses at times on the case study of the State of Israel, yet its findings are applicable, *mutatis mutandis*, unless otherwise stated, to the relations of the EU with all other NCs. The typology and analysis offered would add to the work of Work Package 5, which is focused on the socio-cultural and institutional environment in the NCs and the manner in which such environment affects the transformative role of the ENP.

1 This Working Paper builds upon my earlier writings on approximation of laws under the ENP, see G. Harpaz, 'EU-Med Regionalism, Economic Interdependence, and the Erosion of Sovereignty', in Y. Shany and T. Broude (eds.), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy, and Subsidiarity* (Hart, Oxford, 2008); G. Harpaz, 'Approximation of Laws to the EU *acquis*, Extraterritorial Europeanization and the Erosion of National Sovereignty', in L. Cabada and M. Mravinac (eds.), *Integrating with the European Union: Accession, Association and Neighborhood Policy* (Charles University, Prague, 2008); G. Harpaz, 'When East Meets West - Approximation of Laws in the Euro-Mediterranean Context', 43/1 *Common Market Law Review* (2006), 1; G. Harpaz and L. Herman, 'Approximation of Laws By non-EU Countries with the EU *acquis*: Setting the Scene', 9/3 *European Journal of Law Reform* (2007), 357; G. Harpaz, 'Approximation of Laws: A Realist Perspective', 9/3 *European Journal of Law Reform* (2007), 393.

2. The European Neighbourhood Policy

Notwithstanding the current crisis, the EU can look back with much satisfaction on its record of transforming a large part of Europe, once afflicted by wars, nationalist divisions and Fascism, into a region where peace, stability, political moderation and protection of human rights prevail. Yet, the successful removal of its internal borders might be replaced by new, external dividing lines. The completion of the two waves of enlargement of 2004 and of 2007 obliged the EU to redefine its relations with those NCs who will not join it as Member States, at least in the short and medium term. This vision, enshrined in the Lisbon Reform Treaty,² is the basic objective of the ENP.³

2 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, 2007/C 306/01. For analysis, see G. Harpaz, 'European Integration in the Aftermath of the Ratification of the Treaty of Lisbon: *Quo Vadis?*', 17/1 *European Public Law* (2011), 73.

3 For selective scholarship on the ENP, see T. Casier, 'To Adopt or Not to Adopt: Explaining Selective Rule Transfer under the European Neighbourhood Policy', 33/1 *Journal of European Integration* (2011), 37; P.J. Cardwell, 'EuroMed, European Neighbourhood Policy and the Union for the Mediterranean: Overlapping Policy Frames in the EU's Governance of the Mediterranean', 49/2 *Journal of Common Market Studies* (2011), 219; R.A. Del Sarto and T. Schumacher, 'From EMP to ENP: What's at Stake with the European Neighbourhood Policy towards the Southern Mediterranean?', 10/1 *European Foreign Affairs Review* (2005), 17; G. Edwards, 'The Construction of Ambiguity and the Limits of Attraction: Europe and its Neighbourhood Policy', 30/1 *European Integration* (2008), 45; A. Gawrich, I. Melnykovska and R. Schweickert, 'Neighbourhood Europeanization through ENP: The Case of Ukraine', 48/5 *Journal of Common Market Studies* (2010), 1209; E. Greco, N. Tocci and M. Comelli, 'From Boundary to Borderland: Transforming the Meaning of Borders through the European Neighbourhood Policy', 12/2 *European Foreign Affairs Review* (2007), 203; H. Haukkala, 'The European Union as a Regional Normative Hegemon: The Case of European Neighbourhood Policy', 60/9 *Europe-Asia Studies* (2008), 1601; S. Lavenex and F. Schimmelfennig, 'E U Rules beyond EU Borders: Theorizing External Governance in European Politics', 16/6 *Journal of European Public Policy* (2009), 791; S. Maier and F. Schimmelfennig, 'Shared Values: Democracy and Human Rights', in K. Weber, M.E. Smith and M. Baun (eds.), *Governing Europe's Neighbourhood: Partners or Periphery?* (Manchester and New York, Manchester University Press, 2007), 397; A. Magen, 'The Shadow of Enlargement: Can the European Neighbourhood Policy Achieve Compliance', 12 *Columbia Journal of European Law* (2006), 383; S. Lavenex, 'EU External Governance in "Wider Europe"', 11/4 *Journal of European Public Policy* (2004), 680; G. Sasse, 'The European Neighbourhood Policy: Conditionality Revisited for the EU's Eastern Neighbours', 60/2 *Europe-Asia Studies* (2008), 295; G. Sasse, 'Conditionality-lite: The European Neighbourhood Policy and the EU's Eastern Neighbours', in C. Musu and N. Casarini (eds.), *European Foreign Policy in an Evolving International System - The Road towards Convergence* (Palgrave, 2007); K.E. Smith, 'The Outsiders: The European Neighbourhood Policy', 81/4 *International Affairs* (2005), 757; M.E. Smith and M. Webber, 'Political Dialogue and Security in the European

The ENP was first introduced in the Communication entitled *Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours* (the **Wider Europe Initiative**).⁴ Under the Wider Europe Initiative, the Commission spelled out the intention of the EU to develop closer and more coherent economic, political and social relations between the EU, its Member States, those countries whose future accession to the Union had been agreed and others whose potential for entry had not yet been determined, on the one hand, and all of the Union's other neighbours that currently had no prospect of membership in the EU, on the other hand.⁵ The Wider Europe Initiative was endorsed by the European Parliament⁶ and the Council of Ministers,⁷ and was later entitled the “European Neighbourhood Policy.”

The ENP is designed to upgrade prevailing bilateral and regional relations between the EU and its NCs in the Middle East, North Africa and Eastern Europe, integrating their economies, to an extent yet to be determined, with the enlarged EU, in order to contribute to increased stability, security and prosperity for the EU and those neighbours.⁸ As Kelley provided, the ENP promised: (i) an upgrade in scope and intensity of political co-operation; (ii) reduction of trade barriers and the deepening of trade and economic relations, allowing the NCs a stake in the Internal Market; (iii)

Neighbourhood: The Virtues and Limits of “New Partnership Perspectives”, 14/1 *European Foreign Affairs Review* (2008), 73; B. Van Vooren, ‘A Case-Study of “Soft Law” in EU External Relations: the European Neighbourhood Policy’, 34/5 *European Law Review* (2009), 696.

4 Brussels, March 11, 2003, Com(2003) 104 final.

5 These include Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestinian Authority, Syria, Tunisia, Ukraine, Moldova and Belarus. The Initiative does not apply to the EU's relations with the remaining candidate countries (e.g., Turkey), or to the countries of the Western Balkans. Later the Council decided to include Armenia, Azerbaijan and Georgia in the ENP, see Council of the European Union, 2590th Council Meeting, General Affairs and External Relations – General Affairs, Luxembourg, 14 June, 2004, 10189/04 (Press 195), Provisional Version, Press Release, 12. See also European Parliament, Report, *Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy, Com(2003) 104 - 2003/2018 (INI), Final A5-0378/2003, 5 November, 2003, at 9 and 17; *Beyond Enlargement: Commission shifts European Neighbourhood Policy into higher gear*; Brussels, 12 May, 2004, appears in http://ec.europa.eu/world/enp/index_en.html.

6 European Parliament Report, *ibid.*

7 See for example, the Council Conclusions on Implementation of the Wider Europe – New Neighbourhood Initiative, 13 October, 2003.

8 Council of the European Union, *ibid.*, at 10.

the possibility of participation in key aspects of EU policies and programmes; (iv) increased financial support; (v) the promotion of cultural, educational, environmental, technical and scientific links; and (vi) support for legislative approximation with the *acquis*.⁹ For that purpose the ENP was designed to buttress (or replace as some scholars indicated) the regional dimension of the Barcelona Process with “differentiated bilateralism”.¹⁰

Under the aegis of the ENP, Action Plans, based on the Strategy Report¹¹ and the relevant Country Report,¹² are meant to provide a specific outline of reciprocal social, political and economic commitments between the EU and the relevant NC, covering political dialogue, economic and social development policy, trade, and justice and home affairs. The Council endorsed the Commission's Strategy Paper,¹³ and Action Plans were formulated between the EU and Armenia, Azerbaijan, Egypt, Georgia, Israel, Jordan, Lebanon, Moldova, Morocco, Tunisia, Ukraine, and the Palestinian Authority.¹⁴ For example, the EU-Israel Action Plan,¹⁵ which involves "a significant measure of economic integration and a deepening of political co-operation", provides for enhanced political dialogue and co-operation,¹⁶ increased economic integration,¹⁷

9 J. Kelley, ‘New Wine in Old Wineskins: Promoting Political Reforms through the New European Neighbourhood Policy’, 44/1 *Journal of Common Market Studies* (2006), 29, at 37.

10 Del Sarto and Schumacher, *supra* note 3, at 21, analyzing R. Aliboni, ‘The Euro-Mediterranean Partnership: Regional and Transatlantic Challenges’, Opinions Working Paper, Center for Transatlantic Relations, SAIS, Johns Hopkins University (Washington, 2003), at 8. See also Edwards, *supra* note 3, at 49.

11 The Strategy Paper outlines the vision of the ENP and its main components. See Commission of the European Communities, ‘Communication from the Commission, European Neighbourhood Policy Strategy Paper’, COM(2004), 373 final.

12 Country Reports assess the relevant bilateral relations, analyse the political, economic, social and institutional landscape of the neighbour concerned, and describe the prevailing state of affairs in areas of particular interest to the ENP.

13 Council of the European Union, *supra* note 5, at 10-13.

14 For the text of the Plans, see http://ec.europa.eu/world/enp/documents_en.htm

15 For the text, see http://ec.europa.eu/world/enp/pdf/action_plans/israel_enp_ap_final_en.pdf

16 To include facilitating efforts to resolve the Middle East conflict, the exploration of the possibility of joining other international instruments and protocols dealing with human rights issues, the fight against anti-Semitism, racism, xenophobia, Islamophobia, terrorism and the proliferation of weapons of mass destruction, conflict prevention and crises management.

17 See Article 2.2-2.3 of the Action Plan. The parties undertook to promote reciprocal trade and investment. Special emphasis is placed on the liberalisation of trade in services in general and financial services in particular

enhanced co-operation in justice and home affairs,¹⁸ greater integration of Israel to EU programmes and schemes,¹⁹ and improved people-to-people interactions.²⁰

Indeed, the EU “cannot expand *ad infinitum*”.²¹ This explains why, as Haukkala underscores, it launched the ENP: first avoiding enlargement (devising an alternative to further enlargements and postponing the NC’s accession aspirations) and second, continuing enlargement by other means (re-injecting the Union’s normative agenda and the application of conditionality through the logic of normative hegemony);. The EU thereby attempted to square the circle of relinquishing enlargement, while retaining the Union’s normative power in Europe and in its periphery.²² Hence, as Herdina of the EU Commission noted, the ENP offers the NCs “partnership-for-reform”,²³ placing them in the “realm between accession, integration and external relations policies”.²⁴ For that purpose the ENP relies, as Lavenex and Schimmelfennig

(Article 2.3 of the Action Plan). Article 2.3.1(2) of the Action Plan declares that the parties will complete all the necessary procedures for enabling Israel to participate in the Pan-Euro-Mediterranean cumulation of origin, as a part of the efforts to widen the Euro-Mediterranean links. They also undertook to develop trade promotion between Israel and other Euro-Mediterranean partners. Provisions are made for enhanced co-operation in other areas such as intellectual property rights and public procurement.

18 That includes, under Article 2.4 of the Action Plan issues of migration (lawful and unlawful), asylum policy, fighting terrorism and organized crime (including trafficking in human beings), cyber-crime, drugs, money laundering and other forms of economic crime (with special emphasis on financial of terrorism), co-operation in police areas, judicial co-operation (including extradition, data protection, mutual legal assistance, and enhanced co-operation between Israel agencies and EUROPOL).

19 Under Article 2.5 of the Action Plan enhanced co-operation is envisaged in the areas of transport, energy, the information society, environment, science and technology.

20 Through education, training, and widening youth connections, sport, culture and audio-visual instruments, and increasing the levels of co-operation in the civil society of both parties, by developing and strengthening the links between NGOs and other civil organisations. See Article 2.6 of the Action Plan.

21 E. Landaburu, Director General, DG External Relations, European Commission, ‘From Neighborhood to Integration Policy: Are There Concrete Alternatives to Enlargement?’, CEPS Conference “Revitalising Europe”, Brussels, 23 January 2006, http://ec.europa.eu/world/enp/pdf/060223_el_ceps_en.pdf, as analysed by Haukkala, *supra* note 3, at 1611-1616.

22 Haukkala, *supra* note 3, at 1611-1616, drawing on the work of Kelley, *supra* note 9.

23 A. Herdina, ‘Approximation of Laws in the Context of the European Neighbourhood Policy – A View from Brussels’, 9/3 *European Journal of Law Reform* (2007), 501, at 502.

24 V. Monastiriotis and M. Borrell, ‘Political and Political Economy Literature on ENP: Issues and Implications’, as analysed by W. Bartlett, N. Čučković, K. Jurlin, A. Nojković and V. Popovski, ‘Institutional Quality and Growth in EU Neighbouring Countries, SEARCH DELIVERABLE Interim Working Paper (Task 5.3.) on the

demonstrate, on tools of legalisation and socialisation, thereby extending European integration beyond formal membership and the EU's legal and territorial borders.²⁵ The outcome of that process may be the erection of fuzzy EU borders under which the internal and external frontiers of EU policy-making are less clear-cut than traditionally assumed.²⁶

The ENP may be contextualized under the broader themes of external governance and Europeanisation. Scholarship teaches us that external governance promotes a more institutional, structural view, addressing the external dimension of the integration process through the adoption of a sectoral optic on norms, policies and regulations and their external dimension.²⁷ External governance is thus shaped by issue-specific modes of governance, relying more heavily on networked forms of interaction than on the more hierarchical forms of policy export, as evident in the process of enlargement.²⁸

The theory of Europeanisation, which relates to the implementation of various diffusion processes of European ideas and practices across time and space,²⁹ is examined by scholars through the prism of the disciplines of International Relations, European Studies and Comparative Politics.³⁰ It nowadays forms a “distinctive research area in EU studies”,³¹ classified under the following typology: Membership

Current Status of Social, Cultural and Institutional Environment in Neighbouring Countries, January 2013, both appearing in <http://www.ub.edu/searchproject/results/working-paper-collection/>

25 Lavenex and Schimmelfennig, *supra* note 3, at 805-807.

26 Cardwell, *supra* note 3, at 220, analysing T. Christiansen, F. Petit and B. Tonra ‘Fuzzy Politics around Fuzzy Borders: The European Union's “Near Abroad”’, 35/4 *Co-operation and Conflict* (2000), 389.

27 Lavenex and Schimmelfennig, *supra* note 3, at 794-795. They argue that this should be contrasted with traditional EU external relations, which mostly adopt an agency-based perspective on the EU's performance as a foreign policy actor.

28 *Ibid.*

29 T. Flockhart, ‘The Europeanization or EU-ization? The Transfer of European Norms across Time and Space’, 48/4 *Journal of Common Market Studies* (2010), 787, at 788.

30 Gawrich *et al.*, *supra* note 3, at 1209-1210.

31 U. Sedelmeier, ‘Europeanisation in New Member and Candidate States’, 1/3 *Living Rev. Euro. Gov.* (2006), 1, at 4, <http://www.livingreviews.org/lreg-2006-3>.

Europeanisation, Accession Europeanisation and Neighbourhood Europeanisation.³²
The ENP belongs to the latter sub-category.

³² See Gawrich *et al.*, *supra* note 3, at 1209-1210 who offers this classification and who argue that Membership Europeanisation delineates the EU's impact on existing EU Member States; Accession Europeanisation is applied to states with a clear EU membership perspective; Neighbourhood Europeanisation affects the EU's neighbouring outsiders who have no immediate accession perspective.

3. Approximation of laws under the ENP

Approximation (or harmonisation) of laws may be defined as the process of making different domestic laws, regulations, principles and government policies and sectoral administrative guidance the same or substantially similar.³³ During this process, which can take place unilaterally, bilaterally or multilaterally, features of different legal systems are reconciled.³⁴

The EU is a fine example of regional integration under which extensive harmonisation of laws was and is being performed. In the EU this process has gone beyond merely reducing legislative differences and adopting common legislative instruments, to enter the realm of harmonizing the Member States' policies and regulatory schemes. Approximation of laws within the EU may thus be seen as a co-operative process of creating a quasi-Federal European legal system, which contributes, in turn, to the positive integration of the Internal Market, and ultimately to socio-political integration.³⁵

Approximation of EU laws is also highly relevant in the realm of enlargement. Acceptance of the *acquis* in its entirety is an important demand the EU has placed on acceding states,³⁶ which have had to accept the *acquis* as a *fait accompli*.³⁷ The adoption of the *acquis* is, however, a phenomenon that is not confined to the EU Member States, the EU treating it as an intrinsic part of its foreign policy.³⁸ Extensive approximation of laws to the *acquis* was also carried out under the aegis of the Agreement establishing the European Economic Area³⁹ and by Switzerland, in the

33 G. Mayeda, 'Developing Disharmony? The SPS and TBT Agreements and the Impact of Harmonization on Developing Countries', 7/4 *Journal of International Economic Law* (2004), 737. See also D. Leebron, 'Claims for Harmonization: A Theoretical Framework', 27 *Canadian Business Law Journal* (1996), 63.

34 M. Boodman, 'The Myth of Harmonization of Laws', 39 *American Journal of Comparative Law* (1991), 699, at 703.

35 D.M. Walker, *The Oxford Companion to Law* (1980), at 72.

36 Harpaz and Herman, *supra* note 1.

37 *Ibid.*

38 R. Petrov, 'Exporting the *Acquis Communautaire* into the Legal Systems of Third Countries', 13/1 *European Foreign Affairs Review* (2008), 33, at 52.

39 T. van Stiphout, 'Homogeneity vs. Decision-Making Authority in the EEA Agreement', 9/3 *European Journal*

bilateral EU-Swiss context.⁴⁰ Moreover, non-European countries, as well as regional entities, have aligned their legislation and regulatory regimes to EU laws, either contractually or autonomously.⁴¹

The extensive usage of the *acquis* by the EU in its external relations has been widely researched, mainly from the perspective of external governance theory⁴² and the Multi-Level Governance approach.⁴³ The weight given in the literature, however, to the external impact of EU foreign and its exportation of laws and norms under these theories has diverted much-needed attention from the recipient side of EU *acquis*. This Working Paper is meant to provide a comprehensive analysis, avoiding an EU-centric perspective.

This chapter is focused on approximation of laws under the ENP. It must, however, be emphasized that the advancement by the EU of approximation of laws beyond the contexts of membership and accession and towards other neighbours is not a new phenomenon. For example, as of the 1990s, EU-Med relations include a component of approximation of laws. Each and every Euro-Med Association Agreement concluded between the EU and the non-EU, Mediterranean countries provided a general legal basis for the approximation of laws between the respective parties.⁴⁴ Such general call for approximation of laws was supported by more specific provisions scattered throughout these Agreements, calling for the approximation of laws in specific sectors.⁴⁵ A fine example of such a legal foundation is the EU-Israel Association

of Law Reform (2007), 431.

40 R. Schwok, 'Switzerland's Approximation of its Legislation to the EU *acquis*: Specificities, Lessons and Paradoxes', 9/3 *European Journal of Law Reform* (2007), 449.

41 M. Knodt, 'International Embeddedness of European Multi-Level Governance', 11(4) *Journal of European Public Policy* (2004), 701.

42 Lavenex, *supra* note 3, especially at 683.

43 L. Hooghe and G. Marks, *Multi-level Governance and European Integration* (2001); F. Schimmelfennig and W. Wagner, 'Preface: External Governance in the European Union', 11(4) *Journal of European Public Policy* (2004), 657; E.M. Smith, 'Toward a Theory of EU Foreign Policymaking: Multi-Level Governance, Domestic Politics, and National Adaptation to Europe's Common Foreign and Security Policy', 11(4) *Journal of European Public Policy* (2004), 740.

44 See, for example, Article 48 of the EU-Egypt Association Agreement (2001).

45 Such as intellectual property, agriculture, standards, financial services, and combating drugs-trafficking and money laundering.

Agreement.⁴⁶ This Agreement includes a general provision that stipulates: "The Parties shall use their best endeavours to approximate their respective legislations in order to facilitate the implementation of this Agreement",⁴⁷ to be supported by a call for approximation of laws in specific sectors, such as intellectual property,⁴⁸ agriculture,⁴⁹ standards,⁵⁰ financial services,⁵¹ as well as combating drugs-trafficking⁵² and money laundering.⁵³

Although the call for approximation of laws was couched in neutral terms in the various Euro-Med Association Agreements, the EU did not perceive it as a co-operative process among equal states, as it had been perceived in the context of the Internal Market, but as an asymmetric process under which the Mediterranean neighbours were required to bring their legislation closer to that of the EU.⁵⁴

This legislative pressure exerted by the EU has not gone unnoticed by the non-EU Mediterranean countries. Take for example the case of Israel. Since the conclusion of the EU-Israel Association Agreement in 1995, Israel has moved in the direction of EU legislation in certain areas, including standards,⁵⁵ competition law,⁵⁶ environmental law,⁵⁷ animal protection,⁵⁸ and money laundering legislation.⁵⁹ The EU for its part has

46 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, on the one part, and the State of Israel, of the other part, Official Journal L 147, June 21, 2000, p. 0003-0171.

47 See Article 55 of EU-Israel Association Agreement (1995).

48 See, for example, Article 39 of the EU-Israel Association Agreement (1995).

49 See, for example, Article 46 of the EU-Israel Association Agreement (1995).

50 See, for example, Article 47 of the EU-Israel Association Agreement (1995).

51 See, for example, Article 48 of the EU-Israel Association Agreement (1995).

52 See, for example, Article 56 of the EU-Israel Association Agreement (1995).

53 See, for example, Article 56 of the EU-Israel Association Agreement (1995).

54 See D. Geradin and N. Petit, 'Competition Policy and the Euro-Mediterranean Partnership', 8/2 *European Foreign Affairs Review* (2003), 153, at 167: The area of competition law is a case in point, where the EU expects the NCs' deep convergence of competition rules and regulatory practices.

55 E. Hadar, *The European Union and its Activities in Product Certification, Standardization and Accreditation* (Shaba, 2002) [Hebrew].

56 See M. Gal, 'Size Does Matter: The Effects of Market Size on Optimal Competition Policy' 74 *University of Southern California Law Review* (2001), 1437, at 1477.

57 See A. De-Shalit, 'Europe, Israel and Environmental Policies: Lessons to be Learnt', in A. De-Shalit (ed.), *The Environment: Between Theory and Practice*, (Oxford University Press, Oxford, 2000).

continued under the ENP to exert further legislative pressure in the area of provision of services.⁶⁰

In that respect the ENP only reinforced these legislative pressures while expanding its geographical ambit to include non-Mediterranean, NCs.⁶¹ In return for enhanced trade and investment relations, with resultant improved access to the European market, the ENP requires the NCs, *inter alia*, to align their legislation, to an extent to be negotiated, with its *acquis*. Such approximation of legislation may thus be seen, to a certain extent, as a *sine qua non* for the NCs enhanced participation in the Internal Market, a theme to be explored below.

The various Action Plans, signed under the aegis of the ENP with the NCs, serve in that respect as a template for approximation,⁶² accentuating the call upon the NCs to approximate their laws and converge their policies, standards, and regulatory schemes with those of the EU. The EU-Israeli Action Plan,⁶³ for example, states that the

58 G. Harpaz and R. Frid, 'Case Note - The Israeli Supreme Court Judgment on Force-Feeding of Geese' 10/1 *International Trade Law and Regulation* (2004), N-2-3.

59 See Explanatory Notes of the 2000 money laundering legislation, Number 2809, 1999, 420, at 422. For analysis, see L. Herman, 'World Money Laundering and Israel', 117 *The Israeli Tax Quarterly* (2002), 7 [Hebrew].

60 B. Hoekman, 'From Euro-Med Partnership to European Neighborhood: Deeper Integration, *à la carte* and Economic Development', Working Paper No. 103, The Egyptian Center for Economic Studies, July 2005, at 13 appearing in http://www.gem.sciences-po.fr/content/publications/pdf/Hoekman_EU_neighborhood_ECES.pdf, 23: In 2005 a framework protocol for negotiations on service was agreed in the context of the European Mediterranean Policy. The Protocol calls for progressive alignment with the *acquis* in the area of services - see Commission of the European Communities, Framework Protocol of Istanbul for the liberalization of trade in services among Euro-Mediterranean partners, Mimeo.

61 See Casier, *supra* note 3, at 38: "Rule transfer is at the heart of the ENP". See also F. Schimmelfennig and U. Sedelmeier, 'Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe', 11/4 *Journal of European Public Policy* (2004), 661, who define rule transfer as "the adoption of EU rules in non-member states, i.e. their institutionalisation at the domestic level".

62 A. Albi, 'The EU's "External Governance" and Legislative Approximation by Neighbours: Challenges for the Classic Constitutional Templates', 14/2 *European Foreign Affairs Review* (2009), 209.

63 The Action Plan with Israel was endorsed by the Commission, by the Government of Israel and by the EC-Israel Association Council. The EU-Israel Action Plan, which involves "a significant measure of economic integration and a deepening of political co-operation", is aimed at the fulfilment of the [1994] Essen Declaration in which the EU announced its willingness to establish special relations with Israel. More specifically, the EU-Israeli Action Plan provides for enhanced political dialogue and co-operation, increased economic integration, enhanced

"convergence of economic legislation" and "legislative and regulatory approximation" on the part of the State of Israel⁶⁴ is linked to further economic and political integration. The same legislative agenda is embedded in other Action Plans signed under the ENP. The EU-Jordan Action Plan, for example, provides that "The implementation of the Action Plan will significantly advance the approximation of Jordanian legislation, norms and standards to those of the EU".⁶⁵ Similar provisions are to be found in the EU-Morocco Action Plan.⁶⁶

Subsequent EU official statements,⁶⁷ working papers and reports,⁶⁸ issued under the ENP, all reiterate the link between the offer of enhanced trade and investment relations and legislative and regulatory convergence with the EU. In that way the EU attempts to use the ENP, in general, and the concept of approximation of laws, in particular, as a transformative instrument to promote economic and resultant socio-political reforms in the NCs.⁶⁹ The call for approximation of laws was thus utilized as one component of the EU's external strategy of positive conditionality.⁷⁰

co-operation in justice and home affairs, greater integration of Israel to EU programmes and schemes, and improved people-to-people interactions.

64 *Supra* note 15, at 9, 14-15, 16 and 23.

65 Section I of the EU-Jordan Action Plan (2004).

66 Section I of the EU-Morocco Action Plan (2004).

67 See, for example D. Hübner, The Essential Role of the Community Conditionality in the Triumph of Democracy and Market Economy, Conference on European Strategies for Promoting Democracy in Postcommunist Countries, Vienna, 21 January, 2006, SPEECH/06/27, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/27&format=HTML&aged=0&language=EN&guiLanguage=en>

68 See, for example, Staff Working Paper, 'European Neighbourhood Policy, Country Report, Israel' (COM(2004)373 final), Brussels, 12 May 2004, SEC(2004) 568.

69 The attempt of a foreign power to conduct social engineering and nation-building campaigns is a multi-faceted task. One aspect of that task is the unification of diverse ethnic groups within a state. Another dimension places emphasis on improvement in governance by implementing the rule of law, fighting corruption, installing democracy, while a third aspect focuses on economic construction, see A. Etzioni, 'A Self-restrained Approach to Nation Building by Foreign Powers' 80(1) *International Affairs* (2004), 2.

70 For the use of positive conditionality in the relations between the EU and its vicinity, see N. Tocci, 'Does the EU Promote Democracy in Palestine?', in M. Emerson (ed.), *Democratisation in the European Neighbourhood*, Brussels, CEPS, 2005; N. Tocci, 'Conflict Resolution in the Neighbourhood: Comparing the Role of the EU in the Turkish-Kurdish and Israeli-Palestinian Conflicts', 10/2 *Mediterranean Politics* (2005).

It is submitted that the implementation of the concept of approximation of laws by the NCs may provide various positive outcomes for both the EU and the NCs.⁷¹ One of the underlying paradigms of international and regional trade is that proximity between the provisions of two legal systems may facilitate reciprocal trade relations, while significant differences between legal norms may constitute a barrier to trade.⁷² More specifically, such a legislative course of action may reduce information costs,⁷³ allow traders to utilize economies of scales,⁷⁴ and render the international trading arena fairer,⁷⁵ more predictable and less costly, thereby facilitating and intensifying reciprocal trade⁷⁶ and attracting more foreign investment.⁷⁷ All these advantages are applicable to both the EU and the NCs.

More specifically, from the perspective of the EU, approximation of laws may provide it with geo-political gains, to be explored below. In addition, it may grant it strategic trade benefits. The area of competition law is an instructive case in point. The EU expects its NCs to converge their competition rules and regulatory practices with those of the EU. The expected benefits for the EU, detailed below by Geradin and Petit, are applicable, *mutatis mutandis*, to other areas of law: "...harmonization around its rules generates many benefits, such as saving transaction costs for transnational economic actors and facilitating trade flows between the EC and the Partner countries. At the time of growing internationalization of competition rules, it

71 Harpaz, *supra* note 3 (2006).

72 But see Boodman, *supra* note 34.

73 Enabling market entrance even for relatively small sales, see Leebron, *supra* note 33, at 88. But compare with Boodmand, *supra* note 34, at 715: The absence of harmonisation of laws may not necessarily increase in any significant manner the costs of inter-jurisdictional business.

74 Leebron, *supra* note 33: If a manufacturer faces significantly different requirements in each jurisdiction for which it manufactures, it will not be able to achieve economic of scales beyond its market share in one jurisdiction.

75 Leebron, *supra* note 33.

76 A. Reich, 'Globalization and Law: The Future Impact of International Law on Israel's Commercial Law' 17 *Bar-Ilan Legal Studies*, (2001), 17. See also Tenth Anniversary of the Euro-Mediterranean Partnership: A Work Programme to Meet the Challenges of the Next Five Years, Communication from the Commission to the Council and the European Parliament, April 25, 2005, Section 2.2(c): Approximation of technical legislation in the area of standards and conformity assessment bears an important potential in terms of trade creation, investment attraction and integration of economies. The objective is to promote trade by aligning standards and technical requirements, to reduce costs related to duplicative testing and certification and thus to facilitate market access.

77 Geradin and Petit, *supra* note 54, at 173.

might also be of a strategic importance for the EC to create a constituency of States sharing its vision of competition policy and effectively using rules patterned on EC competition law in their domestic legal orders. ...In this respect, the exportation of EC competition rules through the negotiation of regional trade agreements could help achieve a strategic goal. The creation of a web of countries sharing the same competition law principles as the EC might help the latter gain a stronger negotiating position in the future discussion over competition rules that will take place within the WTO framework...deep convergence offers benefits to EC operators willing to invest in Partner countries. Regulatory convergence reduces transaction costs for EC operators and facilitates the development of economic activities on the markets that have been made accessible thanks to the trade provisions of the association agreements”.⁷⁸

From the NCs perspective, and as Bartlett, Čučković, Jurlin, Nojković and Popovski of the SEARCH Consortium demonstrate, the adoption of the *acquis* improves their institutional quality,⁷⁹ and such an outcome may contribute, according to the analysis of Hlepas, to their economic development.⁸⁰ Indeed, the premise underlying this legislative campaign under the ENP is, as Hoekman contends in a different context, that approximation will facilitate the NCs’ economic development.⁸¹ The premise underlying the ENP is that the pursuance of differentiated convergence with EU norms and legislation will help achieve development.⁸² Such development may result, first and foremost, from the fact that a wide-scale approximation of laws may allow NCs’ undertakings the much-desired improved access to the Internal Market.

The State of Israel is a case in point. Let us take for example the sector of financial services. Israeli service providers are keen to have a stronger foothold in the European

78 Geradin and Petit, *ibid.*, at 155-157 and 171. They argue in addition that the extension of the territorial scope of the EU competition laws will allow the EU to avoid the problematic extraterritorial application of its rules.

79 Bartlett *et al.*, *supra* note 24.

80 N. Hlepas, ‘The Quality of National Institutional Environment of EU and Neighbouring Countries in Comparative Perspectives’, Task 5.3, SEARCH, *supra* note 24.

81 Hoekman, *supra* note 60.

82 *Ibid.*, at 13.

Market.⁸³ For that to happen, a more liberal legal regime is required in order to regulate reciprocal trade in financial services. The EU will not, however, subscribe to such a regime under the ENP before it is satisfied that the Israeli legal regime pertaining to the provision of financial services and to the regulation of such a sector is similar to that of the EU.⁸⁴ Approximation of Israeli legislation by the EU standards on prudence, stability, accountancy and supervisory issues, should be seen, as Herman contended, as a requirement to obtain the EU Single Passport status.⁸⁵ The alignment of Israeli laws with those of the EU may thus provide Israeli service providers with the much-desired access to the European market, while a failure to move in that direction may prevent them from gaining such access.

Another example of the link between approximation of laws and market access is the export of Israeli electronic goods to the EU. Israel exporters enjoy a certain competitive advantage in this sector, and it is only natural that they would want to realize such an advantage in the European market. Yet, in order to gain access to this market, and to realize their Ricardian advantage, Israeli producers must first comply with EU environmental standards.⁸⁶ Such compliance may result, in turn, in the incorporation of EU-based standards in the Israeli municipal legislation.

83 See L. Herman 'Two for Tango: European Union Free Trade Areas in Services and Israel', Working Paper 42/2005, The Helmut Kohl Institute for European Studies, The Hebrew University Jerusalem.

84 Herman, *ibid*: A EU-Israeli free trade area in services would promote the harmonisation and approximation of legislation by the former. Since the removal of remaining trade barriers between the parties entails at least a certain Israeli penetration into the Internal Market, Israel must harmonize appropriate European legislation, practices and standards, in order to be in conformity with the Single Market framework. Harmonisation should also be used as a tool to tackle issues such as state aid and competition policy, to ensure that European services suppliers are not discriminated against their Israeli counterparts. Harmonisation of at least certain areas of EU law should not be seen as overly difficult to digest. Approximation of European law can take a gradual course, and be linked to a future promise for greater integration into the European Single Market. From the EU perspective, harmonisation will provide the EU with better market access into its NCs, will provide prosperity that will guarantee social, economic and political stability and will reduce dependency on the European Union. In addition, the inclusion of a broad array of countries, adhering to European standards and codes, will serve the European Union when multilaterally tackling issues such as rule-making, standardization and more (in particular *vis-a-vis* the United States).

85 *Ibid*.

86 For the EU legislation, see Directive 2002/96/EC Waste from Electronic and Electrical Equipment; Directive 2002/95/EC Restrictions on Hazardous Substances. The Israeli Ministry of Trade and Industry issued a guide for Israeli manufacturers to assist them in complying with the EU norms, see

Yet another case that demonstrates that the alignment of Israeli legislation would provide Israeli exporters with better access to the European market is the area of Anti-Dumping. Anti-Dumping measures are considered to be one of the more popular and effective protectionist weapons in the arsenal of the EU. An extensive body of literature exists, analysing their unfairness and detrimental consequences.⁸⁷ It is argued that the EU Anti-Dumping Policy is enforced politically and is administered opaquely. Consequently, it is legally unpredictable and has been captured by vested interests. In the majority of cases, international price discrimination and sales below cost, the two manifestations of dumping conducted by non-European producers, are tackled without regard to the existence of either predatory intent or capabilities on the part of the foreign exporter, and with almost exclusive concern for whether the EU industry is on the decline. Consequently, the EU Anti-Dumping Policy is overly interventionist and to a certain extent devoid of economic rationale. At times it targets innocuous and beneficial non-European trade practices and consequently produces legal and commercial unpredictability and resultant injustice for non-EU exporters, including Israeli ones.⁸⁸ Due to these characteristics, the EU Anti-Dumping Policy may have a chilling effect on Israeli competitors, as it may on any NCs exporters. It may force them to reduce exports and increase prices, thereby insulating the EU market from such competition. An efficient Israeli exporter may lose the competitive battle to inefficient EU undertakings.

The potentially detrimental effect of the EU Anti-Dumping instrument calls for reform that would entail its more restrained utilization within the EU-Israel reciprocal trade.⁸⁹ The ENP provides a golden opportunity for such a reform.⁹⁰ It may, however, be safely predicted, based on the EU's past experience in other contexts, that the EU will not be willing to discuss with Israel such a reform, until Israel fulfils the

[http://www.tamas.gov.il/NR/rdonlyres/BA4A47D4-BE50-4F84-9F08-](http://www.tamas.gov.il/NR/rdonlyres/BA4A47D4-BE50-4F84-9F08-11DA89BA012C/0/EUROPE_TEKEN_SOFI.pdf)

[11DA89BA012C/0/EUROPE_TEKEN_SOFI.pdf](http://www.tamas.gov.il/NR/rdonlyres/BA4A47D4-BE50-4F84-9F08-11DA89BA012C/0/EUROPE_TEKEN_SOFI.pdf)

87 See, for example, A. Reich, 'Reform in the Dumping and Subsidies Agreements – Lessons from the Israeli Experience', 3 *Kiryat Ono Academic College Law Review* (2003), 391 [Hebrew].

88 G. Harpaz, "'Dumping" the Anti-Dumping Instruments in the Trade Relations between the European Union and the State of Israel?: The European Union's Perspective", 39/3 *Journal of World Trade* (2005), 445.

89 G. Niels and A.T. Kate, 'Trusting Antitrust to Dump Antidumping: Abolishing Antidumping in Free Trade Agreements without Replacing it with Competition Law', 31/6 *Journal of World Trade* (1997), 29.

90 Harpaz, *supra* note 88.

following three conditions: (i) adopts a mutually agreed, harmonized competition regime, based on the EU model, and the effective enforcement of that regime by the Israeli Antitrust Authority against anti-competitive practices conducted by Israeli competitors; (ii) attains a high degree of economic convergence and a significant degree of liberalisation of all factors of production between the parties, based on the EU *acquis*, and; (iii) adopts common disciplines relating to public procurement and state aid, based again on the EU *acquis*.

In conclusion, in various areas of commerce, aligning one's legislation with that of the EU may constitute a prerequisite for the grant of improved accessibility for NCs' undertakings to the Internal Market. The NCs cannot ignore that prospect.

It is nowadays very difficult for a small trading country to thrive without joining a regional economic block. This applies *a fortiori* to Israel, due to its small economy and population, scarce resources⁹¹ and unique geo-political landscape. The possibility that Israel "shall dwell alone and shall not be reckoned among the nations"⁹² does not represent a viable option. Israel needs regional economic backing.⁹³ The ENP, in general, and compliance with its requirement of approximation of laws with those of the EU, in particular, may partially satisfy that need. Such conclusion applies also to

91 But see the discovery of natural gas in the territorial waters of Israel, <http://www.timesofisrael.com/gas-from-tamar-deposit-pumped-into-israeli-market/>

92 Numbers 23:9.

93 T. Einhorn, 'The Role of the Free Trade Agreement between Israel and the EEC: The Legal Framework for Trading with Israel, Between Theory and Practice (Baden-Baden, Nomos, 1994), 52, at 85-87: "Foreign trade for Israel is a sine qua non. Limited natural resources make her dependent upon imports. The funding of the imports should come insofar as possible from exports, since otherwise capital has to be imported, through grants or loans, to make up for the indispensable foreign currency expenditure. In order to compete in export markets, the domestic industry must produce products that are competitive in both quality and price. Exposing the domestic market to competing imports obliges the domestic producer to be efficient in order to survive the market conditions. The small size of the domestic market dictates that, in the absence of competing imports, there would hardly be any competition at all in many sectors....Furthermore, mass production is often essential for an industry to be competitive. Israel is too small to provide a market for large-scale domestic production. To reap the benefits of size, the industry must engage in exports...A substantial share of the goods imported into Israel are consumed by other industries. Exporting industries that must use as inputs goods manufactured by protected industries are thereby made uncompetitive..."

those NCs, such as Morocco, Tunisia and Algeria, which are heavily dependent on trade with and investment from the EU.⁹⁴

Approximation of laws may also benefit the executive branches of the NCs. A case in point is the Israeli Executive. Despite its overall fine qualities,⁹⁵ it lacks, in certain important areas, the required management and workforce to face the legislative challenges stemming from complex global and regional realities.⁹⁶ In a few instances such a state of affairs has already caused delays in implementing international norms, and the resultant inclusion of the State of Israel in various "black lists".⁹⁷ Approximating Israel's laws with those of the EU may assist in that regard, by providing Israeli policy makers with ready-made,⁹⁸ high-quality legislation.⁹⁹ It may also provide Israel with better protection from domestic rent-seekers,¹⁰⁰ and enhance her credibility in European and international fora.¹⁰¹

Furthermore, the NCs are already in the midst of a process of adapting their legislation to norms created by multilateral organisations, such as the World Trade Organisation. (Israel is also an OECD member and hence it aligns its standards to that of the OECD too.)¹⁰² Approximating the laws of the NCs with those of the EU may therefore be seen to be a natural evolutionary step towards meeting multilateral benchmarks.

94 See Chapter 4.2 for an analysis of that dependence.

95 *Supra* note 68.

96 The area of Anti-Dumping legislation is a case in point.

97 The area of money laundering is only one case in point. See Herman, *supra* note 59.

98 Boodmand, *supra* note 34, at 718: Jurisdictions which do not want to devote resources to lengthy law reform projects can "free-ride" upon the law reform project of other jurisdictions.

99 *Ibid.*

100 See A. Nov, 'Wider Europe: The EU State Aid Regime and its Opportunity for the Southern Mediterranean Countries', a paper presented in the Sixth Mediterranean Social and Political Research Meeting, Montecatini Terme, 16-20 March, 2005, at 7-8: "...it may be beneficial for a country that provides tax incentives to FDI as a result of political pressure, to relinquish its sovereignty and be bound by a global or regional regime that will require that country to abstain from providing tax incentives".

101 See Geradin and Petit, *supra* note 54, at 174, for the application of this argument in the area of competition law.

102 A. Magen, 'Israel and the Many Pathways of Diffusion', 35/1 *West European Politics* (2012), 98, at 105.

Scholarship has taken cognizance of the various potential advantages of the approximation of the NCs' laws to those of the EU.¹⁰³ A case in point is the State of Israel. Let us take, for example, the area of competition law.¹⁰⁴ The adoption of competition paradigms, doctrines, and models of enforcement prevailing in the EU may provide the State of Israel, as Gal contends, with a ready-made basis for her competition law, and a large, comprehensive and clear corpus of case law and commentary, assisting her in the reduction of trade barriers and saving her adaptation costs.¹⁰⁵ The adoption of EU competition provisions may also create a network externality.¹⁰⁶ Similar benefits may be derived by other NCs willing to approximate their competition laws with those of the EU.¹⁰⁷ Other areas where research has been conducted on the benefits of aligning Israel's laws with those of the EU include commercial law,¹⁰⁸ the provision of services in general,¹⁰⁹ and financial services in particular,¹¹⁰ state aid,¹¹¹ environmental law,¹¹² animal rights,¹¹³ consumer protection,¹¹⁴ and Anti-Dumping.¹¹⁵

The ENP's ambitious agenda, coupled with its ten years of operation, when examined in the light of the potential benefit analysed above, raised expectations for comprehensive alignment of legislation by the NCs with resultant significant socio-economic reforms. Yet the results of the ENP on the eve of its tenth anniversary are much less impressive. Although there is some evidence of the intensification of that

103 See Reich, *supra* note 76.

104 Gal, *supra* note 56; M. Hirsch, E. Inbar and T. Sadeh (eds.), *The Future Relations between Israel and the European Communities - Some Alternatives* (Bursi, 1996), at 119.

105 Gal, *supra* note 56, at 1438.

106 *Ibid.*, at 1477: As more decisions that apply the law to various factual settings begin to accumulate, legal certainty is enhanced. See also Geradin and Petit, *supra* note 54, at 172-174.

107 See Geradin and Petit, *supra* note 54.

108 Reich, *supra* note 76.

109 Herman, *supra* note 83.

110 *Ibid.*; A. Reich, 'Regulating Competition in the Insurance Sector: Lessons from the European Community', 16 *Bar-Ilan Law Studies* (2001), 301 [Hebrew].

111 Nov, *supra* note 100.

112 *Supra* note 86.

113 *Supra* note 58.

114 Hirsch *et al.*, *supra* note 104, at 115-116.

115 Harpaz, *supra* note 88.

practice by some of the NCs,¹¹⁶ extensive scholarship, including that which stems from the SEARCH Consortium, demonstrates that such a trend is limited, partial, selective and uneven, both across countries¹¹⁷ and sectors.¹¹⁸

The high hopes raised when the ENP was first launched for a comprehensive, systematic and all-encompassing legislative alignment process with resultant economic and political transformative consequences were thus not realized.¹¹⁹ Even the EU itself was recently forced to acknowledge that state of affairs, having to revise the ENP: “Recent events and the results of the review have shown that EU support to political reforms in neighbouring countries has met with limited results”¹²⁰ and progress across the NCs “has been very uneven. In many partner countries, wide-ranging reforms were sometimes prevented or slowed by vested political or economic interests. In some cases, there was some backsliding of reforms”.¹²¹

116 Lavenex and Schimmelfennig, *supra* note 3, at 807.

117 See Bartlett *et al.*, *supra* note 24 who established with respect to Ukraine and Moldova that “the EU role has so far failed to promote transformative processes and to encourage the evolution of institutions”. See also Sasse, *supra* note 3, at 313-314: “In the case of Moldova, a country with a newly discovered interest in closer links with the EU, the ENP has helped reform-oriented Moldovan politicians to gain attention and credibility. Furthermore, the ENP has encouraged the co-operation of Ukraine and Moldova over Transnistria and turned the EU into a new actor of conflict management in the region”.

118 See Bartlett *et al.*, *supra* note 24 who argue that the ENP has not yet played an important role as a transformative power. See also Casier, *supra* note 3, at 41-49, referring to an ENP Implementation Report that singled out Ukraine, Moldova, Morocco and Israel as the countries where progress on the Action Plans has been such “that a particular deepening of relations with the EU is warranted”, Commission of the European Communities, Implementation of the European Neighbourhood Policy in 2007. COM(2008)164. Casier argues in 41-42 that Israel has used the ENP to establish closer connections to the EU, but has done so in a selective way. Israel has progressed in very specific fields: it has adopted a strategy to liberalise its electricity market and has converged its conformity rules of industrial products to that of the EU.

119 For support, see T. Bodenstein and M. Furness, ‘Separating the Willing from the Able: Is the European Union’s Mediterranean Policy Incentive Compatible?’, 10/3 *European Union Politics* (2009), 381, at 396: The ENP, like the EMP, has failed to anchor political and economic reforms in the Mediterranean Basin.

120 Join Communication by the High Representative of the Union For Foreign Affairs and Security Policy and the European Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions. A new response to a changing Neighbourhood: A review of European Neighbourhood Policy, Brussels, 25 May 2011, COM(2011) 303, at 1.

121 Join Communication to the European Parliament, the Council, the European Economic and Social Committee of the Regions, European Neighbourhood Policy: Working towards a Stronger Partnership, Brussels, 20.3.2013, JOIN(2013) 4 final, at 3.

The remainder of this Working Paper is devoted to an analysis and typology of the various factors that hindered the more meaningful realization of the approximation of laws agenda embodied in the ENP.

4. Obstacles, challenges and inhibitions

Drawing on scholarship that examines the effectiveness of “accession Europeanisation” and relying on the work conducted in the spheres of external governance and Europeanisation, this chapter will analyse the various factors that hinder the more meaningful realization of “Neighbourhood Europeanisation”, classifying them according to whether they pertain to the ENP itself, to the EU, to the NCs, or to the interface between the EU and its NCs.¹²²

4.1. Factors relating to the ENP

This sub-Section distils and analyses those ENP-related factors which can partially account for the limited effectiveness of the ENP as an engine of approximation of laws.

4.1.1. Lack of a “Golden Carrot”

Drawing on the logic of consequentialism (as opposed to the sociological logic of appropriateness), it is argued that one of the more cogent explanations for the willingness of a recipient country to align its legislation relates to what Casier termed the “external incentives model”.¹²³ The attractiveness (objectively and subjectively perceived) of the incentive offered by the other country is thus of paramount importance.

122 For earlier works, see Gawrich *et al.*, *supra* note 3, at 1216 and 1229-1230 who examined the implementation of the EU–Ukraine Action Plan, focusing on democracy promotion and economic co-operation and came to the conclusion that the effective implementation of it depends on five independent variables – content and clarity of EU demands, incentives and rewards, direct financial support, forms and degree of linkage, and local perception of demands and rewards. See also Sasse, *supra* note 3, at 300 who relies on Schimmelfennig and Sedelmeier 2005 in concluding that there has been a trend to conceptually reduce the notion of effective conditionality to two primary conditions: consistent and credible conditions and low domestic adoption costs.

123 Casier, *supra* note 3, at 43.

This is most probably the best explanation in the context of EU enlargement policy,¹²⁴ which proved itself to be a highly effective instrument for advancing internal reforms in the acceding countries: “the reform process in many Central and Eastern European countries has taken a *sui generis* turn precisely because of the external EU option, that is, the possibility of membership...this option has deeply affected the incentives and opportunities of reformers throughout Central and Eastern Europe”.¹²⁵

Indeed, as Bartlett, Čučković, Jurlin, Nojković and Popovski of the SEARCH Consortium succinctly postulate, the prospect of accession, the positive accession conditionality and the accompanying process of Europeanisation of economic policies and governance structures has acted as a powerful drive of institutional convergence, especially in the pre-accession period.¹²⁶ Thus scholarship teaches us that the very accession horizons led to a robust EU impact, even when the membership incentives lacked credibility.¹²⁷ The degree of willingness on the part of the third country government to align its policies was proven to be of less importance in face of clear conditionality for membership.¹²⁸

As analysed above, the ENP was modelled on the institutional and procedural experience of the EU’s enlargement policy:¹²⁹ “...the ENP is clearly an effort to extend, or even emulate, the success of enlargement”.¹³⁰ As such it could also have raised high expectations of such an extensive transformative process. Yet, despite its resemblance to the enlargement ethos, instruments, procedural and institutional

124 Schimmelfennig and Sedelmeier, *supra* note 61.

125 T. Plumper and W. Mattli, ‘The Internal Value of External Options: How the EU Shapes the Scope of Regulatory Reforms in Transition Countries’, 5/3 *European Union Politics* (2004), 307, at 324.

126 Bartlett *et al.*, *supra* note 24.

127 F. Schimmelfennig and H. Scholtz, ‘EU Democracy Promotion in the European Neighbourhood: Political Conditionality, Economic Development and Transnational Exchange’, 9/2 *European Union Politics* (2008), 187, at 207.

128 P. Hille and C. Knill, “‘It’s the Bureaucracy, Stupid’” The Implementation of the *Acquis Communautaire* in EU Candidate Countries, 1999–2003’, 7/4 *European Union Politics* (2006), 531, at 547.

129 Sasse, *supra* note 3, at 296. See also Edwards *supra* note 3, at 52; F. Bicchieri, “‘Our Size Fits All’: Normative Power Europe and the Mediterranean”, 13/2 *Journal of European Public Policy* (2006), 286, at 287: “Much of the EU’s action can be characterized as an unreflexive attempt to promote its own model because institutions tend to export institutional isomorphism as a default option”, as analysed by Edwards, *supra* note 3, at 52.

130 Kelley, *supra* note 9, at 49.

aspects, the ENP was meant to serve, as some scholars including Artelaris, Kallioras and Petrakos of the SEARCH Consortium demonstrate, as an accession avoidance instrument.¹³¹ The ENP may thus be seen as a form of EU external governance, which consists of selective extension of its legal boundaries (norms, rules and policies), while precluding the opening of its institutional boundaries (through full-fledged membership);¹³² in the words of Commissioner Ferrero-Waldner: "...[the] European Neighbourhood Policy is not about membership...That's a very clear answer".¹³³ In that respect the ENP purposely attempted to avoid any "rhetorical entrapment" with respect to those NCs who possess membership aspirations.¹³⁴

The lack of accession horizon inherent in the ENP did not provide pro-reform actors in the NCs with the required leverage to overcome internal opposition to such reforms. (For the analysis of pro and anti-reform actors in the NCs, see Chapter 4.3 below). Consequently, the ENP by and large did not succeed in serving as an effective anchor of legislative and other reforms:¹³⁵ "...without the membership perspective, the ENP countries may not be motivated to undertake domestic reforms".¹³⁶

This conclusion is supported by the work of Bartlett, Čučković, Jurlin, Nojković and Popovski who demonstrated, drawing on the analysis of Moldova and Ukraine, that due to the lack of an accession horizon, ENP countries have a much weaker institutional convergence path than the acceding countries. They contrasted the outcome with the more effective EU external governance over Croatia, given Croatia's strong incentive for membership.¹³⁷ Their work is in line with the analysis of Magen who focused on Israel's alignment of legislation with the ENP and who

131 P. Artelaris, D. Kallioras and G. Petrakos, European Policy Brief, 'Trade Flows and Localization Choices: Policy Implications of the Patterns of Economic Integration between the European Union and its Neighbouring Countries', January 2013, SEARCH, <http://www.ub.edu/searchproject/results/working-paper-collection/>

132 Lavenex, *supra* note 3.

133 Press Conference, 16 February 2005, appearing in <http://www.rferl.org/content/article/1057492.html>, as analysed by Edwards, *supra* note 3, at 59.

134 F. Schimmelfennig, 'The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union', 55/1 *International Organization* (2001), 47, as analysed by Sasse, *supra* note 3, at 296-97.

135 See Casier, *supra* note 3, at 43; Schimmelfennig and Scholtz, *supra* note 127; Magen, *supra* note 3.

136 Kelley, *supra* note 9, at 36.

137 Bartlett *et al.*, *supra* note 24.

came to the conclusion that the lack of an accession perspective tempers any top-to-bottom, government-driven pressures for legislative alignment.¹³⁸ It is also being corroborated by the work of Schimmelfennig and Scholtz who argued that the effectiveness of EU external pressures will increase with the size of the incentives: the promise of enlargement is more powerful than the promise of association or assistance, and the impact of the EU on candidates for membership should be stronger than that on a state with no membership prospective;¹³⁹ only the highest rewards, associated with membership, may be expected to balance substantial domestic power costs.¹⁴⁰

A *caveat* is, however, warranted with respect to the causal link between the (objective) lack of membership prospective and the slow reforms in the NCs. The question after all, is not only about the objective promise of the ENP but also about the subjective perception of such promise by the NCs (a theme to be re-visited in Chapter 4.3). Thus the prospects of an NC aligning its legislation, institutions and regulation to the EU model with the hope that such a move might prove it to be worthy of EU membership, may not be excluded, notwithstanding the (objectively examined) accession avoidance strategy of the ENP.¹⁴¹ An NC which would prove itself an ardent adherer to the ENP might be tempted to believe that it may succeed in creating a “procedural entrapment”, relying on the following assumption: “... the ENP creates a setting for a variation on the familiar neo-functionalist pattern of integration: if an ENP country with membership aspirations does indeed meet the EU’s criteria and objectives, many of which are of a technocratic kind, the EU will find it very hard to deny membership on substantive grounds...”.¹⁴²

138 Magen, *supra* note 102, at 102.

139 Schimmelfennig and Scholtz, *supra* note 127, at 191.

140 *Ibid.*

141 See M. Bauer, C. Knill and D. Pitschel, ‘Differential Europeanization in Eastern Europe: The Impact of Diverse EU Regulatory Governance Patterns’, 29/4 *Journal of European Integration* (2007), 405, at 417: The “unlikely members”, namely the NCs “feel compelled to prove their trustworthiness as future members of the Union and therefore demonstrate their openness to EU measures and models”. For support of the same theme, see Casier, *supra* note 3, at 46-49; H. Maull, ‘Europe and the New Balance of Global Order’, 81/4 *International Affairs* (2005), 775; Sasse, *supra* note 3.

142 Sasse, *supra* note 3, at 296-297.

4.1.2. Lack of other meaningful incentives

The external incentives Model, analysed above, may partially account for the effectiveness of the EU external governance.¹⁴³ Under it, the need for the ENP to offer the NCs meaningful trade benefits is only being reinforced, given its accession-avoidance strategy. Thus the lack of a membership perspective requires the ENP to offer alternative meaningful incentives. These were precisely the policy recommendations made by Artelaris, Kallioras and Petrakos under the SEARCH Consortium.¹⁴⁴ A meaningful access to the Internal Market is thus required of the ENP. After all, as Lavenex and Schimmelfennig contend, “governance by externalization” is produced by the EU’s Internal Market, as firms interested in participating in it need to follow EU’s rules.¹⁴⁵

Yet the Commission’s original vision, which was bold, albeit vague,¹⁴⁶ has been diluted with the increased institutionalisation of the ENP, leading to the reduction of the scope and intensity of anticipated inclusion.¹⁴⁷ Indeed, a careful reading of the founding documents of the ENP (coupled with a scrutiny of almost ten years of its implementation) indicates that it has failed to meet such expectations, neglecting to provide meaningful incentives that would create a clear-cut cost-benefit case in favour of domestic reforms.¹⁴⁸ This qualified nature of the ENP’s benefits, which the

143 Schimmelfennig and Sedelmeier, *supra* note 61. See also Casier, *supra* note 3, at 46: The first factor explaining selective rule transfer is the perceived usefulness of ENP provisions for domestic purposes. Interviews conducted by him in the NCs reveal that rule transfer was strongly dependent on the (perceived) usefulness of (certain) reforms within the NCs.

144 See Artelaris *et al.*, *supra* note 131, referring to deep and comprehensive bilateral FTAs which would go beyond the traditional concept of trade liberalisation, to include eliminations of NTBs, liberalization of investment regime, meaningful liberalization of trade in services and far reaching harmonization or mutual recognition of trade and investment related regulations and institutions. See also Casier, *supra* note 3, at 43.

145 Lavenex and Schimmelfennig, *supra* note 3, at 799.

146 Magen, *supra* note 3, at 413.

147 *Ibid.*

148 For support, see Casier, *supra* note 3, at 44: Financial support remains relatively limited. See also Gawrich *et al.*, *supra* note 3, at 1220 with respect to the Ukraine and Bartlett *et al.*, *supra* note 24, referring to “weak and inconsistent ENP policies”.

Commission itself acknowledged, will be re-examined below under the expectation-capacity gap theme.¹⁴⁹

It would thus be advisable for the EU to work in cooperation with the NCs in order to back the ENP's impressive rhetoric with a generous offer of a comprehensive package of liberal trade and economic regimes. Both the EU and the NCs should go beyond the limited sphere of partial removal of tariff and non-tariff barriers to free movement of industrial goods, and reach the sphere of deep integration.¹⁵⁰ More specifically, the ENP should contribute to improved market access to the Internal Market for NCs' exporters, to pro-competition regulation and to a healthier investment climate in the NCs.¹⁵¹ It is indeed to be hoped that the ENP will provide the platform for improved regimes governing different aspects of economic and trade relations. The first candidate for such enhancement should be the sector of provision of services, especially in the more economically-advanced NCs.

The link between the liberalisation of services and economic growth, the increase in FDI, technology transfer and technology spillovers has been examined exhaustively.¹⁵² Applying the conclusions of those writings to our context should lead us to deduce that the liberalisation of trade in services and the interrelated establishment regime would carry great benefits for both the EU and the NCs.¹⁵³ The

149 See A. Herdina, Head of Unit, ENP Sector Coordination Unit, DG External Relations, *supra* note 23, at 501-503: The value of aligning with the *acquis* differs from sector to sector, and – within sectors – between different issues; European Commission (2006) On Strengthening the European Neighbourhood Policy, COM (2006) 726 final, 4 December, 2006, available at: http://ec.europa.eu/world/enp/pdf/com06_726_en.pdf

150 See P. Brenton and M. Manchin, 'Trade Policy Issues for the Euro-Med Partnership', Centre for European Policy Studies, Working Paper No. 7, May 2003, at 7, who advance this argument in the general Euro-Med context. They contend that deep integration entails agreements to reduce the market segmenting effects of differences in national regulations by the coordination, harmonisation or mutual recognition of national laws, regulations and enforcement mechanisms.

151 See Hoekman, *supra* note 60, for that proposition in the Euro-Med context.

152 For examination of this issue in the Euro-Med context, see Brenton and Manchin, *supra* note 150, at 2-7.

153 See the Tenth Anniversary of the Euro-Mediterranean Partnership: A Work Programme to Meet the Challenges of the Next Five Years, Communication from the Commission to the Council and the European Parliament, April 25, 2005, Section 2.2(a): Services account for approximately 60% of GDP in the Mediterranean countries. World Bank studies indicate that the liberalisation of trade in services generates substantial welfare gains. It may also contribute to domestic economic adjustments and reforms. Full text appears at

ENP must therefore provide for significant reciprocal liberalisation of trade and investment in service.¹⁵⁴

In addition, the enhanced model for future relations should include the more meaningful liberalisation of the EU market to NCs' agriculture goods,¹⁵⁵ the adoption of more pro-competition provisions pertaining to public procurement,¹⁵⁶ competition,¹⁵⁷ the adoption of more stringent provisions on state aid,¹⁵⁸ environmental protection,¹⁵⁹ the mitigation of the threat of contingent protection,¹⁶⁰ and the lowering of incidences of non-tariff barriers.¹⁶¹ Special attention should be devoted to the area of standards, where there is room for enhanced bilateral arrangements.¹⁶² These arrangements can assist in realizing the significant trade potential between the EU and the NCs and offer the NCs a better incentive for the pursuance of legislative and regulatory regimes (a theme that would be further developed in Chapter 4.3 below).

The revision of the ENP in 2011 is meant to meet that challenge. The EU launched in 2011 a reform of the ENP, based on the principle of "more for more", offering those NCs that are willing and able to pursue meaningful political and socio-economic reforms more Money, more Market access and more Mobility. This revised approach is founded on Deep and Comprehensive FTAs (DCFTAs) to be adopted with these

http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/mediterranean_partner_countries/r10156_en.htm

154 Hoekman, *supra* note 60; see also Herman, *supra* note 83; Hirsch *et al.*, *supra* note 104, at 65-66.

155 For support, see Hoekman, *supra* note 60; Hirsch *et al.* *supra* note 104, at 74-80. See also the Tenth Anniversary of the Euro-Mediterranean Partnership, *supra* note 153, Section 2.2(a): A road map should be agreed on trade liberalisation in agricultural products, providing for a high degree of liberalisation with a very few number of exceptions and a timetable for implementation.

156 For support, see Hirsch *et al.*, *supra* note 104, at 53-54.

157 But see the debate on this issue in Chapter 4.3 below.

158 For support, see Nov, *supra* note 100.

159 See De-Shalit, *supra* note 57.

160 Hoekman, *supra* note 60, at 21: Safeguard measures should not be needed, given the small size of the addressees of the ENP. Anti-Dumping protection should be removed upon the completion of bilateral free trade. See also Harpaz, *supra* note 88.

161 Hoekman, *supra* note 60, at 20.

162 Brenton and Manchin, *supra* note 150, at 9-11 and 15. See also Hadar, *supra* note 55.

NCs: “DCFTAs provide for the gradual dismantling of trade barriers and aim for regulatory convergence in areas that have an impact on trade, in particular sanitary and phytosanitary rules (SPS), animal welfare, customs and border procedures, competition and public procurement. They are designed to be dynamic in order to keep pace with regulatory developments in the EU's Internal Market. For the most advanced partners, a DCFTA can lead to a progressive economic integration with the EU Internal Market.”¹⁶³ It remains to be seen whether the EU would actually attain that ambitious, self-declared goal.

4.1.3. Lack of definitiveness and legalism

Scholarship on rule transfer assumes that the degree of rule alignment is conditional *inter alia*, upon the clarity, definitiveness and determinacy¹⁶⁴ of the rules to be aligned with.¹⁶⁵ Yet the ENP intentionally reduced the “law” to a minimum and relied instead on “soft” instruments.¹⁶⁶

163 Join Communication by the High Representative of the Union For Foreign Affairs and Security Policy and the European Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, A new response to a changing Neighbourhood: A review of European Neighbourhood Policy, Brussels, 25 May 2011, COM(2011) 303, at 8.

164 See Magen, *supra* note 3, at 414-415 for the notion of determinacy.

165 For support, see Schimmelfennig and Sedelmeier, *supra* note 61. 664ff.; Gawrich *et al.*, *supra* note 3; Magen, *supra* note 3, at 414-415: The degree of determinacy of norms and rules promoted by an exogenous actor affects its ability to impact domestic decision-makers. The more legalistic the rule and the clearer it is regarding its expectations of the domestic change to be performed, the higher its determinacy value. Determinacy also affects the informational nature of the rule, with highly determinate rules providing a clear roadmap for reform. High Determinacy aids the effectiveness of conditionality by enhancing its credibility and reducing the scope for reinterpretation by the targeted government of what constitutes compliance, and aiding monitoring for compliance against defined benchmarks. Magen’s approach is supported by the work of A. Tovias and M. Ugur, ‘Can the EU Anchor Policy Reform in Third Countries? An Analysis of the EURO-MED Partnership’, 5/4 *European Union Politics* (2004), 395, at 403, in the context of the EMP: “To function as an effective anchor, the EMP should leave minimum scope for discretion. Otherwise, discretion would, in light of the risk of free riders, enable each party to deviate from the ex ante optimal levels of reform and anchoring that they might have agreed to. Therefore, for the EMP to function as an effective anchor it must provide agreements that are as complete as possible to prevent biased interpretations and/or ex post non-compliance”.

166 Van Vooren, *supra* note 3, at 717. Van Vooren postulates that “This preference was based chiefly on two considerations: first, the cumbersome process of negotiating new legal documents was considered to be of insufficient added value in the face of the financial and human costs of such negotiations. More fundamentally, legally binding commitments were simply not thought useful to achieve ENP objectives, and in various policy

A fine example of that is the issue of the dispute settlement mechanism under the ENP. The current dispute settlement mechanisms under the various Euro-Med Association Agreements with the Mediterranean NCs are to a large extent non-legalistic and political.¹⁶⁷ NCs may fear, just as Israel did when a dispute erupted over the export to the EU from the Golan Heights, East Jerusalem, the West Bank and the Gaza Strip,¹⁶⁸ territories that came under Israel's control following the Six Days War (1967),¹⁶⁹ that that non-legalistic feature could have been translated, had she referred the dispute to the dispute settlement mechanism under the Association Agreements, into an asymmetric political conflict. They may further fear that such asymmetric conflict might allow the EU to create a linkage between trade, economic and political issues.¹⁷⁰

In such a scenario, the EU would have enjoyed, as Weiler predicted as far back as 1995, a clear advantage over the State of Israel: “As a general proposition, small countries favor hard procedures in their legal dealings with more powerful actors. The law often can serve as an “equalizing” agent. When one meets before arbitration panel, everyone is supposedly – and in more than a formal sense everyone, to some

fields would lead to a lowest common denominator”. See also Petrov, *supra* note 38, at 39-40 who refers to “Soft-harmonization commitments”.

167 For support, see Hoekman, *supra* note 60, at 28: The dispute settlement and enforcement mechanism are largely diplomatic in nature.

168 In August 2005 Israel withdrew unilaterally from the Gaza Strip. Hence the dispute and its solution are not applicable any more to this area.

169 For the dispute and its implications, see M. Hirsch, ‘Rules of Origin as Foreign Policy Instruments?’, 26 *Fordham International Law Journal* (2003), 572. For the solution to the dispute, see G. Harpaz, ‘The Dispute over the Treatment of Products Exported to the European Union from the Golan Heights, East Jerusalem, the West Bank and the Gaza Strip - The Limits of Power and the Limits of the Law’, 38/6 *Journal of World Trade* (2004), 1049.

170 T. Broude, ‘From Pax Mercatoria to Pax Europea: How Trade Dispute Procedures Serve the EC’s Regional Hegemony’, a paper presented at the conference on The EU in Regional and Bilateral Dispute Settlement (2004), at 29, organized by the Israeli Association for the Study of European Integration in co-operation with the Friedrich Naumann Foundation, The EU-Israel Forum, The German Innovation Centre and the Interdisciplinary Centre, Herzlia, 24-25 October 2004, at 22-23. For an updated version, see T. Broude, ‘Between Pax Mercatoria and Pax Europea: How Trade Dispute Procedures Serve the EC’s Regional Hegemony’, in P.B. Stephan (ed.), *The Economics of European Union Law* (Cheltenham: Edward Elgar, 2007).

extent, is – equal. In political bargaining, the unequal power...is much more evident”.¹⁷¹

The result of such fears was that in the context of the above-mentioned trade dispute, Israel did not rely on the dispute settlement mechanism, but adopted the EU political position. At the end of the day, instead of the trade dispute being solved on the basis of objective, legal rules of international and regional trade law, it was settled in accordance with the unequal economic and political powers of the respective parties.

The examination of the deficiencies of the existing dispute settlement, *in abstracto*, and the analysis of the implications of these deficiencies, *in concreto*, led us to the conclusion that the dispute settlement mechanism does not serve the EU’s declared intentions under the ENP, namely the promotion of a rule-based, regional and bilateral legal environment.¹⁷² The dispute settlement mechanism shall therefore be reinforced bilaterally with each NC, rendering it more legalistic and hence less political. Indeed, the Action Plan between the EU and Israel, for example, takes cognizance of that need by providing a mandate for negotiating enhanced dispute settlement procedures for trade disputes.¹⁷³ Such potential improvement in the dispute settlement mechanisms must be seen in its wider context: namely, as Jackson has expressed it,¹⁷⁴ the move from power-based diplomacy to rule-based diplomacy and, as Reich has termed it,¹⁷⁵ the gradual juridification of international and regional trade law.¹⁷⁶ For the NCs the move from power-based diplomacy to rule-based adjudication and the juridification of international and regional trade law are to be welcomed. As Broude persuasively argued, such developments appear to provide the NC with a more objective and effective mechanism, better protecting her from economic and political pressures

171 J. Weiler, ‘Comments on the Dispute Resolution Procedures in the EU-Israel New Association Agreement’, in Hirsch *et al.*, *supra* note 104, at 177.

172 For support, see Broude, *supra* note 170, at 30.

173 See Article 2.3.1 of the EU-Israel Action Plan.

174 See the introductory parts of J. Jackson, *The World Trading System, Law and Policy of International Economic Relations* (MIT, 1997).

175 Reich, *supra* note 76.

176 C. Baudenbacher, ‘The EFTA Court - an Example of the Judicialisation of International Economic Law’, 28 *European Law Review* (2003), 880.

exerted upon her by the EU.¹⁷⁷ Yet despite the promise of a more juridical dispute settlement mechanism under the ENP, the negotiations between the EU and the NCs to formulate a more robust, legally based mechanism turned out to be futile.

The failure to adopt a more robust dispute mechanism with the various ENP NCs is a micro-cosmos of the ENP's "light-legalism". Indeed, the ENP lacks binding commitments.¹⁷⁸ The same is true with respect to the time framework for alignment,¹⁷⁹ the precise demands required from the NCs¹⁸⁰ and the privileges awaiting the NCs upon completion of the alignment process.¹⁸¹ The language of the ENP is cautious¹⁸² and fraught with ambiguous terms.¹⁸³ The ENP's determinacy is further undermined by the lack of common ENP *acquis*,¹⁸⁴ or normative commonality,¹⁸⁵ by the absence of a comprehensive, detailed roadmap for reform¹⁸⁶ supported by explicit deadlines:¹⁸⁷ "...the ENP is a dynamic policy, of which the objectives and criteria develop as the policy grows. In comparison to enlargement, the ENP is a highly undefined policy and a much more political process".¹⁸⁸

177 Broude, *supra* note 170, especially at 9-11. .

178 Petrov, *supra* note 38, at 41 and 51-52.

179 Sasse, *supra* note 3, at 302.

180 *Ibid.*

181 Casier, *supra* note 3, at, 43.

182 See the analysis of Casier, *supra* note 3, at 43, who refers to the following assertions appearing in the EU-Ukraine Action Plan: "possibilities of gradual opening of...certain Community programmes"; "the review of the feasibility of the establishment of a Free Trade Area"; "a constructive dialogue on visa facilitation", EU/Ukraine Action Plan. 2005. http://ec.europa.eu/world/enp/pdf/action_plans/ukraine_enp_ap_final_en.pdf

183 See Casier, *supra* note 3, at 48, who analyses the use of central terms such as "privileged relations" and "a stake in the Internal Market".

184 Magen, *supra* note 3, at 414-415.

185 P. Leino and R. Petrov, 'Between "Common Values" and Competing Universals - The Promotion of the EU's Common Values through the European Neighbourhood Policy', 15/5 *European Law Journal* (2009), 654, at 671: "The ENP is premised on a vague normative apparatus: even within the EU itself there is a lack of genuine European consensus on the content and scope of values shared by the EU Member States".

186 Magen, *supra* note 3, at 414-415.

187 Petrov, *supra* note 38, at 39-40.

188 Casier, *supra* note 3, at 48.

The ENP's lack of legalism and definitiveness (a feature which is denied by the Commission),¹⁸⁹ adversely affects the effectiveness of the ENP as a transformative model.¹⁹⁰ This feature is also connected to the ENP's weak mechanism of conditionality.

4.1.4. Weak mechanisms of conditionality

Conditionality (together with socialisation) has been perceived as a means to achieve change in norms or in behaviour, in international relations in general, and in the enlargement context, in particular:¹⁹¹ "EU conditionality stands out historically as perhaps the most sweeping and intrusive set of conditions ever imposed on a country in times of peace; it shapes the legal landscape in each and every sector of an applicant's economy...".¹⁹² Thus scholars, especially those focusing on the top-to-bottom external impact of the EU, could have expected the employment of strong conditionality mechanisms by the ENP.¹⁹³ For them the following statement by Prodi came as no surprise: "We need to set benchmarks to measure what we expect our

189 Edwards, *supra* note 3, at 48, who refers to the Commission's document, 'Strengthening the ENP'. December 2006. COM (2006) 726 final: "...concreteness: meaning that the Action Plans are detailed...".

190 But see J. Goldstein and L. Martin, 'Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note', 54/3 *International Organization* (2000), 603, at 620-621: If agreements are impossible to breach, either because of their level of obligation or because the transparency of rules increases the likelihood of enforcement, elected officials may find that the costs of signing such agreements outweigh the benefits. The downside of increased legalisation lies in such a case in the inevitable uncertainties of economic interactions between states and in the need for flexibility to deal with such uncertainty without undermining the trade regime as a whole. Legalization as increased binding nature could therefore constrain leaders and undermine free-trade majorities at home.

191 Sasse, *supra* note 3, at 304, relying on Kelley, *supra* note 9. For the concept of "conditionality", see J. Hughes, G. Sasse and C. Gordon, *Europeanization and Regionalization in the EU's Enlargement to Central and Eastern Europe - The Myth of Conditionality* (Basingstoke, Palgrave, 2004).

192 Plumpert and Mattli, *supra* note 125, at 324.

193 C. Mendez, F. Wishlade and D. Yuill, 'Conditioning and Fine-Tuning Europeanization: Negotiating Regional Policy Maps under the EU's Competition and Cohesion Policies', 44/3 *Journal of Common Market Studies* (2006), 581, at 582: Most of the literature has tended to adopt a top-down conceptualization, focusing on the domestic impact of external pressures emanating from the EU.

neighbours to do in order to advance from one stage to another. We might even consider some kind of ‘Copenhagen proximity criteria’”.¹⁹⁴

Indeed, the initial launching of the ENP, drawing on the enlargement policy, was supported by strong conditionality, establishing a clear link between the conditions and the rewards to be expected and suggesting an effective monitoring mechanism.¹⁹⁵

A reading of the ENP launching document suggests that a clear *quid pro quo* was in fact postulated. In return for its willingness to open its economic gates, under the aegis of the ENP, the EU required the NCs to adopt its basic values, namely peace, the rule of law, democracy, the protection of human rights, and a free market economy. Such adoption required the pursuance of reforms, and these reforms entailed, in turn, the approximation of laws and regulatory practices with the EU *acquis*.¹⁹⁶ Demonstrated progress on the economic front, as well in the political, juridical and social spheres was initially considered as an essential precondition for the ability of the NCs to fully reap the economic benefits offered by the ENP.¹⁹⁷

Yet subsequent ENP documents, including the Action Plans themselves, were couched in a much less conditional language,¹⁹⁸ leading Sasse to characterize the ENP

194 R. Prodi, President of the European Commission, ‘A Wider Europe - A Proximity Policy as the key to Stability’, Peace, Security and Stability International Dialogue and the Role of the EU”, Sixth ECSA-World Conference, Jean Monnet Project. Brussels, 5-6 December, 2002, http://europa.eu/rapid/press-release_SPEECH-02-619_en.html.

195 Commission of the European Communities, Communication from the Commission to the Council and the European Parliament, Wider Europe — Neighbourhood: a new framework for relations with our Eastern and Southern Neighbours. Brussels, 11 March, COM(2003) 104 final: “[i]n return for concrete progress demonstrating shared values and effective implementation of political, economic and institutional reforms, including aligning legislation with the *acquis*, the EU’s neighbours should benefit from the prospect of closer economic integration with the EU”. For analysis, see Haukkala, *supra* note 3, 1615; Kelley, *supra* note 9; Casier, *supra* note 3, at 43-44.

196 For a theoretical analysis of the attempts of the West to “export” Western values, see, by analogy, Etzioni, *supra* note 69.

197 See speech by Günter Verheugen, Member of the European Commission, The European Neighbourhood Policy Prime Ministerial Conference of the Vilnius and Visegrad Democracies: ‘Towards a Wider Europe: The New Agend’, Bratislava, 19 March, 2004: “The closer we move together in our political dialogue, the more we shall be able to do in economic areas as well”, http://europa.eu/rapid/press-release_SPEECH-04-141_en.html.

198 Magen, *supra* note 3, at 416 who refers to the Commission of the European Communities, ‘Communication from the Commission, European Neighbourhood Policy Strategy Paper’, COM(2004), 373 final which emphasizes the “joint ownership” and which stresses that “the EU does not seek to impose priorities or conditions on its

as “form of conditionality-lite”,¹⁹⁹ and Casier to conclude that the “link between conditions and rewards is unclear. It is uncertain which conditions an ENP state has to fulfil in order to get a certain reward”.²⁰⁰ Thus the language of conditionality as well as the ENP’s benchmarks and rewards, have been undergoing a process of erosion.²⁰¹

Several factors further eroded the credibility of the ENP’s conditionality mechanism: (i) the *de jure* lack of specificity, analysed above, regarding both the incentives offered and the link between them and the ENP’s requirements;²⁰² (ii) the *de facto* weak connection between the NCs practices and the EU awards;²⁰³ (iii) inconsistency in the ENP’s documents themselves regarding the seriousness of the conditionality mechanism;²⁰⁴ (iv) the abstraction of the declared shared values which underpin the expected socio-political and economic reforms;²⁰⁵ (v) a lack of unified *acquis* benchmarks,²⁰⁶ and (vi) the emerging declaratory commitment on the part of the EU for “joint ownership”, analysed below.²⁰⁷

partners.... There can be no question of asking partners to accept a pre-determined set of priorities. These will be defined by common consent and will thus vary from country to country”. See also Haukkala, *supra* note 3, at 1615 and Kelley, *supra* note 9.

199 Sasse, *supra* note 3, at 296 and 303.

200 Casier, *supra* note 3, at 44.

201 For support, see Magen, *supra* note 3, at 417: The language of conditionality has been toned down with the ENP’s progressive institutionalization; Kelley, *supra* note 9, at 35-36.

202 Magen, *supra* note 3, at 416.

203 For an earlier instance under the EMP, see Tovias and Ugur, *supra* note 165, at 406: The per capita MEDA assistance under the Barcelona Process is not closely related to the level of reforms achieved by the recipient States. The weak correlation is an indicator of EU’s inability to act as an effective and credible anchor for reforms in these countries - in both *ex ante* and *ex post* conditionality terms. If MEDA assistance was conditioned on *ex ante* reform promises, lack of correlation means that states that kept their promises were not rewarded accordingly. If, however, MEDA assistance was conditional on actual performance, lack of correlation implies that states failing to undertake reforms were not penalized.

204 Magen, *supra* note 3, at 416.

205 Leino and Petrov, *supra* note 185, at 665.

206 Kelley, *supra* note 9, at 35-36, referring to a Commission official who explained: ‘ENP consistency is very problematic, because we do not have a uniform *acquis*’.

207 Kelley, *supra* note 9, at 35-36.

The erosion of the conditionality mechanism, acknowledged by a member of the Commission's ENP task who concluded that approximation of laws "remains essentially voluntary",²⁰⁸ eroded the effectiveness of the ENP.

Yet as stated above, the EU launched in 2011 a revision of the ENP, based on the principle of "more for more". The reform was supported by two financial instruments, one designed for the Southern Mediterranean Countries (Spring; Support for Partnership, Reform and Inclusive Growth) and another designed for the Eastern Neighbourhood. What is common to the two is the intention to reinforce the conditionality mechanism of the ENP. The reinforced positive conditionality mechanism is declared to be based on what is called in the ENP jargon the three Ms.: more Money, more Market access and more Mobility, for those NCs that are willing and capable of pursuing meaningful political and socio-economic reforms:²⁰⁹ "only those partners willing to embark on political reforms and to respect the shared universal values of human rights, democracy and the rule of law have been offered the most rewarding aspects of the EU policy, notably economic integration (based on the establishment of Deep and Comprehensive Free Trade Areas - DCFTAs), mobility of people (mobility partnerships), as well as greater EU financial assistance. Equally, the EU has reacted to violations of human rights and democracy standards by curtailing its engagement".²¹⁰ Yet a careful reading of this declared revised conditionality reveals that it is more focused on political conditionality than on trade

208 Herdina, *supra* note 149: "In many cases, the ENP Action Plans...often merely establish a commitment to align with the *acquis* only over a long term, using formulations such as "establish a first list for *acquis* alignment" or "work towards alignment" on a certain item. In other sectors, such as on environment policies, the ENP Action Plans stipulate only very basic commitments, focusing on core functions of environmental governance, some key sectoral measures as well as regional and international cooperation".

209 COM (2011) 303 of 25.05.2011. For analysis, see, R. Balfour, 'Changes and Continuities in EU-Mediterranean Relations after the Arab Spring', in S. Biscop, R. Balfour and M. Emerson (eds.), *An Arab Springboard for the EU Foreign Policy*, Egmont Paper 54 (The Royal Institute for International Relations, Academia Press, Gent, January 2012), 27, at 29.

210 Join Communication to the European Parliament, the Council, the European Economic and Social Committee of the Regions, Delivering on a new European Neighbourhood Policy, Brussels, 15.5.2012, JOIN(2012) 14 final, at 3-4.

conditionality,²¹¹ a shift of orientation that may raise other challenges to be analysed below (Chapter 4.1.7.).

A *caveat* is, however, in order. Strong conditionality is not a panacea for successful rule transfer, whereas weak conditionality may not, at all times, lead to the failure of such exercise. The distinction between rule adoption and rule internalisation is relevant to our analysis. Formal rule adoption entails *de jure* transposition of EU rules, standards, or regulatory models, whereas rule internalisation denotes a process in which domestic elites become cognisant of these rules and standards, and come to accept them as legitimate and desirable.²¹² According to the recent analysis of Magen, formal adoption might fall victim to the phenomenon of “decoupling”, whereby formal institutional commitments remain detached from *de facto* behavioural practices and informal institutional understandings.²¹³ Such decoupling is more likely to occur where formal adoption is conducted under conditions of coercive legal imposition or aggressive pursuance of conditionality.²¹⁴ In such contexts, meaningful societal internalisation lags behind top-down, government-driven, large-scale formal rule adoption.²¹⁵ Hence weak mechanisms of conditionality may not be perceived as solely negative.

Moreover, weak mechanism of conditionality may be compensated for by strong institutional links between the EU and the NCs which would result in the creation of strong technocratic networks. The work of Lavenex on external governance is relevant for this purpose. Lavenex contrasts the governance Model with the traditional Community Model of integration.²¹⁶ Whereas the latter relies on the supranational formulation of binding EU law through the interaction between the EU’s political institutions, the former relies on soft, weak legalistic forms of policy-making,

211 *Supra* note 209.

212 Magen, *supra* note 102, at 99-100.

213 *Ibid.*

214 *Ibid.*, 100, relying on T. Börzel and T. Risse, ‘From Europeanization to Diffusion: Introduction’, 35/1 *West European Politics* (2012), 1.

215 Magen, *supra* note 102, at 99-100. See also A. Magen and M. Leonardo (eds.), *International Actors, Democratization, and the Rule of Law* (Oxford: Routledge, 2009).

216 S. Lavenex, ‘A Governance Perspective on the European Neighbourhood Policy: Integration beyond Conditionality?’, 15/6 *Journal of European Public Policy* (2008), 938.

advanced by formal and informal policy networks and agencies.²¹⁷ Under the governance approach, information networks,²¹⁸ implementation networks²¹⁹ and regulatory networks²²⁰ ascribe more importance to process, than to output, to cooperative instruments, than to legal obligations, and to a more inclusive character, than to the more hierarchal nature of traditional modes of European integration.²²¹ The notion of the *acquis* is thus being transformed, under the governance Model, and integration is being advanced not so much through the Law but rather through co-ordination.²²² In accordance with Lavenex, such a model is more far-reaching and hence preferable: In contrast to the conditional transfer of a predetermined legal *acquis*, which is confined to the expansion of EU's regulatory boundary network governance,²²³ a process-oriented mode of cooperative policy-making facilitates the simultaneous extension of both the regulatory and institutional EU boundaries.²²⁴ Thus, these networks represent in Lavenex's opinion the most advanced form of flexible sectoral integration in terms of shared governance.²²⁵

The external applicability of the governance Model led Lavenex to the conclusion that the traditional rationalist, actor-based foreign policy approaches to the ENP, which focuses on the weak mechanisms of conditionality, may not be sensitive enough to the EU's effective external influence. Although the ENP does not represent a unified

217 *Ibid.*

218 According to Lavenex, *ibid.*, information networks are set up to diffuse policy-relevant knowledge, practices and ideas among the members.

219 According to Lavenex, *ibid.*, implementation networks focus primarily on enhancing co-operation among national regulators to implement/enforce existing laws and rules - be they national, international or European.

220 According to Lavenex, *ibid.*, regulatory networks are the most powerful ones in terms of governance because they have an implicit or explicit legislative mandate and are geared at the formulation of common rules and standards in a given policy area.

221 According to Lavenex, *ibid.*, the term "hierarchy" describes in this context a relationship of superiority and subordination in which one party unilaterally expands predetermined parts of its regulative boundary to the other without, however, allowing for the latter's participation in the determination of these obligations or organisational inclusion in the policy frameworks where these obligations are shaped.

222 Lavenex, *supra* note 216.

223 *Ibid.* Legal boundary refers to the extension of the regulatory scope of EU's rules or policies to non-Member States.

224 Lavenex, *supra* note 216: While the institutional boundary refers to the inclusion of non-Member States in EU policy-making organisations.

225 *Ibid.*

foreign policy with a clear hierarchy of goals, actors, strategies and instruments, it may provide, under Lavenex's analysis of the governance approach, a roof over expanding structures of sectoral, functional co-operation regional integration that moves at different speeds and with different dynamics in different policy fields.²²⁶ The creation of network governance may prove to be effective for regulatory approximation and organisational inclusion of ENP countries, particularly in more technocratic and non-politicized policy areas, serving as alternative instruments of policy transfer, mitigating the weaknesses of strategic conditionality (a theme revisited below.)²²⁷

4.1.5. Lack of a joint venture?

The Commission attempts to market the ENP as a common effort resulting in "joint ownership".²²⁸ Yet this framing cannot hide the true colours of the ENP. Contrary to

²²⁶ *Ibid.*

²²⁷ See A.M. Slaughter, *A New World Order* (Princeton: Princeton University Press, 2008), 59: 'Behind the facade of technical adjustments for improved coordination...and uniformity of standards lie subtle adjustments' of national laws". See also Smith, *supra* note 3.

²²⁸ See Prodi, *supra* note 216: "I am thinking of innovative concepts such as institutions co-owned by the partners". See also Kelley, *supra* note 9, at 39: The ENP refers to a "partnership", and its home page lists the NCs as "partners". See also Commission of the European Communities, 'Communication from the Commission, European Neighbourhood Policy Strategy Paper', COM(2004), 373 final, 8: "...there can be no question of asking partners to accept a predetermined set of priorities. These will be defined by common consent" and "...mutual commitment to common values, principally within the fields of the rule of law, good governance, the respect for human rights, including minority rights, the promotion of good neighbourly relations and the principles of market economy and sustainable development". See also Communication from the European Commission: on strengthening the European Neighbourhood Policy. Brussels, 4 December, COM(2006) 726 final; Commission, 'Strengthening the ENP', December 2006. COM (2006) 726 final, which state: "joint ownership — Action Plans are mutually agreed rather than being imposed", as analyzed by Edwards, *supra* note 3; Commission of the European Communities (2007) 'A strong European neighbourhood policy' COM(2007) 774 final.: "both the ENP partner country and the EU can hold each other accountable for living up to their mutual commitments". For analysis, see Cardwell, *supra* note 3, at 227-228; P. Van Elsuwege and R. Petrov, 'Article 8 TEU: Towards a New Generation of Agreements with the Neighbouring Countries of the European Union?', 36/5 *European Law Review* (2011), 688, at 694: In order to counterbalance the perception that the EU unilaterally imposes external conditions on the partner countries, the Commission initiated the concept of "joint ownership" as a key principle of the ENP. The idea that both the EU and the NCs contribute to shaping and implementing the bilateral relationship is reflected in the procedure for the adoption of the Action Plans and the monitoring of its implementation, which both occur within the bodies established under the Partnership and Co-operation Agreements or Association

other more cooperative contexts, such as that of the EU-Switzerland agreements,²²⁹ the ENP was a policy launched by the EU, the end product of internal EU strategy thinking, aimed at adapting another EU policy (*viz.* enlargement) and meeting some of the EU's strategic challenges in its geographical vicinity, ultimately offered to them as a mature, non-negotiable framework.²³⁰

Although the ENP's call for approximation of laws was couched in neutral terms, it was clear that the EU did not perceive it as a cooperative process, as it did in the Internal Market context, and to a lesser extent in the EEA context,²³¹ but rather as a paternalistic process in which the EU expects its NCs to bring their legislation closer to that of the EU, under a process which allows very little scope for negotiation.²³² The ENP thus signifies, in the words of Olsen, "a more positive export–import balance as non-European countries import more from Europe than *vice versa* and European solutions exert more influence in international fora".²³³ The declared "joint

Agreements.; Leino and Petrov, *supra* note 185, at 669-671: Almost all Action Plans contain references to commonly shared values.

229 Schwok, *supra* note 40; Petrov, *supra* note 38, at 46 and 49: The EC-Swiss sectoral agreements imply the informal binding involvement of Swiss experts in the drafting of the dynamic *acquis*.

230 See Haukkala, *supra* note 3, at 1612: The Union does not give any meaningful say to the NCs in setting the normative agenda, the objectives and the means are non-negotiable and the only time when the partners would be consulted is when the individual action plans with clear benchmarks and timetables are being agreed upon. See also Casier, *supra* note 3, at 39: To a certain degree Action Plans read like a wish list of the EU and stipulate in detail reforms to be undertaken in the ENP countries. According to an interviewee at the European Commission, 80 per cent of the action points reflect the preferences of the EU; Leino and Petrov, *supra* note 185, at 655 and 666-667: The ENP provides very few opportunities to engage in a balanced dialogue and consultations pertaining to ENP-related issues. There is a lack of an institutional framework that would enable the NCs to participate in decision-making, about the actual meaning of "common values" and develop them further.

231 Petrov, *supra* note 38, at 37, 46 and 49: The application of the principle of homogeneity within the EEA context assists the dynamic incorporation of EU norms, having been adopted after the signature of the Agreement, into the legal systems of the non-EU Contracting Parties. The principle presumes the equality of the parties to this process, since the incorporation of the relevant *acquis* cannot take place in the absence of an agreement between the EU and the EEA countries. Under this Agreement, the Commission is obliged to consult the EFTA member states' experts at the early stages of preparation of any new relevant EU law. Within the EU-Swiss bilateral, sector agreements the information exchanges procedure of the newly adopted *acquis* must be formally notified to Switzerland and *vice versa*.

232 See Geradin and Petit, *supra* note 54, at 167.

233 J. Olsen, *Europe in Search of Political Order* (Oxford: Oxford University Press, 2007), 71.

ownership” is further undermined by the mechanism of conditionality and the concept of “differentiated bilateralism”.²³⁴

The process of adopting the ENP is thus hierarchical. The same is true with the normative apparatus of the ENP. The EU attempted to contextualize the ENP with a shared area of common normativity,²³⁵ and at times present the “common norms” as reflecting universalistic norms.²³⁶ Yet the normative apparatus of the ENP is vertical rather than horizontal, reflecting the normative agenda of the EU,²³⁷ as explicitly acknowledged by Article 8 of the EU Treaty (adopted by the Lisbon Reform Treaty after the launch of the ENP),²³⁸ by the various ENP documents,²³⁹ as well as by Prodi himself: “the aim is to extend to this neighbouring region a set of principles, values and standards which define the very essence of the European Union”.²⁴⁰

Due to this feature of the ENP, it may be safely argued, drawing on the works of Lavenex and Schimmelfennig and that of Börzel, that the ENP belongs to the realm of

234 Leino and Petrov, *supra* note 185, at 663; Magen, *supra* note 3, at 416: Bilateralism reduces the ability of ENP countries to form collective negotiation alliances among themselves, which would increase their relative bargaining power *vis-a-vis* the EU.

235 Van Elsuwege and Petrov, *supra* note 228, at 693: The 2004 ENP Strategy Paper underlines that “the privileged relationship with neighbours will build on mutual commitments to common values principally within the fields of the rule of law, good governance, the respect for human rights, including minority rights, the promotion of good neighbourly relations, and the principles of market economy and sustainable development”. Moreover, all bilateral documents between the EU and the NCs emphasize the need for the latter to adhere to common values as a precondition for further enhancement of their bilateral relations with the EU. The ENP policy documents all refer to “shared” or “common” values”.

236 Leino and Petrov, *supra* note 185, at 655. According to them, the EU’s “common values” are declared to be universal, yet is difficult for the Union to base its own identity on them and at the same time to use these values in order to draw a line between “us” and “others”.

237 *Ibid.*, at 669-671.

238 Article 8(1): “The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation”.

239 See Van Elsuwege and Petrov, *supra* note 228, at 694: “common” or “shared values” should be fundamentally understood as the EU’s fundamental values and objectives, see for example The 2004 European Neighbourhood Strategy Paper, which provides the ENP envisages “a ring of countries, sharing the EU’s values and objectives”. COM (2004) 373 final, at p. 5.

240 Prodi, *supra* note 194.

external, asymmetric, hierarchal relations and not to the more cooperative, egalitarian networks constellation.²⁴¹

According to most scholars, this nature of the ENP is one of its weak points, because its hierarchical nature is not conducive to long-term effective reforms. For example, Haukkala, who drew on the work of Hettne and Söderbaum on “soft imperialism”,²⁴² came to the conclusion that the ENP amounts to the implementation of soft (or normative) power in a hard (or hegemonic) manner “through an asymmetric relationship that advocates a one-sided reading of norms and values without engaging the recipients in a genuine dialogue about the content and meaning of those terms”,²⁴³ thereby revealing the “uglier face of the Union’s normative power as one based on domination. By denying its neighbours’ calls for belonging and by demanding that they nevertheless conform to its norms and values, the Union can be seen as acting precisely in this way”.²⁴⁴ For Haukkala and others, this nature of the ENP erodes the ENP’s legitimacy in the eyes of the recipient NCs, thereby adversely affecting its *effet utile*.

Furthermore, and as argued by Leino and Petrov, the vagueness of the EU’s declared “common values” has transformed this supposedly neutral, legal principle into a political instrument in the hands of the EU institutions, putting into question its effectiveness as a strategic EU external policy tool.²⁴⁵

241 Lavenex and Schimmelfennig, *supra* note 3, at 797-798, relying T. Börzel, ‘European Governance – Verhandlungen und Wettbewerb im Schatten der Hierarchie’, in I. Tommel (ed.), *Governance und Policy-Making in der Europäischen Union* (Wiesbaden: VS, 2007), 61, at 64. Lavenex and Schimmelfennig argue at page 797 that: “Hierarchical governance takes place in a formalized relationship of domination and subordination and is based on the production of collectively binding prescriptions and proscriptions. In the modern state, this function is exerted through legislation, that is, the definition of authoritative, enforceable rules whose violation may be sanctioned. Both the institutionalization of domination and the authority of rules go along with the implicit acquiescence of the ‘ruled’...The vertical relationship between the ‘rulers’ and the ‘ruled’ implies that influence is exerted in an asymmetric manner”.

242 B. Hettne and F. Söderbaum, ‘Civilian Power or Soft Imperialism? The EU as a Global Actor and the Role of Interregionalism’, 10/4 *European Foreign Affairs review* (2005), 535, at 539.

243 Haukkala, *supra* note 3, at 1613.

244 *Ibid.*, at 1611-1622.

245 Leino and Petrov, *supra* note 185, at 671.

In addition, drawing on the econometric analysis conducted by Berkowitz, Pistor and Richard of numerous cases of “legal transplants”, one may conclude that the lack of meaningful joint ownership is not conducive to large scale approximation of laws under the ENP. According to their analysis, a good legal reform strategy should enable instead a more careful choice of the legal rules whose meaning can be understood and whose purpose is appreciated by domestic law makers, law enforcers, and economic agents, who are the ultimate consumers of the Law. Legal reforms must ensure that there is “domestic demand” for the new norm and that the “foreign supply” of that norm matches demand.²⁴⁶ Moreover, where the Law develops internally through a process of trial and error, innovation and correction, and with the participation of the users of the Law and the legal profession, legal norms and institutions tend to be highly effective, but where foreign law is imposed and legal evolution is external, legal institutions tend to be weaker.²⁴⁷

This Working Paper will revert to this theme below when addressing the (subjective) perceptions in the NCs of the (objectively) asymmetric policy. Suffice to mention at this stage that this scholarly critical approach of the ENP is not consensual. There are in fact other researchers who are of the opinion that the super-imposed nature of the ENP may actually assist it in serving as an effective engine for legislative and regulatory reform.²⁴⁸ Moreover, the *à la carte* nature of the ENP tempers the super-imposed nature, by allowing the NCs to choose to adopt some of Internal Market's regimes, consistent with their own interests (for example, proposed liberalisation in trading of services), while rejecting, in principle, other components which might harm those interests (for example, the legal obligation to permit free movement of persons).

246 D. Berkowitz, K. Pistor and J.F. Richard, 'The Transplant Effect', 51/1 *American Journal of Comparative Law* (2003), 163.

247 *Ibid.*

248 See Casier, *supra* note 3, at 46: Because the reform agenda is largely imposed by the EU in the form of the Action Plan, it receives a higher status. By being detached from internal political divisions and intrigues, the Action Plan may be invoked as a neutral and non-negotiable agenda and hence serve as an agenda for domestic reforms.

4.1.6. ENP too expansive

The ENP was initially meant to regulate the relations of the EU and some of its Eastern European neighbours. Due to political pressures exerted by some Mediterranean EU Member States, it was extended both to North African and Middle Eastern NCs. Yet another extension led to the inclusion of countries in the Caucasus. Nowadays the ENP caters to sixteen NCs, which can be broadly divided into three distinct sub-categories: Eastern European NCs, Middle East and Northern Africa NCs and NCs in the Caucasus. In fact the Commission itself officially pursues two sub-ENP policies, one with respect to Eastern European NCs, and the other with respect to Southern Mediterranean NCs.

It is indeed virtually impossible to formulate and implement a coherent policy with a regional dimension which would cater for such a large number of NCs, with a geographic spread over three different continents and with such degree of socio-economic, political, cultural and linguistic diversity. By the same token, it is difficult to implement the bilateral, differential feature of the ENP *vis-à-vis* so many countries with such a degree of heterogeneity (a theme to be explored below in greater details). Similarly, it is rather challenging to cooperate with a view to adopting “common values” in such an overstretched policy: “... for ‘common values’ to be both nation-specific and common to all countries at the same time they necessarily need to be very general and allow for local adjustments and exceptions”.²⁴⁹ As a result of the over-expansive nature of the ENP, a cleavage was created among EU Member States between those more interested in Eastern European NCs and those interested in the Mediterranean NCs, thereby eroding the coherence and consistence of the ENP,²⁵⁰ weakening, once again, its *effet utile*.

4.1.7. The politicization of the ENP

The work of Lavenex and Schimmelfennig teaches us that EU external governance is more effective when it is channelled through more sectoral, policy-specific,

²⁴⁹ Leino and Petrov, *supra* note 185, at 665.

²⁵⁰ Edwards, *supra* note 3, at 53.

technocratic (as opposed to macro-institutional, political) channels.²⁵¹ The de-linking of the ENP from high politics could therefore assist the implementation of the agenda of approximation of (trade) laws. Yet the ENP suffers from politicization that may adversely affect its effective implementation. One reason for such politicization is its declared bilateral dimension. This bilateral, differentiated nature of the ENP (as compared, for example, with the more regionally-based EMP) has led to the situation whereby, in the words of an EU official, “different paths of preparation, different benchmarks and different rewards” are applied to the various ENP addressees.²⁵² The end result of such a process is that the rule transfer process under the ENP is “less ‘objective’ and much more political. It is driven less by collective EU considerations than by individual preferences within the Member States. Because of the absence of clear collective criteria and rewards, bilateral relations between the NCs and the EU Member States are far more determining than in the case of enlargement”.²⁵³

The second and more influential factor that caused the politicization of the ENP is its original, declared intention of linking rewards with the implementation not only of legislative and economic reforms but also socio-political macro reforms. The ENP was premised on economic and political conditionality and its call for approximation of laws must therefore be examined in its wider, strategic context, namely the EU desire to enhance its influence both regionally and globally. This EU campaign for approximation of trade, economic, financial and monetary laws may be seen as part of a grand design, namely the reform of the NCs’ governance, civil societies and economies. The EU perceives legal, socio-economic, and political reforms in the NCs and economic prosperity as intertwined.²⁵⁴

Take, for example, the Middle East NCs. The Middle East is afflicted by structural social, political and economic problems. These include, according to the EU, deficits

251 Lavenex and Schimmelfennig, *supra* note 3, at 806-808: Although external governance is institutionalized in overarching frameworks such as the EEA or the ENP, the actual transfer of EU rules follows sectoral lines rather than these macro-institutional prerogatives.

252 A Commission’s official interviewed in June 2008 by Casier, *supra* note 3, at 48.

253 Casier, *supra* note 3, at 48.

254 See A. Magen, 'Building Democratic Peace in the Eastern Mediterranean: An Inevitably Ambitious Agenda', Working Paper Number 9, Stanford Institute for International Studies (2004), 115.

in governance, marginalisation of women, poor implementation of international human rights conventions, insufficient independence of legal and judicial systems, low status of non-governmental organisations, unevenly dispensed education, authoritarianism and poor economic and social performance.²⁵⁵ These structural problems hamper the development of democratic values, prosperity, the protection of human rights, and the peaceful resolution of conflicts. The EU is concerned with the prevailing state of affairs, fearing that political extremism, terrorism, socio-economic unrest, narcotics trafficking, and illegal immigration in the NCs may have negative increasing spillovers for it.²⁵⁶ After all, as the former French Foreign Minister, H. de Charette has noted, "when violence returns to the Middle East, sooner or later it will show up in Paris".²⁵⁷

Europe also had to face significant political, economic and social problems in the aftermath of World War Two. As stated above, the EEC and then the EC and the EU served as efficient instruments, enabling Europe to solve its own problems, and thereby to become stabilized. Now the EU wishes to "export" its successful campaign pursued under the European integration programme to its vicinity and beyond, creating a linkage between structural reforms, on the one hand, and peace, stability and prosperity, on the other hand.

Hence in return for its willingness to open its economic gates, under the aegis of the ENP, the EU expects its NCs to gradually adopt the basic values of the EU (peace, the rule of law, democracy and the protection of human rights and freedoms) and for that purpose to pursue political, economic and institutional reforms that entail the approximation of laws.²⁵⁸

255 See Commission of the European Communities, Communication from the Commission to the Council and the European Parliament, Reinforcing EU Actions on Human Rights and Democratisation with Mediterranean Partners, Strategic Guidelines, Brussels 21.05.2003 Com(2003) 294 final, at 4.

256 Tocci, *supra* note 70.

257 R. Dannreuther, 'The Middle East- Towards a Substantive European Role in the Middle East Peace Process', in R. Dannreuther (ed.), *European Union Foreign and Security Policy – Towards a Neighbourhood Strategy* (Routledge, 2004), 151, at 152.

258 For a theoretical analysis of the attempts of the West to "export" Western values, see, by analogy, Etzioni, *supra* note 69.

Such a choice is only a natural one from the EU perspective. It was Huntington who predicted that the European Union would be the single most important force to counterbalance American hegemony.²⁵⁹ Yet the EU suffers, as a major global power, from what may be termed a hard-power deficit, which was recently manifested in Libya.²⁶⁰ The ability of the EU to project decisive force into other regions is limited.²⁶¹ Consequently, the EU, in its attempt to acquire international influence, relies mainly on economic instruments and on what Nye termed "soft power" instruments.²⁶² The EU attempts to translate its (albeit eroding) economic leverage into a diplomatic tool. It positions itself as a civil and civilizing Normative Power,²⁶³ which uses instruments of persuasion, strategic dialogue, free trade agreements, regional projects and financial incentives and rewards to "export" its values, and thereby to extend its sphere of economic and normative influence.²⁶⁴ One of the instruments in the EU arsenal used to gain such regional and global hegemony is the concept of approximation of laws, which assists it in gaining economic influence and resultant political influence. Consequently, the ENP itself explicitly creates a clear *quid pro quo*. In return for the EU's willingness to open its economic gates, the EU requires its NCs to adopt its basic values, referred to above, and such adoption requires the pursuance of socio-political reforms.²⁶⁵

The politicization of the ENP is thus a well-designed strategy. Yet reverting to the work of Lavenex and Schimmelfennig, such strategy may prejudice the ENP's effectiveness.²⁶⁶ As will be argued below in greater detail, this intentional creation of

259 S. Huntington, 'The Lonely Superpower', 78/2 *Foreign Affairs* (1999).

260 Z. Laïdi, 'Europeans without Europe: The Paradox of the Arab Spring', in E. Ratka and O. Spaier (eds.), *The European Union and Its Neighbourhoods: Concepts, Constructions and Strategies of European Foreign Policy* (Nomos Verlagsgesellschaft, Baden-Baden, 2012), 109.

261 R. Kagan, 'Power and Weakness: Why the United States and Europe See the World Differently', 113/1 *Policy Review* (2002).

262 J.S. Nye, *Soft Power – The Means to Success in World Politics* (Public Affairs, 2004).

263 See I. Manners, 'Normative Power Europe: A Contradiction in Terms?', 40/2 *Journal of Common Market Studies* (2002), 235.

264 E. Aoun, 'European Foreign Policy and the Arab-Israeli Dispute: Much Ado about Nothing?', 8/3 *European Foreign Affairs Review* (2003), 289, at 299.

265 For a theoretical analysis of the attempts of the West to "export" Western values, see, by analogy, Etzioni, *supra* note 69.

266 Lavenex and Schimmelfennig, *supra* note 251.

a linkage between trade benefits and socio-political reforms may affect the manner in which the NCs perceive the ENP (in terms of sovereignty and legitimacy) and that impact might, in turn, prejudice their willingness and ability to pursue significant approximation of laws.

A fine example of that impact is Israel's participation in the ENP. Although Israel, according to the EU, functions as a well-established parliamentary democracy,²⁶⁷ two major problems still prevail: the difficulty of reconciling the declared Jewish nature of the State of Israel with the rights of Israel's non-Jewish minorities, and its conduct in the Occupied Territories.²⁶⁸ In the opinion of the EU, these problems hamper the resolution of the Middle East conflict, with resultant destabilizing effects in security terms. The ENP thus linked the upgrading of bilateral relations between the EU and Israel to Israeli progress on these political fronts. Such linkage ultimately led to the freezing of EU-Israel negotiations for upgrading reciprocal relations and to the neglect to adopt a new Action Plan.²⁶⁹ Yet this linkage of the ENP with high politics is mitigated by the weak mechanism of conditionality, analysed above.

267 EU-Israel Action Plan, *supra* note 15.

268 *Ibid.*

269 S. Pardo and J. Peters, *Uneasy Neighbors: Israel and the EU* (Lexington Books, 2010). For support, see the following statements of the Commission: The process of developing closer EU-Israel partnership needs to be, and to be seen, in the context of the broad range of our common interests and objectives, which notably include the resolution of the Israeli-Palestinian conflict through the implementation of the two-state solution", Eighth Meeting of the EU-Israel Association Council, Statement of the EU, Luxembourg, 16 June, available at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/association_counc/association_council.pdf; Commission communication on the implementation of the ENP: "Any review of bilateral EU-Israel relations, including in the context of the ENP Action Plan, must take into account the persisting Arab-Israeli conflict", Communication to the European Parliament and the Council, Implementation of the ENP 2008, COM (2009) 188/3, 4 available at http://ec.europa.eu/world/enp/pdf/progress2009/com09_188_en.pdf See also See European Commission and High Representative of the EU For Foreign Affairs and Security Policy, Joint Staff Working Document, Implementation of the European Neighbourhood Policy in Israel: Progress in 2012 and recommendations for action, Brussels, 20.3.2013, SWD(2013) 91 final, at 2 which explicitly speaks of freezing of upgrading the relations.

4.2. Factors relating to the EU

This sub-Section distils and analyses the EU-related factors which can account for the limited effectiveness of the ENP as an engine for approximation of laws. More specifically, and drawing on the work of Lavenex and Schimmelfennig, it argues that power-based explanation pertaining to the EU's trade power, the (eroding) dependence of the NCs on trading with the EU, as well as existence of alternative, competing entities that are engaged in external governance, may all negatively affect the effectiveness of the EU external governance, including, in particular, its ability to generate approximation of laws.²⁷⁰ For the purpose of this analysis the Working Paper relies on the following assumptions offered by Lavenex and Schimmelfennig: (i) The mode of external governance varies with structures of power and interdependence (high and asymmetrical interdependence in favour of the "governance provider" tends to produce a hierarchical mode of governance and is conducive to market governance); (ii) The effectiveness of external governance increases with the bargaining power of the "governance provider".²⁷¹

4.2.1. Capacity-expectations gap

The ENP was formulated on the basis of a very promising, generous proposal. Prodi, the President of the Commission at the time of its launch referred to it as offering the NCs the possibility of "sharing everything with the Union but institutions".²⁷² Likewise, in more concrete terms, the ENP was presented as a generous offer: "Deeper Economic Integration with our ENP partners will be central to the success and credibility of the policy. From the outset, a key premise of the ENP was that economic integration should go beyond free trade in goods and services to also include "behind the border" issues: addressing non-tariff barriers and progressively achieving comprehensive convergence in trade and regulatory areas (such as technical norms and standards, sanitary and phytosanitary rules, competition policy, enterprise competitiveness, innovation and industrial policy, research cooperation, intellectual property rights, trade facilitation customs measures and administrative capacity in the

²⁷⁰ Lavenex and Schimmelfennig, *supra* note 3.

²⁷¹ *Ibid.*, at 804.

²⁷² Prodi, *supra* note 194, as analysed by Edwards, *supra* note 3, at 51.

area of rules of origin, good governance in the tax area, company law, public procurement and financial services)...The objective would ultimately be that our partners share a common regulatory basis and similar degree of market access."²⁷³

Moreover, the generous promise made by the ENP was supported by a new differentiated, tailor-made principle, aimed at buttressing the regional nature of the Policy. Contrary to the Barcelona Process in which the EU treated, in principle, all non-EC Mediterranean countries that were not Member States at that time *en bloc*, the ENP purports to treat, in principle, each of its NCs in accordance with its particular needs, objectives, economic development and rate of progress.²⁷⁴ In the words of the Commission: "the intensity and level of ambition of relations with each ENP partner is differentiated, reflecting the degree to which common values are effectively shared, the existing state of relations with each country, its needs and capacities, as well as common interests".²⁷⁵ This bilateral component of the ENP was especially attractive for the more advanced NCs, which under previous regional arrangements had to contend themselves with an unsatisfactory regional, non-differentiated policy which catered to the lowest regional common denominator.²⁷⁶

Yet, the promise of differentiated bilateralism embodied in the ENP was not fully met by the EU. The work of Bodenstein and Furness is relevant in that regard. They concluded that three options are open to the Commission when devising an incentive structure: (i) to offer a costly incentive-compatible agreement with shutdown for reform-reluctant partners; or (ii) to continue to offer a low-end one-size-fits-all agreement that bunches all countries together on a less than optimal reform level; or it may (iii) offer less costly agreements in an effort to separate reform-willing and capable partners from those unwilling or unable to engage in reform. In their opinion the Action Plans are differentiated only in terms of the specific details of the reforms

273 Communication from the European Commission: on strengthening the European Neighbourhood Policy. Brussels, 4 December, COM(2006) 726 final, at 4-5.

274 See EC Commission, *supra* note 5: The Action Plans will be differentiated, *i.e.* tailor-made to reflect the existing state of relations with each country, its needs and capacities, as well as common interests.

275 Commission communication on proposals for Action Plans under the ENP, 9 December, COM (2004) 795 final.

276 For analysis of the latter theme, see A. Tovias and R. Del Sarto, 'Caught Between Europe and the Orient: Israel and the ENP', 36/4 *The International Spectator* (2001), 91.

requested, yet essentially they constitute a low-reward, one-size-fits all offer. Such an offer is tantamount, in their opinion, to a shutdown agreement that either deters most countries from implementing reform, if its requirements are too high, or provokes reform-minded countries to under-deliver, if it is too low.²⁷⁷

A case in point for the constraints of the bilateralism principle is the State of Israel. The effective pursuance of differentiated bilateralism could have placed Israel in a privileged position, as compared with other NCs, enabling her to translate advanced technological and economic status into substantial economic advantages in the form of liberalized legal regimes.²⁷⁸ This reality was acknowledged by the Commission Strategic Guidelines on Human Rights and Democratisation with Mediterranean Partners,²⁷⁹ by the Commission's Country Report on Israel,²⁸⁰ by the Wider Europe Initiative, and by the Action Plan itself.²⁸¹ The ENP thus carried for Israel the promise of polling itself out of the regional EMP and basing its relations with the EU on bilateral parameters that could have reflected Israel's socio-political and economic-technological advancement. The Commission for its part enhanced Israel's high expectations. Enlargement Commissioner Günter Verheugen went as far to state that "I consider Israel to be a natural partner for the EU in the new neighbourhood policy....Our relations will be tailor-made and can range from the *status quo* to the type of close interconnection that we have with countries like Norway or Iceland in the European Economic Area".²⁸²

277 Bodenstein and Furness, *supra* note 119, at 392-394 and 396.

278 There is however, a negative aspect to that differentiated, tailor-made principle. The *en bloc* principle, which formed the basis of the Barcelona Process, was intended to advance coherent economic, political and social co-operation in the Middle East and North Africa. The tailor-made approach would reinforce bilateral relations and may therefore come at the expense of regional coherence and solidarity, so needed in the Middle East in general.

279 Commission of the European Communities, Communication from the Commission to the Council and the European Parliament, Reinforcing EU Actions on Human Rights and Democratisation with Mediterranean Partners, Strategic Guidelines, Brussels 21.05.2003 Com(2003) 294 final, 5.

280 See Commission Staff Working Paper, European Neighbourhood Policy, Country Report, Israel, [COM(2004)373 final], Brussels, 12.5.2004, SEC(2004) 568.

281 The Action Plan, Section I (Introduction), *supra* note 15.

282 Verheugen, speech delivered at a Conference on EU Enlargement and Israel, The Hebrew University, Jerusalem, 15 June 2003, as cited and analysed by Del Sarto and Schumacher, *supra* note 3, at 24.

Yet soon after the launch of the ENP, the State of Israel had to face the dissonance between the EU's promising rhetoric and the more modest realities, and to realize that the EU operates under certain constraints when applying the promised differentiated treatment.

It must be emphasized in this context that the EU's relations with Israel, as well as with other NCs, have known several instances in which turgid promises were not fully realized.²⁸³ The promise of the ENP to grant the NCs "a significant measure of economic and political integration",²⁸⁴ and Prodi's description of the ENP as offering "all but institution" raised high expectations in the NCs which were not met.

Europe's inability to support the high rhetoric with commensurate trade benefits contributes to the widespread Israeli perception that the EU's policies reflect the lowest common denominator and that the EU excels in words and not in deeds: "The Europeans are strong when it comes to politics and declarations, however when there is a concrete opportunity to do something and help alone, they shy away."²⁸⁵ Such inability on the part of the EU is criticised by other countries too,²⁸⁶ further eroding the EU's credibility in its neighbourhood (a theme to be revisited below).

In 2011 the EU revised the ENP with the intention of revitalizing the principle of differentiated bilateralism, promising that the revised ENP "will involve a much higher level of differentiation, allowing each partner country to develop its links with the EU as far as its own aspirations, needs and capacities allow".²⁸⁷ It remains to be seen whether the EU will succeed in the precise place where it failed in the past.

283 See L. Chokron, 'The Political Background of the Negotiations Toward the 1995 Association Agreement', in Hirsch *et al.*, *supra* note 104, at 180 and 184.

284 See European Parliament Report, *supra* note 5, at 9.

285 Zohar Peri of the Israeli Ministry of Trade and Industry, *Jerusalem Post*, 3 August, 1995.

286 A. Warkotsch, 'The European Union and Democracy Promotion in Bad Neighbourhoods: The Case of Central Asia', 11/4 *European Foreign Affairs Review* (2006), 509, at 517, with respect to countries in Central Asia.

287 Join Communication by the High Representative of the Union For Foreign Affairs and Security Policy and the European Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, A new response to a changing Neighbourhood: A review of European Neighbourhood Policy, Brussels, 25 May 2011, COM(2011) 303, at 2.

4.2.2. The weakening of the EU

This sub-Chapter is premised on the assumption referred to *supra*, according to which power-based explanation relating to the EU's material power may account for effective external, EU governance (or lack thereof). This premise is supported by the scholarship of Lenz, who, drawing on his examination of the alignment by Mercosur of EU's institutional arrangement, argues that EU's material support may induce such domestic actors to emulate EU-type institutional models.²⁸⁸ According to his analysis, direct and meaningful EU support may empower pro-reform domestic players who advance EU-style institutional change.²⁸⁹

The ENP was launched in 2003-2004 in a period of relative EU confidence. The Euro had just been launched, the EU was moving towards completion of the “big-band” wave of accession and the process of adopting a Constitution was progressing. This period raised expectations that the EU would be able to invest the required institutional and financial resources to provide the much-needed support for the pro-reform domestic actors in the NCs. Yet soon after, the EU had to address a multi-dimensional and multifaceted crisis. The Constitutional Treaty suffered a devastating blow in the French and Dutch referenda, the newly launched accession negotiations with Turkey fell into stagnation, enlargement fatigue emerged, and the legitimacy deficit from which the EU suffers worsened, only to be followed by a severe and long-lasting economic and financial crisis. Euro-scepticism thus became more prevalent, more entrenched and more politically mainstream.²⁹⁰

Under these strained conditions, most of the EU's material resources were directed inwards, facing the internal crises. The ENP has consequently started to lose esteem and as Bartlett, Čučković, Jurlin, Nojković and Popovski of the SEARCH Consortium

288 T. Lenz, ‘Spurred Emulation: The EU and Regional Integration in Mercosur and SADC’, 35/1 *West European Politics* (2012), 155, at 156-158 and 169-170.

289 Lenz, *ibid.*, at 169-170: As for Mercosur, the challenge is mainly about the empowerment of domestic advocacy coalitions and epistemic communities, including the two smaller member states and regional institutions, whereas in SADC it has to do more with the influence of EU-oriented (and often EU-paid) consultants.

290 For analysis of the phenomenon of Euroscepticism, see 51/1 (Special Issue) *Journal of Common Market Studies* (2013).

persuasively argue, the EU has “not yet played an important role as a ‘transformative power’” in the ENP context.²⁹¹ According to them, if the EU were to fail to pursue a more active and robust role, the ENP’s promise for legislative, regulatory and institutional reforms might stagnate, run out of steam or even backfire.²⁹²

The EU’s ability (or lack thereof) to materially support the NCs is not the only relevant factor. It is submitted that the very success of the European integration process (or lack thereof) may impair the effectiveness of external EU influence on domestic actors.²⁹³ As Casier noted, NCs may remodel themselves on the EU if they consider it to be successful or legitimate.²⁹⁴ Yet when the EU is perceived to operate under a long-standing, existential crisis, its ability to serve as a magnet for legislative and regulatory reforms is diminished.

4.2.3. The weakening (trade) leverage of the EU

This sub-Chapter is premised on the rationalist logic of consequentialism (as opposed to the sociological logic of appropriateness), in accordance with which instrumental calculations and strategic interaction dominate international negotiation processes.²⁹⁵

In accordance with this rationalist perception, external governance is effectively produced by the EU’s Internal Market, when non-EU firms interested in participating in it are required and willing to follow EU’s rules.²⁹⁶ Yet, the precise ability of the EU to induce a NC to align its legislation with that of the EU depends, *inter alia*, on the degree of access to the Internal Market offered to it under the ENP and on the respective balance of bargaining powers of the EU and that of the NC; such a balance

291 Bartlett *et al.*, *supra* note 24.

292 *Ibid.*

293 For support, see Lenz, *supra* note 288, at 169-170.

294 Casier, *supra* note 3, at 47.

295 J.G. March, and J.P. Olsen, ‘The Logic of appropriateness’, in M. Rein, M. Moran and R.E. Goodin (eds.), *Handbook of Public Policy* (Oxford, Oxford University Press, 2006), 689; Mendez, Wislade and Yuill, *supra* note 193, at 599.

296 Lavenex and Schimmelfennig, *supra* note 3, at 799.

depends, in turn, on the degree of dependence of the NC on its trade with the Internal Market.²⁹⁷

Currently most ENP countries are highly dependent on trade with the EU.²⁹⁸ Yet scholarship teaches us that outside the realm of enlargement, the EU bargaining power tends to be weak and inconsistent.²⁹⁹ This conclusion applies with added force in the ENP context, given the shrinking global prominence of the EU in terms of the relative size of the Internal Market.

Indeed, as Artelaris, Kallioras and Petrakos of the SEARCH Consortium postulate, the BRIC countries together with other emerging markets erode the importance of the EU in trading terms, rendering the EU a less significant trading partner for the NCs. These developments, which are only predicted to continue (see Figures 1-2 below) weaken, according to power-based explanations of external governance, the effectiveness of the ENP as a promoter of legislative and regulatory alignment.³⁰⁰

This conclusion is further reinforced in the light of the diminishing degree of trade dependence of most of the NCs,³⁰¹ including Israel,³⁰² on trade with the EU. Figures

297 For support, see Lavenex and Schimmelfennig, *supra* note 3, at 804: Whether EU rules are selected for co-operation, and whether these rules will be adopted and applied depends on the bargaining power of the EU.

298 For analysis, see Casier, *supra* note 3, at 45. See also Schimmelfennig and Scholtz, *supra* note 127, at 191; A. Moravcsik and V. Milada, 'Preferences, Power and Equilibrium: The Causes and Consequences of EU Enlargement', in F. Schimmelfennig and U. Sedelmeier (eds.), *The Politics of European Union Enlargement: Theoretical Approaches* (Routledge, London, 2005), 198, at 201. According to the data available in the EU website, these are the 2011 trade rates of the NCs with the EU (in Millions of Euro): Algeria: 44,452 (51.35% of the country's general trade); Ukraine: 33,960 (31.97%); Israel: 31,608 (31.6%); Morocco: 23,133 (50.12%); Tunisia: 20,601 (67.73%); Egypt: 19,397 (30.28%); Belarus: 17,530 (28.42%); Azerbaijan: 13,566 (52.15%); Libya: 10,905 (56.25%); Syria: 5,877 (19.93%); Lebanon: 5,735 (34.48%); Jordan: 3,005 (8.06%); Moldova: 2,760 (26.54%); Georgia: 1,785 (13.42%); Armenia: 1276 (16.2%).

299 Lavenex and Schimmelfennig, *supra* note 3, at 804. See also Casier, *supra* note 3, at 49, who went as far as suggesting that prevailing economic dependence of the NCs on the Internal Market cannot promote effective legislative alignment, given the fact that such alignment does not correlate with degrees of interdependence in various countries and sectors.

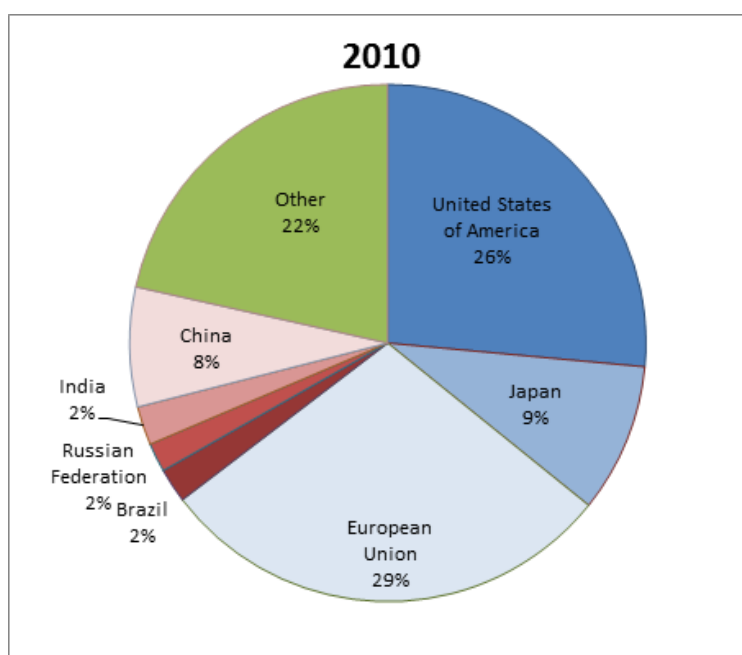
300 But compare with Edwards, *supra* note 3, at 58: For Ukraine, Moldova and Georgia, the importance of the European market reinforces their still strong European aspirations.

301 Artelaris *et al.*, *supra* note 131. For statistics, see *supra* note 298.

3-4 below illustrate that such a trend occurred in nine out of the fifteen examined NCs, including four out of the five largest trading partners of the EU (Ukraine, Israel, Morocco and Tunisia). This diminution renders the Internal Market less important for numerous NCs, with the resultant diminishing effectiveness of the EU as a transformative entity.

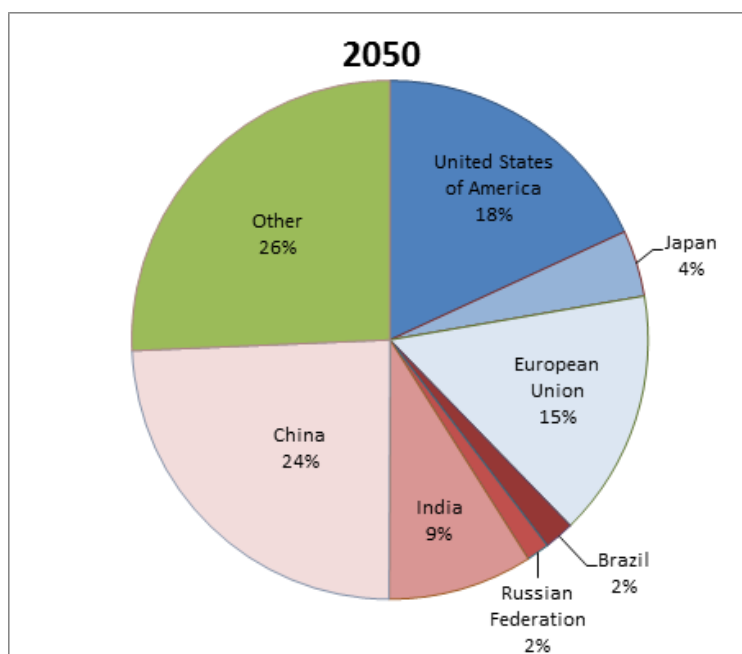
302 For support, see Magen, *supra* note 102, at 103 who argues that Israelis expect Western markets, including, in particular, the EU, to become relatively less dominant over time. According to Magen, who supports his argument with trade statistics, Israeli officials expect trade diversion to continue, even accelerate, over the coming decade, particularly towards China and India.

Figure 1 - Regional shares of the world GDP in 2010 (constant 2005 USD)



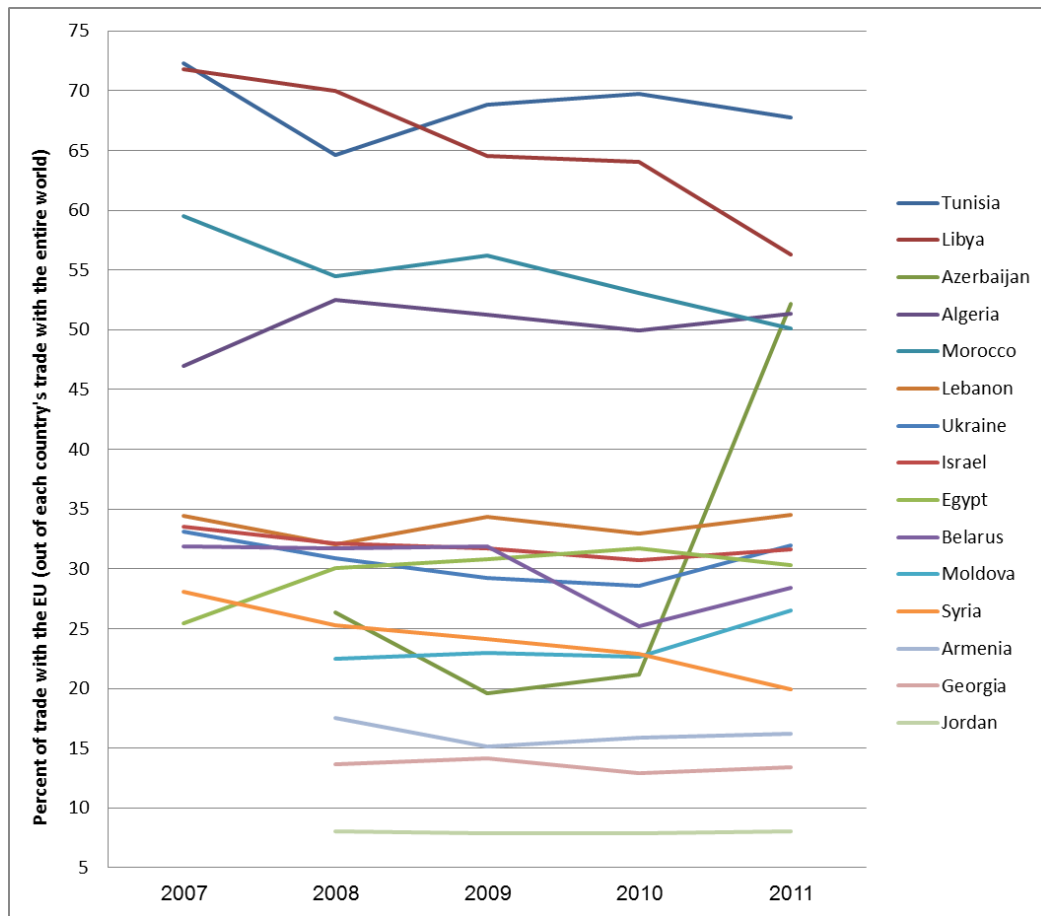
Source: EU, Global Europe 2050: Executive Summary, October 2011
http://ec.europa.eu/research/social-sciences/pdf/global-europe-2050-summary-report_en.pdf

Figure 2 - Regional shares of the world GDP in 2050: “Nobody cares” (constant 2005 USD)



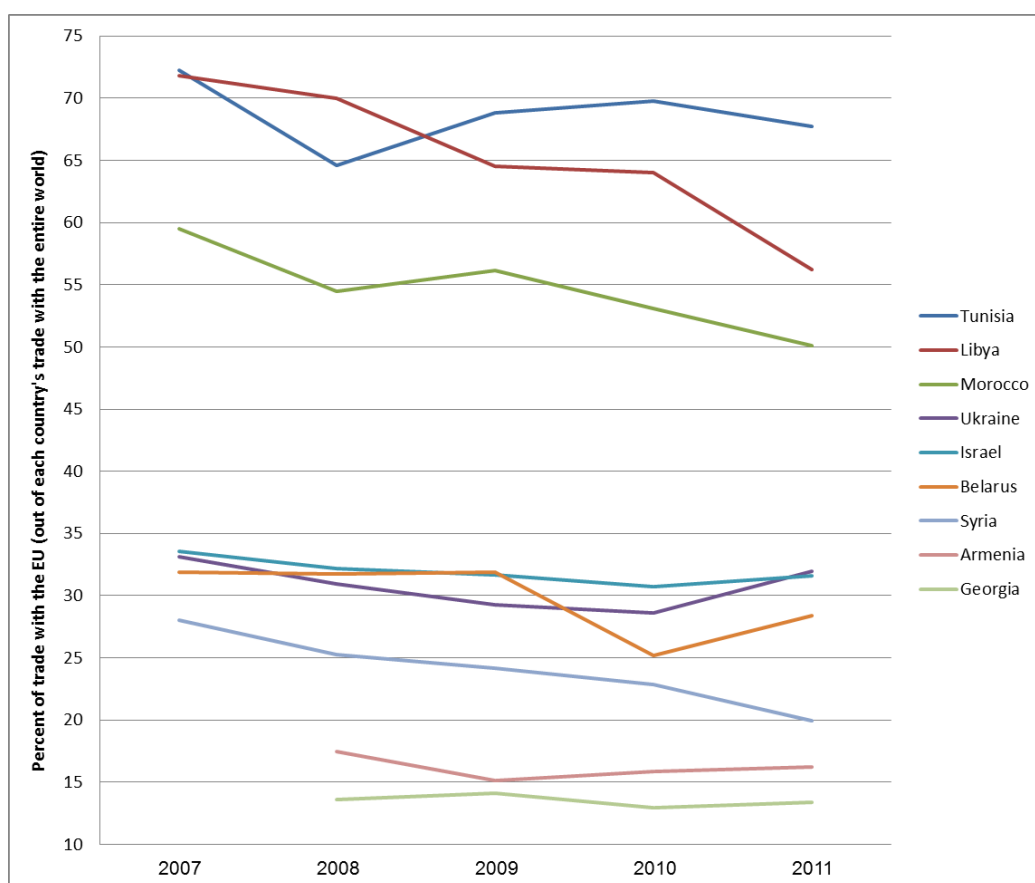
Source: EU, Global Europe 2050: Executive Summary, October 2011
http://ec.europa.eu/research/social-sciences/pdf/global-europe-2050-summary-report_en.pdf

Figure 3 - The declining trade dependence of the NCs' on the EU (15 NCs, not including Palestine)



Source: the EU Commission: <http://ec.europa.eu/trade/>

Figure 4 - The declining trade dependence of the NCs' on the EU (including only those NCs whose dependency has been reduced)



Source: the EU Commission: <http://ec.europa.eu/trade/>

4.2.4. New alternatives for the EU

A “monopolist” EU transfer provider is likely to be more effective³⁰³ than the EU, which has to compete with other such providers.³⁰⁴ As Edwards postulates, where such “alternative ‘poles of attraction’ (or distraction) emerge, uncertainties engendered by the EU compound”.³⁰⁵ The EU recently took cognizance of the

303 See Magen, *supra* note 102, at 105 and J. Checkel, ‘Why Comply? Social Learning and European Identity Change’, 55/3 *International Organization* (2001), 553.

304 Magen, *supra* note 102, at 105.

305 Edwards, *supra* note 3, at 50.

emergence of alternative poles of attraction,³⁰⁶ fearing that this state of affairs might result in it being “less attractive as a model and partner”.³⁰⁷

Scholarship supports such fears with respect to Moldova, Georgia and the Ukraine.³⁰⁸ It is submitted that such fears are also relevant with respect to the State of Israel. For many years, the EU served as the most prominent point of reference for legislative and regulatory alignment. Yet the very prospect of Israel’s accession to the OECD (and its ensuing actual accession) changed that state of affairs.

As Magen postulates, the very opening of an OECD membership horizon redirected Israeli bureaucratic attention towards a new aspiration group and produced a reduction in domestic pressure to associate more closely with the EU.³⁰⁹ Magen’s analysis is substantiated by explicit statements by high ranking Israeli officials who take cognizance of the fact that the OECD provides Israel with a more politically attractive point of reference for legislative and regulatory reforms than that of the EU.³¹⁰ Even the EU itself in its latest survey of Israel’s progress under the ENP refers in the context of intellectual property to the OECD legislative benchmark and not to its own *acquis* in this area.³¹¹

306 See Join Communication to the European Parliament, the Council, the European Economic and Social Committee of the Regions, European Neighbourhood Policy: Working towards a Stronger Partnership, Brussels, 20.3.2013, JOIN(2013) 4 final, at 21, referring to the creation of the Eurasian Union between the Russian Federation, Belarus and Kazakhstan.

307 *Ibid.*

308 Edwards, *supra* note 3, at 50.

309 Magen, *supra* note 102, at 105. In accordance with his analysis, OECD is currently being viewed by Israeli officials as a superior association group. The OECD constitutes a club that includes all major Western powers with which Israel seeks affiliation, leading EU States, the US, Canada, and Japan. Moreover, as an economic organisation, it does not deploy overt political conditionality. Hence, costs of association with it are perceived by Israel to be lower.

310 See the words of Mr. Mordehai Amichai-Bivas, Head of Europe Department, Ministry of Foreign Affairs, at the conference, ‘The European Neighbourhood Policy and Israel: Achievements and Prospects for the Future’, Bar Ilan University, 21 January, 2013.

311 See European Commission and High Representative of the EU For Foreign Affairs and Security Policy, Joint Staff Working Document, Implementation of the European Neighbourhood Policy in Israel: Progress in 2012 and recommendations for action, Brussels, 20.3.2013, SWD(2013) 91 final, at 4, calling Israel to ensure “further progress in amending legislation on intellectual property rights to bring it into line with OECD commitments.”

Another potential competitor for legislative reforms is the United States. In 1985 Israel signed a Free Trade Agreement with the United States, thus becoming the first country to have a free trade area with both the US and the EU.³¹² Israel's participation in the ENP enables her, to an extent yet to be determined, to more meaningfully join Europe's Internal Market, while retaining, in principle, an independent commercial policy towards third countries, and thus maintaining the said privileged trade relations with the United States. Nonetheless, approximating Israel's laws to those of the EU may still have negative implications for trade and economic relations between the State of Israel and the United States. One of the main objectives of the 1985 United States-Israel Free Trade Agreement, from the American viewpoint, was to improve the competitiveness of U.S. exporters to Israel, as compared with EU exporters: "The economic advantage to the United States of a free trade area is the elimination of relatively high tariff barriers on nearly one-half of United States exports to Israel and removal of the EC duty-free competitive advantage in the Israeli market, particularly in industrial products which directly compete with the EC".³¹³

Any approximation of Israeli laws to the EU *acquis* may run counter to that objective. The ENP entails the alignment of Israel's legislation and standards with those of the EU, with resultant improved accessibility to Israeli markets for European exporters. This would render Israel's economy more integrated with that of the EU, at the expense of Israel's economic relations with United States. After all, Israel's trade potential is not unlimited and the trading game is to some extent a zero-sum one.

U.S. officials are complaining that Israel's trade surplus with the United States "subsidizes" Israel's chronic trade deficit with the EU.³¹⁴ Those American concerns

312 For a general comment on the Agreement and on certain aspects of it, see A.S. Galper, 'Restructuring Rules of Origin in the U.S.-Israel Free Trade Agreement: Does the EC-Israel Association Agreement Offer an Effective Model?', 19 *Fordham International Law Journal* (1996), 2028; S. Ward, 'The U.S.-Israel Free Trade Area: Is it GATT Legal?', 19/2 *George Washington Journal of International Law and Economics* (1985), 199.

313 H.R. REP. No. 64, 99th Cong., 1st Sess. 2 (1985), reprinted in 1985 U.S.C.C.A.N. at 64. See also Galper, *ibid.*: One of the objectives of the 1985 Free Trade Agreement was to remedy the comparative disadvantage of U.S. exports to Israel as compared to EC exports after implementation of the EC-Israel FTA.

314 Hirsch *et al.*, *supra* note 104, at 96; see also the words of Ambassador Zalman Shoval, former Israeli Ambassador to Washington and currently the President of Israel-U.S. Chamber of Commerce, who also

are only likely to be exacerbated by any meaningful implementation of the ENP in general and the approximation of Israeli laws to those of the EU, in particular. In that regard, Israel walks a tightrope. As Sofer puts it, one of the principal challenges of Israeli diplomacy is juggling the asymmetry of her intimate strategic ties with the U.S. and her close economic ties with Europe.³¹⁵ Israel is not the only country to face this challenge in relation to the United States. It is also relevant to those other Mediterranean countries, such as Jordan, which maintain very strong political relations with the United States while relying on the Internal Market as their principle market.

complained against the discriminatory treatment of American firms in Israel, as compared with European firms, see the Israeli daily business newspaper *Globes*, 22 February, 2004 [Hebrew].

315 S. Sofer, 'Towards Distant Frontiers: The Course of Israeli Diplomacy', 10(1-2) *Israel Affairs* (2004), 1, at 7.

4.3. Factors relating to the NCs

This sub-Chapter focuses on the NCs-related factors that impair the effectiveness of the ENP, to include subjective perceptions of the NCs about the EU, its norms, the ENP's rewards and demands, the impact of the ENP on national sovereignty, slow mechanism of socialisation, weak institutional arrangements, low social capital and the prominence of domestic veto players. Such a focus on the NCs renders the analysis more nuanced as it injects a subjective dimension into the more objective analysis of the ENP, offered in Chapter 4.1. It also mitigates the ENP scholarship's excessive focus on the EU perspective.³¹⁶

4.3.1. The slow processes of socialisation

Conditionality and socialisation are considered as the two most relevant (alternative or supplementary) mechanisms for norm change by the non-EU State.³¹⁷ In light of the weak mechanism of ENP's conditionality, analysed above, the ENP mechanism of socialisation, social learning and communication acquires particular prominence,³¹⁸ being perceived as a model of strategic social construction.³¹⁹

The Socialisation Theory does not perceive predetermined interests of the State, nor materialist cost-benefit balancing, as the chief explanations for a State's behaviour.³²⁰ Instead, State's processes of rule adoption and internalisation are mainly driven by a social learning process, during which the State's interests are shaped by social

316 For that theme, see A. Bendiek, 'The ENP. Visibility and Perceptions in the Partner Countries', Working Paper, Stiftung Wissenschaft und Politik, Berlin, FG2, 2008/01. See also Casier, *supra* note 3, at 39-40 and Edwards, *supra* note 3, at 58 for the advantages of such a focus.

317 See Sasse, *supra* note 3, at 304, relying on W. Jacoby, *The Enlargement of the European Union and NATO: Ordering from the Menu in Central Europe* (Cambridge, Cambridge University Press, 2004) and on R. Epstein, 'Cultivating Consensus and Creating Conflict: International Institutions and the (De-) Politicisation of Economic Policy in Postcommunist Europe', 40/8 *Comparative Political Studies* (2006), 1019.

318 Lavenex and Schimmelfennig, *supra* note 3, at 798.

319 Kelley, *supra* note 9, at 39: Socialisation is a main feature of the ENP. For the broader theme, see A.I. Johnston, Treating International Institutions as Social Environments, 45 *International Studies Quarterly* (2001), 487.

320 Magen, *supra* note 3, at 420-421.

structures and engagement, argumentation, persuasion, and complex learning.³²¹ The domestic decision-makers are responsive during this process to cognitive-social logic of appropriateness.³²² Indeed, IR Constructivist literature views the exportation by the EU of its *acquis* as an endogenous, identity-forming process that may lead to transnational convergence of collective values and interests of the NCs along the identities and interests of the EU (while formulating and reinforcing the EU's own identity and legitimacy).³²³

The effectiveness of the ENP as an instrument for strategic social construction depends on the EU's ability to facilitate social-learning by the NC's domestic institutions.³²⁴ Yet such a process requires much longer periods of time than for effective mechanisms of conditionality.³²⁵ The EU's Twinning programmes and the full or partial opening of EU's other programmes and institutions to the membership of the NC's may prove to be highly instrumental in supporting the social learning process.³²⁶

This prolonged nature of sociological mechanism is only being exacerbated by the problems, analysed below, of low social capital and limited institutional capacities in many of the NCs. Thus the ten years of legislative convergence under the aegis of the ENP may not be as long a period of time as may initially have been thought to be and hence the more critical views about the transformative impact of the ENP may be considered to be too harsh on the EU and on the ENP.

321 *Ibid.*

322 *Ibid.*

323 *Ibid.*

324 *Ibid.*, at 424-426.

325 For support, see Sasse, *supra* note 3, at 300.

326 Magen, *supra* note 3, at 424-426. Magen argues that the EU's Twinning programmes may be conducive because they embed professional and technical experts from the administrations of the EU Member States in those of NCs' transferring know-how and establishing interpersonal linkages across peer institutions. The opening of EU's other programmes and institutions to the membership of the NC's may facilitate multi-level, multi-theme societal interaction and resultant bottom-up socialisation through learning.

4.3.2. NCs perceptions of the EU's legitimacy and success

As Lavenex and Schimmelfennig argue, the effectiveness of EU external governance may be enhanced when the perceived quality of existing EU institutions is positive, especially when such institutions are imbued, according to sociological institutionalism, with high legitimacy.³²⁷ Their conclusion is substantiated by the scholarship of Magen, who postulates that "Domestic actors in ENP countries are more likely to be persuaded by the EU to adopt its rules if they consider the regional community of states represented by the EU as a valid *a priori* reference group whose collective values and norms they share, whose acceptance they seek, and with which they wish to be identified".³²⁸

The concept of legitimacy may be seen in this context as a normative belief that a rule or institution should be obeyed, not due to coercion or self-interest, but due to its inherent normative strength,³²⁹ when it is perceived as desirable, proper or appropriate within a socially constructed system of norms, values, beliefs and definitions.³³⁰ As Max Weber contended: "But custom, personal advantage, purely effectual or ideal motives of solidarity do not form a sufficiently reliable basis for a given domination. In addition, there is normally a further element, a belief in legitimacy. Experience shows that in no instance does domination voluntarily limit itself to the appeal to material or effectual or ideal motives as a basis for its continuance...Every such system attempts to establish and to cultivate the belief in its legitimacy".³³¹

Based on that line of thinking, international law scholars, who belong to the sociological camp, are concerned with the interface between legitimacy and compliance. According to this line of thought, compliance with social or legal norms

327 Lavenex and Schimmelfennig, *supra* note 3, at 802.

328 Magen, *supra* note 3, at 421.

329 J. Steffek, 'The Legitimation of International Governance: A Discourse Approach', 9/2 *European Journal of International Relations* (2003), 249, at 252; I. Hurd, 'Legitimacy and Authority in International Politics', 53/2 *International Organization* (1999), 379, at 379, 381 and 387; T. Franck, *The Power of Legitimacy among Nations* (New York, Oxford University, 1990).

330 M. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches', 20/3 *Academy of Management Review* (1995), 571, at 574.

331 M. Weber, *Economy and Society* (Berkeley: University of California Press, 1978), 213.

can be achieved not only through coercion or self-interest, but also through legitimacy.³³² In Hurd's opinion, legitimacy contributes to compliance by providing an internal reason for an actor to follow a rule. When the rule is perceived by that actor as legitimate, compliance is no longer motivated by a fear of sanctions or a by a calculation of self-interest, but by an internal sense of moral obligation.³³³

The analysis of the subjective perceptions of the NCs of the EU and its integration process, a theme which has attracted much scholarly attention in recent years,³³⁴ is beyond the scope of this Working Paper. The Paper thus limits itself to two propositions. First, not all NCs and their societies perceive the EU as a legitimate organisation. Take for example the case of the State of Israel. As I demonstrated elsewhere, the widespread narrative that prevails in the Israeli political sphere, as well as in broad quarters of Israeli society, is that in its Middle East dealings, the EU and most of its Member States are unbalanced and anti-Israeli. Critical European approaches towards Israel are perceived as the outcome of a European surrender to vested Arab interests, as instruments designed to clear Europe's own (historical) conscience and create its own identity, and as a reflection of European naivety, double standards and preference for preaching and declaration over deeds.³³⁵ This narrative adversely affects the legitimacy of the EU in Israel³³⁶ and hence aggressive legislative pressure applied by the EU may thus be perceived in Israel as illegitimate.

Second, the current crisis of the EU and its eroding global trading prominence prejudice the manner in which it is perceived by the NCs, rendering it less successful, less attractive, less legitimate and hence a less effective anchor for reform.

332 Hurd, *supra* note 329, at 379.

333 *Ibid.*, at 387.

334 For a general examination of this theme and a particular focus on the State of Israel, see G. Harpaz and A. Shamis, 'Normative Power Europe and the State of Israel: An Illegitimate Eurotopia?', 48/3 *Journal of Common Market Studies* (2010), 579.

335 G. Harpaz, 'Normative Power Europe and the Problem of a Legitimacy Deficit: An Israeli Perspective', 12/1 *European Foreign Affairs Review* (2007), 89.

336 *Ibid.*

4.3.3. NCs perceptions of the legitimacy of the EU's norms

Scholarship teaches us that the effectiveness of external governance may be manifested at three levels: rule selection (in international negotiations and agreements), rule adoption (in domestic legislation) and rule application (in domestic political and administrative practice).³³⁷ The degree of rule selection, rule adoption and rule implementation is affected by whether and to what extent the EU rules themselves constitute the normative reference point for the non-EU state.³³⁸ Indeed, the perceived subjective legitimacy of the norm with which the NC is asked to align its legislation affects its willingness to perform such alignment.³³⁹ This conclusion is supported by the work of Schimmelfennig and Sedelmeier who perceive the social learning model, based on a social Constructivist approach, as a prominent model for external governance in the enlargement realm, according to which candidate countries adopt EU norms and rules, because these norms are deemed by them to be appropriate and not because they are being tied to specific consequentialist incentives.³⁴⁰ This conclusion is further substantiated by the seminal work of Franck on the link between compliance and legitimacy under international law, which established that the “compliance-pull” of governments is influenced by the intrinsic qualities of the norms themselves: “in a community organized around rules, compliance is secured to whatever degree it is, at least in part by the perception of a rule as legitimate by those to whom it is addressed”.³⁴¹

Law addressees are embedded in their specific legal system and hence law reform may be better implemented when supported by the cooperation of the citizens.³⁴² Thus

337 Lavenex and Schimmelfennig, *supra* note 3, at 800ff.

338 *Ibid.*

339 *Ibid.*, at 794: The interest in external governance is spurred by certain qualities of the *acquis* itself, EU norms and rules may even gain prescriptive qualities. See also E. Barbe', O. Costa, A. Herranz and M. Natonski, 'Which Rules Shape EU External Governance? Patterns of Rule Selection in Foreign and Security Policies', 16/6 *Journal of European Public Policy* (2009), 834.

340 Schimmelfennig and Sedelmeier, *supra* note 61.

341 T.M. Franck, 'Legitimacy in the International System', 82/4 *American Journal of International Law* (1998), 705, at 706, as analysed by Magen, *supra* note 3, at 421.

342 I. Markovits, 'Exporting Law Reform - But Will It Travel?', 37/1 *Cornell International Law Journal* (2004), at 99 and 110.

a society with a strong sense of the legitimacy towards any proposed normative reform will give greater effect to the new provision than a society where the legitimacy of the Law is weak.³⁴³

Such subjective legitimacy of any given EU norm may be attained when it is inherently of high legislative quality,³⁴⁴ when it is definitive and legalized,³⁴⁵ when it represents an efficient institutional solution for a concrete policy problem,³⁴⁶ when it is being obeyed by the EU itself,³⁴⁷ or when it reflects an internationally accepted norm.³⁴⁸

4.3.4. NCs perceptions of the magnitude of the ENP's demands and rewards

Domestic perceptions in the NCs regarding the magnitude of the ENP's demands and rewards constitute yet another important variable.³⁴⁹ After all, and as argued by Mendez, Wishlade and Yuill, the subjective interpretation of Europeanisation pressures may be just as important as the (objectively examined, analysed-above) pressures themselves.³⁵⁰

NCs may consider the adoption of the *acquis* to be an extremely time-consuming and costly task.³⁵¹ These high adaptation costs, when examined in light of the analysis

343 J. Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process', 51 *American Journal of Comparative Law* (2003), 839, at 844.

344 Lavenex and Schimmelfennig, *supra* note 3, at 794.

345 T. Freyburg, S. Lavenex, F. Schimmelfennig, T. Skripka and A. Wetzel, 'EU Promotion of Democratic Governance in the Neighbourhood', 16/6 *Journal of European Public Policy* (2009), 916.

346 Lavenex and Schimmelfennig, *supra* note 3, at 802.

347 *Ibid.*

348 *Ibid.*; Freyburg et al., *supra* note 345.

349 Gawrich *et al.*, *supra* note 3, at 1216. See also Magen, *supra* note 3, at 417: The size of adoption costs and their distribution among domestic actors strongly impacts the actors' decision whether to accept EU conditions.

350 Mendez, Wishlade and Yuill, *supra* note 193, at 585.

351 For support, see Del Sarto and Schumacher, *supra* note 3, at 34-35: The size of the Internal Market *acquis* is enormous; any southern Mediterranean partner wishing to participate in it is required to bring its entire regulatory system in line with the Commission's requirements, including full harmonisation of standards for goods and services, the implementation of Community policies in the fields of agriculture, industry, transportation,

conducted above of the modest incentives provided by the ENP, might cause them to perceive such high demands as not being sufficiently compensated for by commensurate benefits.³⁵² Indeed, such fears are substantiated by scholarship focused on the ENP.³⁵³

It must be stressed, in this context, that the socio-economic costs on the part of the NCs stemming from the project of approximation of laws are immediate and certain, while any envisaged benefit is a long-term, speculative eventuality. Moreover, some of the instruments offered by the ENP, viewed positively by the EU, might be negatively perceived by authoritarian NC regimes.³⁵⁴

There are three additional features of the ENP, discussed above, that might adversely affect the legitimacy of the ENP in the eyes of the NCs. First, differentiated bilateralism reduces the ability of NCs to form collective negotiation alliances among themselves, thereby reducing their relative bargaining powers.³⁵⁵ Second, the conditionality (both negative and positive) that links the demands and awards ought to be credible,³⁵⁶ yet as established above, the degree of such credibility leaves much to be desired. Thirdly, the lack of a genuine “joint ownership” in the planning,

telecommunication, energy and the environment, the adoption of the EC's Competition Policy, and the establishment of surveillance and enforcement mechanisms.

352 *Ibid.*, at 37: The ENP does not provide relevant and adequate incentives for the political elites and the societies concerned to tackle far-reaching economic and political reforms.

353 Magen, *supra* note 3, at 413: ENP country officials complain that the EU continues to be reluctant to liberalize precisely those sectors in which southern Mediterranean countries possess the greatest interest, notably market access for agricultural products and greater movement of persons, including legal cross-boundary employment and immigration.

354 For support, see Magen, *supra* note 3, at 419: In the case of the more authoritarian regimes in the NCs, many of the incentives offered by the Commission, including economic and regulatory liberalisation, intensified political engagement and security cooperation, greater EU involvement in political conflicts and enhanced people-activity, could well be perceived as threats rather than inducements.

355 Magen, *supra* note 3, at 416. Yet, as demonstrated above, the principle of differentiated bilateralism is not employed robustly.

356 Schimmelfennig and Scholtz, *supra* note 127, at 191.

formulation and implementation of the ENP and in the incentives offered by it is, once again, prejudicial.³⁵⁷

4.3.5. NCs perceptions of the impact of the ENP on national sovereignty

Drawing on EU external governance in the enlargement sphere as well as in non-European realms, it is argued that the perception by NCs of the impact of the ENP on national sovereignty is yet another relevant variable for their willingness to adopt EU norms.³⁵⁸

The concept of sovereignty has always intrigued philosophers, political scientists, jurists, historians and theorists in international relations.³⁵⁹ Scholars analyse and qualify this concept through its own contestable elements: legal versus political sovereignty, external versus internal sovereignty, indivisible versus divisible sovereignty, and governmental versus popular sovereignty.³⁶⁰

Krasner identifies four different meanings of the term sovereignty, namely Interdependence, Domestic, Westphalian, and International Legal Sovereignty. According to his analysis, Interdependence Sovereignty refers to the ability of states to control movement across their borders.³⁶¹ Domestic Sovereignty denotes authority

357 For support, see Magen, *supra* note 3, at 422: Whether the NCs will accept as legitimate a system where they have neither present decision-making power, nor the prospect of equal participation, remains an open question.

358 For support, see Gawrich *et al.*, *supra* note 3, at 1216. See also Lenz, *supra* note 288, at 156, who analysed the EU's impact on Mercosur and came to the conclusion that such influence has not led to a wholesale copying of EU institutional arrangements, the selection of EU norms being adapted to fit with policy-makers' normative convictions, especially their continuing concerns about national sovereignty.

359 See, for example, D.A. Lake, 'The New Sovereignty in International Relations', 5/3 *International Studies Review* (2003), 303; H. Spruyt, *The Sovereign State and its Competitors: An Analysis of Systems Change* (Princeton: Princeton University Press, 1994); D. Sarooshi, 'Sovereignty, Economic Autonomy, the United States and the International Trading System: Representations of a Relationship', 15/4 *European Journal of International Law* (2004), 651; T.L. Ilgen (eds.), *Reconfigured Sovereignty – Multilayer Governance in the Global Age* (Aldershot, Ashgate, 2003).

360 See Sarooshi, *ibid.*

361 According to some, the technological advances of globalisation have reduced the costs of transportation. Since states cannot regulate trans-border movements, sovereignty is being eroded, see, for example, S.D. Krasner, 'Abiding Sovereignty', 22/3 *International Political Science Review* (2003), 231.

structures within states and the ability of these structures to effectively regulate behaviour.³⁶² According to Westphalian Sovereignty, the sovereign state enjoys a monopoly of authoritative decision-making, to the exclusion of external sources of authority, operating in an environment of non-intervention in its internal affairs.³⁶³ International Legal Sovereignty refers to mutual recognition: juridical independent territorial entities are capable of entering into voluntary contractual agreements, each operating on a free and equal footing.³⁶⁴ Sovereignty implies formal equality among states, none of which "is entitled to command, none is required to obey".³⁶⁵

Under classical Realism, sovereignty entails the existence of a supreme authority of the state over a certain territory,³⁶⁶ and the aforesaid external characteristic of sovereignty constitutes anarchy in international relations.³⁶⁷ *Per contra*, under Constructivism, sovereignty, in both its internal and external elements, is a socially constructed trait not exogenous to the international system, but a social fact that is produced, and reproduced through the practices of states and by other social norms and practices.³⁶⁸ Anarchy is therefore, "what States make of it".³⁶⁹

For the purpose of our analysis of the interface between approximation of laws and sovereignty it will suffice to assume that the concept of sovereignty relates to the (i) state's general independence from and legal impermeability to the influence of foreign powers; (ii) state's exclusive jurisdiction and supremacy of governmental powers over her territory and inhabitants; (iii) an (almost) monopoly over fundamental political decisions, as well as over legislative, executive and judiciary powers, and (iv) the

362 Different aspects of domestic sovereignty can involve the recognition of a given authority structure, or the level of control officials can actually exercise. Thus, the loss of interdependence sovereignty would also imply some loss of domestic sovereignty, Krasner, *ibid.*, at 231-232.

363 *Ibid.*, at 232-233.

364 *Ibid.*, at 233.

365 K.N. Waltz, *Theory of International Politics* (Reading, MA, Addison-Wesley, 1979), as analysed by Lake, *supra* note 359, at 305.

366 Lake, *supra* note 359, at 305-306.

367 *Ibid.*, at 305.

368 *Ibid.*, at 307-308.

369 A. Wendt, 'Anarchy is what States Make of It: The Social Construction of Political Power', 46/2 *International Organization* (1992), 391.

right to determine her political, cultural, and socio-economic identities, both current and future.³⁷⁰

The experience gained during the process of European integration demonstrates the significant constraints placed on the sovereignty of the EU Member States by the process of convergence of national laws.³⁷¹ Such consequences may prove to be all the more challenging in the ENP context, as the pressures exerted by the EU on the NCs to approximate their laws with the EU's *acquis*, policies and regulatory schemes may not match the aforesaid classic perception of sovereignty. The NCs are required to adopt EU norms, and this entails the performance on their part of economic reforms and the opening of their domestic markets to European exporters, thereby limiting their economic independence and sovereignty.³⁷² Such consequences, which entail the shift of the locus of authority, take place at four different levels, namely legislative, bureaucratic, political, and judiciary. Each of these will be examined in turn.

The requirement to adopt EU legal norms renders it more difficult for any NCs to pursue whatever autonomous legislative agenda they please. As a result of these European legislative pressures, the NCs might find it more difficult to fully determine their own national legislative *curriculum vitae*. Such consequences are incompatible with the aforesaid concept of Interdependence Sovereignty. Adopting the *acquis* may result in a more liberalised EU-NCs trading environment, facilitating easier movement of goods, services, capital and persons. Consequently, the NCs may no longer control movement across their borders, in the same manner they did prior to their adoption of European norms.³⁷³ Similarly, such pressures are in conflict with the concept of Domestic Sovereignty, as approximation of laws erodes the ability to the NCs to effectively regulate domestic behaviour.³⁷⁴ Likewise, the adoption of European norms is not in full harmony with the concept of Westphalian Sovereignty, as it adversely

370 H. Steinberger, 'Sovereignty', in R. Bernhardt (ed.), *Encyclopaedia of Public International Law* (Elsevier, 2000), vol. 4, 500, at 500, 502, 507 and 515.

371 C. Bewin, *The European Union and Cyprus* (Eothen, 2000).

372 Hirsch *et al.*, *supra* note 104, at 94.

373 *Supra* note 361.

374 Different aspects of domestic sovereignty can involve the recognition of a given authority structure, or the level of control officials can actually exercise. Thus, the loss of Interdependence Sovereignty would also imply some loss of domestic sovereignty, see Krasner, *supra* note 361, at 231-232.

affects the NCs' control over decision-making. Such a legislative move is also not in line with the principle of non-intervention in sovereigns' internal affairs.³⁷⁵ Finally, aligning one's laws with the *acquis* is arguably not in line with International Legal Sovereignty, as such a course of action is not pursued on an equal footing with the EU,³⁷⁶ a theme analysed *supra*. In addition, approximation of laws narrows the NCs' scope for executive, bureaucratic manoeuvres, because they can no longer employ trade instruments, standards and regulatory practices, as they were accustomed to employ prior to the process of approximation of laws. They are required, instead, to reposition themselves ideologically and practically, from being a provider to a facilitator, thus reducing public expenditure and increasing market efficiency.³⁷⁷

Moreover, approximation of laws with the *acquis* and the resultant enhanced integration of the NCs into the Internal Market may further increase the NCs' dependence on European markets, while such increased dependence may, in turn, impose further restrictions on the NCs' political autonomy. Such a move may place the NCs under much pressure, having to juggle foreign pressures and domestic social opposition to such pressures.³⁷⁸ In such a scenario, any given NC might be required to "...reposition itself ideologically, from being a provider to a facilitator, not an easy task when the entire post-colonial era has seen the state developing distributive rather than regulatory features. At the same time, regimes must diffuse or eradicate potential challengers to their rule that may draw on socio-economic discontent to de-legitimise the existing political status quo. They must reduce public expenditure and increase market efficiency, even as they protect those chains of patronage and distribution that shore up their positions of power. They must acquiesce to the demands of international creditors to accelerate reform, while easing the pace so as to preserve stability and convince populations that their national economies are not enslaved to western imperialist conspiracies".³⁷⁹

³⁷⁵ *Ibid.*, at 232-233.

³⁷⁶ *Ibid.*, at 233.

³⁷⁷ E.C. Murphy, *Navigating the Economic Reform Process in the Arab World: Social Responses, Political Structures and Dilemmas for the European Union* (Cap, Munich, 2002), 37.

³⁷⁸ For general analysis, see E. Said, *Orientalism* (Pantheon Books, 1978).

³⁷⁹ Murphy, *supra* note 377, at 47.

The anticipated changes in the legal system stemming from approximation of laws may also pose great challenges for the NCs' judiciaries. One of the traditional manifestations of sovereignty is the state's monopoly over judiciary powers and the ability of the judiciary to independently develop the domestic legal system. The adoption of European norms by the NCs' legal systems will result in the erosion of the autonomy of the NCs' judiciaries. The legal system of the NCs will encompass a growing body of European norms, and that will lead these judiciaries, when interpreting "imported" European norms, to take into account the judicial pronouncements of the European Court of Justice on such European norms that were adopted into the domestic legal system. The creation of the European Economic Area between the EU and Norway, Iceland and Liechtenstein supports that prediction. That occurrence involved the adoption by these countries of virtually all the EU commercial *acquis*. The experience gained from the EEA teaches us about the profound impact that the EEA has had on the national judiciaries of Norway, Iceland and Liechtenstein, the latter being more and more influenced by the EU jurisprudence pertaining to EU norms.³⁸⁰

Thus the ENP campaign of approximation of laws, in itself, and when examined in its wider context, namely the attempt to pursue wide-scale reforms in the NCs, is likely to face significant challenges, complexities and opposition in terms of (the erosion of) national sovereignty.

This conclusion applies with added force to the State of Israel. Confronted by the Romans, Crusaders, Turks, British and other foreign powers, the Jewish People fought hard to gain, maintain and regain sovereignty. The Holocaust reinforced the underlying conviction of the Zionist movement that the Jewish People needed their own independent state. It also created in Israel a strong psychological linkage between nationalism and national survival.³⁸¹ The creation of the State of Israel in 1948 provided the Jewish People with a homeland, but failed to sever that linkage. Hence, ancient and contemporary history has combined to make Israel resent international interference in its affairs: "The young Israeli state, born out of two thousand years of

380 For analysis, see Baudenbacher, *supra* note 176.

381 H. Ben-Israel, 'Summing Up', in B. Kühnel (ed.), *Troubled Waters: Europe and its Relations with the United States and Israel* (The Institute for European Studies, Jerusalem, 2003), 93.

Diaspora and continuously faced with external threats, has naturally been grounded on strong nationalistic feelings. The pursuit of almost total self-reliance, the practice of exclusive sovereignty, the importance given to land and control of borders as well as to military rather than civilian components of security are core principles of the State of Israel....".³⁸² Despite the success of the Zionist movement, some Israelis continue to suffer from what may be termed the "Massada syndrome"³⁸³ and hence from a besieged mentality.³⁸⁴ Bold scepticism and mistrust towards international norms and institutions are entrenched in Israel society.

Such a sceptical approach is particularly evident when Europe is seen to be interfering in Israel's internal affairs. The haunting memories of the Holocaust, the perceived desertion by France on the eve of the Six Days War (1967),³⁸⁵ and the increasingly antagonist stance taken towards Israeli policies by numerous European countries, have created in Israel a negative Pavlovian reaction towards European intervention.³⁸⁶ In light of this atmosphere of suspicion and scepticism, the "exportation" of European legal norms and the expected diminution of Israel's sovereignty may reinforce popular, deep-seated prejudices against European intervention in Israel's internal affairs, perceived as intellectual parochialism, conventionalism, paternalism, and even as neo-Imperialism.³⁸⁷

It is submitted, however, that the classical Westphalia paradigm of international law as a horizontal model, based upon principles of sovereignty, formal equality of states, non-intervention in domestic affairs, and state consent, no longer represents 21st Century trade, or economic, social and political realities. Likewise, modern realities do not co-exist harmoniously with the aforesaid concepts of Interdependence,

382 Ambassador Giancarlo Chevallard, in Kühnel, *ibid.*, at 15.

383 In 73 CE the Romans put under siege the Massada fortress, situated close to the Dead Sea, which was settled by the Hebrews. The odds were not on the Hebrews' side but they decided to fight till the end, including collective suicide.

384 For such an approach see G. Steinberg 'Kantian Pegs into Hobbesian Holes: European's Policy in Arab-Israeli Peace Efforts', Working Paper 05/04 The Israeli Association for the Study of European Integration, appearing in <http://micro5.mscc.huji.ac.il/~iasei/>

385 Gera, 'Israel and the June 1967 War: Twenty Five Years Later', 46/2 *Middle East Journal* (1992), 229.

386 See A. Dieckhoff, 'The European Union and the Israeli-Palestinian Conflict', 16 *Inroads* (2005), 52, at 60-61.

387 Boodmand, *supra* note 34, at 721-723.

Domestic, and International Legal Sovereignty. The NCs should thus adjust their perceptions of sovereignty to fit modern realities and their trade, socio-economic and geo-politic situation. Sovereignty should not be treated as a fixed, perpetual, absolute, immutable and indivisible condition, but as a qualified, relative, elastic, divisible, malleable concept.

A wide-scale adoption of EU legislation may also be objectionable from a democratic perspective. The proximity between the policy-maker and the addressee of the legal norms constitutes a sign of healthy governance. That verity was recognized by ancient Greek philosophers,³⁸⁸ by the Church,³⁸⁹ and in more recent times by the EU itself:³⁹⁰ “...making decisions on a more local basis has both substantive and procedural value. The substantial value derives from the ability of a more local population to implement choices which...better reflect its preferences, resources and technologies...The procedural value of localism is one of participation, of having a more meaningful say over the policies that affect one's life, and to maintain more direct influence over one's government and governmental officials”.³⁹¹ These propositions are also applicable to our context. The adoption by NCs of provisions enacted in Brussels will distance the NCs' citizens from the decision-making process, which will thereby run contrary to the aforesaid principle. Approximation of laws may thus be negatively perceived in terms of national sovereignty and democracy. Can that be mitigated by strong institutional links between the EU and the institutions of the NCs?

4.3.6. The strength of institutional arrangements

The work of Ascani, Crescenzi and Iammarino under the aegis of the SEARCH Consortium indicates that the quality and strength of national institutional settings is

388 Aristotle, *The Politics of Aristotle* (Translated by Ernest Barker) (1957), 68-76.

389 Poorley, 'Limit and Possibility: An Augustinian Counsel to Authority', in Paffenroth and Huohes (eds.), *Augustine and Liberal Education* (2000), 14-161.

390 Article 5 of the EU Treaty, as analysed by A. Estella, *The EU Principle of Subsidiarity and its Critique* (Oxford University Press, Oxford, 2002).

391 Leebron, *supra* note 33, at 104.

an important variable in the economic success of the NCs.³⁹² The same may be argued with respect to the ability of a given NC to adopt legislative and regulatory reforms and to pursue economic transformation.³⁹³

Indeed, the NCs' ability to meaningfully participate in the ENP depends, *inter alia*, on their governance capacity and strength.³⁹⁴ Such strength depends, in turn, on the extent to which they can perform with a certain degree of autonomy from political pressure, on the extent to which their activities are based on clearly specified legal rules and on the degree of their accountability.³⁹⁵ Financial resources, strength, and the degree of fit of existing administrative arrangements with European requirements are also of particular importance.³⁹⁶ Institutional autonomy and advanced institutional capacities are conducive to rule selection, adoption and implementation.³⁹⁷ Moreover, an advanced institutional apparatus may be able to ensure the adaptation of the EU norms to the domestic climate of the NC.

These conclusions are supported by the experience gained in recent waves of EU enlargement. Hille and Knil attempted to find explanations for differences in candidate countries' pre-accession performance in implementing EU policies. They found that administrative shortcomings constitute one of the most influential factors in the implementation of EU directives; countries with independently and effectively operating bureaucracies had fewer problems in aligning to EU policies, irrespective of the degree of the political willingness of their government to implement EU legislation.³⁹⁸ Thus according to their analysis, the characteristics of the bureaucracy

392 A. Ascani, R. Crescenzi and S. Iammarino, Report on Task 5.3: 'Background: Comparative View of the Quality of National Institutional Environments', London School of Economics and Political Science, December 2012, *supra* note 24.

393 For support, see J. Revilla-Diez, D. Schiller and D. Zvirgzde, 'Similarities and Differences of Institutional Change between ENP Countries and other Catch-Up Countries', WP5/14 SEARCH Working Paper, Task 5.3, January 2013, *supra* note 24.

394 For support, see Lavenex, *supra* note 216.

395 Hille and Knil, *supra* note 128, at 538-539.

396 *Ibid.*

397 Lavenex and Schimmelfennig, *supra* note 3, at 805.

398 Hille and Knil, *supra* note 128, at 539 and 546-549.

are at least as important as the nature of their political systems for the performance of countries.³⁹⁹

The analysis of Lavenex and Schimmelfennig, referred to above, regarding the various levels of approximation of laws: rule selection, rule adoption and rule application is also relevant in this theme.⁴⁰⁰ According to their analysis, rule application constitutes the deepest impact of external governance.⁴⁰¹ Yet weak institutional capacities in the recipient country may lead, drawing on research pertaining to EU accession process,⁴⁰² to rule selection with no ensuing rule adoption, only to be followed by no meaningful rule application.⁴⁰³ Put differently, mere formal legislative adoption by a country with a weak institutional apparatus does not constitute a guarantee for successful institutional performance:⁴⁰⁴ "Blind without history, jurisprudence without comparative understanding can scarcely rise above the level of provincial casuistry and empirical craft".⁴⁰⁵

Berkowitz, Pistor, and Richard's above-mentioned econometric analysis, which establishes that the manner in which a country received its laws is an important determinant of the effectiveness of the Law, is also relevant to our theme. Legal transplant thus increases its own receptivity by making significant adaptation to the local pre-existing formal and informal legal order.⁴⁰⁶ For the Law to be effective, a demand for it must exist. If the transplanted law is adapted to domestic conditions, then the law will be used. *Per contra*, if the Law is not so adapted, a "transplant effect" may be expected.⁴⁰⁷ The initial demand for the law will be weak, while the

399 *Ibid.*

400 Lavenex and Schimmelfennig, *supra* note 3, at 800ff.

401 *Ibid.*

402 Bartlett *et al.*, *supra* note 24: The Croatian, Bulgarian and Romanian cases demonstrate the significant gap between the adopted and enforced rules and norms and its negative repercussions.

403 Lavenex and Schimmelfennig, *supra* note 3, at 800ff.

404 Bartlett *et al.*, *supra* note 24, examining Bulgaria and Rumania.

405 Yntema, in Rabel, *The Conflicts of Laws* (1945), at XIII.

406 Berkowitz *et al.*, *supra* note 246.

407 *Ibid.*, at 167 and 174.

legal order will function less effectively.⁴⁰⁸ Thus advanced institutional capacities may assist in the long-run effective implementation of the *acquis* in the NCs.

Israel is an indicative case in point. The work of Magen reveals that due to the non-hierarchical, non-coercive nature of EU-Israel relations, EU-traceable legislative and institutional change in Israel is triggered by bottom-to-top pressure by academic, business, or regulatory change agents that recognise the desirability of a given EU practice.⁴⁰⁹ Such domestic entities exerted pressure on governmental actors to endorse the EU norm and, following a process of lesson-drawing, to adapt it to domestic conditions.⁴¹⁰ The end result of such process of “soft socialisation” is a conscious, calibrated lesson-drawing, selective emulation of EU norms, as opposed to the outcome of a top-to-bottom surrender to coercive legal authority.⁴¹¹ Such an outcome may result in a higher quality, more meaningful, long-standing permeation of the EU norm to the domestic legal system, and as a result, with a more effective transformative impact of these norms.⁴¹²

Yet the lower level of governance capacity in most NCs as compared with the EU average⁴¹³ resulted, according to various research projects conducted under the SEARCH research project, in a slower economic and institutional reform path in the NCs than in candidate countries⁴¹⁴ and East Asian countries.⁴¹⁵ The research conducted by Bartlett, Čučković, Jurlin, Nojković and Popovski on the case studies of Ukraine and Moldova is relevant to our work, as it reached the conclusion that the change brought about by the ENP in formal institutions should not be allowed to outpace the (slower) change in informal institutions. According to their analysis, EU reform programmes should focus equally on informal institutions and on formal institutions in an attempt to enhance social capital in the NCs.⁴¹⁶

408 *Ibid.*, at 167 and 174.

409 Magen, *supra* note 102, at 100-102 and 108.

410 *Ibid.*

411 *Ibid.*

412 *Ibid.*

413 Bartlett *et al.*, *supra* note 24.

414 *Ibid.*

415 Revilla-Diez *et al.*, *supra* note 393.

416 Bartlett *et al.*, *supra* note 24.

4.3.7. Low social capital

According to the analysis of Hlepas, institutional trust and social capital⁴¹⁷ interact with political contexts, while formal public institutions require social capital in order to function properly.⁴¹⁸ The state of affairs in many of the NCs is not promising in that regard:⁴¹⁹ “Dictatorships, authoritarian regimes and ‘close’ societies obviously undermine formation and use of social capital...Low levels of social capital lead to excessively rigid and unresponsive political system with high levels of corruption. Low levels of social capital and especially of generalized trust seem, therefore, to create a vicious circle of unresponsive political systems and non-competitive business structures on the one hand, mistrusting citizens and clients on the other”.⁴²⁰ Thus low levels of social capital of various NCs may constitute yet another factor that prejudices the effectiveness of the ENP as a transformative model.

4.3.8. Domestic veto players

Drawing on the work of Lavenex and Schimmelfennig in the realm of accession Europeanisation, one may assume that the effectiveness of the ENP external governance will be prejudiced when that governance is faced with large number of cohesive and effective domestic veto players.⁴²¹ This is particularly so when such players might be required to incur high costs during the rule adoption and rule

417 For analysis of the concept, see E. Parts, *Social Capital, its Determinants and Relations with Economic Growth: Comparison of the Western European and the Central and Eastern European Countries* (Tartu, Tartu University Press, 2009).

418 Hlepas, *supra* note 80.

419 See E. Parts, ‘The Dynamics and Determinants of Social Capital in the European Union and Neighbouring Countries’, WP 5/01 SEARCH Working Paper, *supra* note 24, at 11-12: Comparison of the levels of social capital showed that the levels were lower in NCs than in Western EU Member States. See also Hlepas, *supra* note 80.

420 N. Hlepas, ‘Social Capital, Democratization and Economic Performance: EU, Candidate and Neighboring Countries in Comparative perspective’, Task 5.1, WP1/05 SEARCH, *supra* note 24.

421 Schimmelfennig and Sedelmeier, *supra* note 61, at 664–665; Lavenex and Schimmelfennig, *supra* note 3, at 805. For further analysis of the concept, see Hille and Knill, *supra* note 128, at 536-537, who rely on the seminal work of G. Tsebelis, *Veto Players: How Political Institutions Work* (Russell Sage Foundation/Princeton University Press, New York, 2002).

implementation process,⁴²² or when they perceive the EU's agenda to be intrusive in their particular national socio-political and economic environment.

From the trade perspective, domestic groups most particularly affected by trade policy are often well organized and articulate, and if protected by that policy, they would favour the *status quo* and hence would attempt to serve as veto players in relation to any proposed liberalizing reform.⁴²³ The political economy of the NCs may lead them to rely on an external anchor for reform when faced with such strong domestic constraints in the form of domestic resistance to reform.⁴²⁴ Indeed, the ENP may trigger much domestic opposition because it links trade benefits with socio-political and economic reforms. As Etzioni demonstrates, social engineering and nation-building policies pursued by foreign powers are highly objectionable as they seek to overcome prevailing social forces and long-established moral and social cultures, societal structures and traditions, and attempt to undo deeply ingrained cultural and psychological predispositions, strong emotional ties and religious beliefs.⁴²⁵ Thus the existence of domestic veto players who benefit from the *status quo* and who perceive proposed EU reforms as illegitimate, contrary to their entrenched belief, or economically prejudicial to their vested interests may use their internal political force to prevent the adoption and implementation of such reforms. The NCs are thus required to find the means to overcome their vulnerability to pressure exerted by veto players,⁴²⁶ relying on the existence of capable domestic pro-liberalisation groups.⁴²⁷ Yet such alliance requires meaningful trade benefits, which as analysed above, the ENP fails to offer.

It is further submitted that the veto players need not always belong to the traditional group of the "usual suspects". At times it would be the NCs' governments themselves

422 Schimmelfennig and Sedelmeier, *supra* note 61, at 664–665; Lavenex and Schimmelfennig, *supra* note 3, at 805; Bartlett *et al.*, *supra* note 24.

423 Goldstein and Martin, *supra* note 190, at 608–609.

424 See Tovias and Ugur, *supra* note 165, at 397.

425 Etzioni, *supra* note 69, at 4.

426 Tovias and Ugur, *supra* note 165, at 413–414.

427 Goldstein and Martin, *supra* note 190, at 608–609.

who, presenting themselves as partners to the reform process, may oppose such reforms and may disguise their opposition by nominal cooperation with the EU.⁴²⁸

4.3.9. The “Arab Spring”

According to the analysis of Lenz, EU influence is most likely to be effective when there is a strong functional demand for institutional change in the recipient country; such a demand occurs when a major political or economic crisis erupts, throwing “previous established practices into discredit and leads to institutional negotiations under conditions of high uncertainty in order to unsettle entrenched member state preferences, originally opposed to EU-style regional integration, and the power configurations sustaining an existing regional institutional equilibrium”.⁴²⁹

It is submitted that the recent events that have taken place in some of the Arab countries do not neatly match Lenz’s conclusions. The “Arab Spring” not only led to the ousting of some Arab leaders who had kept long-standing relations of dependence with the EU but also to the gradual replacement of these countries’ bureaucracies. Thus, for example, the incoming bureaucrats in Egypt under Morsi’s regime (prior to its ousting), were more normatively distanced from the EU as compared with the old establishment, and they catered to a different constituency than the pro-Western Egyptian elite which was the darling of the disposed regime. As indicated above, the Socialisation model teaches us that NC’s domestic actors are responsive to the logic of appropriateness. Drawing on the analysis of Haas, it is submitted such a response is reinforced when epistemic communities meaningfully interact through the process of interpersonal persuasion, communication, exchange, and reflection, thereby

428 See Edwards, *supra* note 3, at 8: NCs may pay lip service to European norms while actually doing little — as has been the case among many of the Mediterranean states during the Barcelona Process. Edwards relies for that purpose on the work of A. Hamzawy, ‘Euro-Mediterranean Partnership and Democratic Reform in Egypt: Contemporary Policy Debates’, in H.M. Fernández and R. Youngs (eds.), *The Barcelona Process: An Assessment of a Decade of the Euro-Mediterranean Partnership* (ARI 137/2006), 131-138, who referred to the process in which the Egyptian government had been able to win continued EU support despite resistance to change and, indeed, further breaches of human rights as “reverse conditionality”.

429 Lenz, *supra* note 288, at 156-157.

establishing thick institutional networks.⁴³⁰ The Arab Spring might prove, at least in the short-term, to be counterproductive in that respect. The incoming bureaucrats of Morsi's (ousted) regime in Egypt, for example, did not undergo the almost twenty years of EU socialisation, as did the bureaucracy of the Mubarak regime, and they therefore do not form part of dense institutional networks with their EU counterparts. Thus the Arab Spring might render the transformative, sociological-led agenda of the ENP even more difficult to attain. The EU takes cognizance of that risk⁴³¹ and attempts to face the challenge.⁴³²

The fear that the Arab Spring would render the transformative agenda of the ENP even more difficult to attain is supported by scholarship that analyses legislative and other reforms in the context of a principal-agent relationship. Bodenstein and Furness, for example, argue that such a relationship is often dominated by problems of information asymmetry: the principal faces difficulties in evaluating whether the agent is genuinely committed to reforms or whether the intent behind its acceptance of an offer is insincere.⁴³³ Their conclusion, which was adopted in the context of the Barcelona Process, might be applicable with added force to the Arab NCs, given the political and bureaucratic changes that they are undergoing during the Arab Spring.

Yet the recent analysis of Spair and Zachmann insists that the Arab Spring provides the EU with a window of opportunity for facilitating economic and political reforms in the Southern Mediterranean NCs. In accordance with their analysis, the EU should offer these NCs a credible perspective for meaningful economic integration, including not only free trade in industrial goods but also free trade in agricultural products and free movement of labour, leading to the establishment of a Euro-Med Economic Area by 2030, should the NCs adopt the corollary reforms.⁴³⁴

430 P. Haas, 'Introduction: Epistemic Communities and International Policy Coordination', 46/1 *International Organization* (1992), 1, as analysed by Magen, *supra* note 3, at 422.

431 *Supra* note 121.

432 See 'EU's Response to the "Arab Spring": The State-of-Play after Two Years', Brussels, 8 February, 2013, A 70/13, http://europa.eu/rapid/press-release_MEMO-13-81_en.html

433 Bodenstein and Furness, *supra* note 119, at 382-384.

434 A. Sapir and G. Zachmann, 'A European Mediterranean Economic Area to Kick-Start Economic Development', in S. Biscop, R. Balfour and M. Emerson (eds.), *An Arab Springboard for the EU Foreign Policy*,

4.4. The interface between the EU and the NCs

Drawing on domestic structure explanations accentuated by Lavenex and Schimmelfennig, it is argued that the interface between the EU and the NCs is of relevance to the effectiveness of the transformative role of the ENP: “The effectiveness of external governance increases with the resonance of EU rules...EU rules are more likely to be selected, adopted and applied if they resonate well with domestic rules, traditions, and practices..”⁴³⁵ Thus the effectiveness of EU external governance may depend on the congruence between its policies and institutions and those of the third country; when congruence between European policies and third country’s policies, processes and institutions is low, adaptation pressure will be high and significant resistance can be expected, while when congruence is high, adaptation pressure will be low and no meaningful resistance may be expected.⁴³⁶ In the latter scenario, the EU may have much confidence in the legal system of that third country and such confidence may facilitate sophisticated means of *acquis* export, such as mutual recognition agreements.⁴³⁷

4.4.1. Normative mismatch

Some scholars contend that any legal norm can be effectively transplanted into any socio-economic and political context. The most prominent advocate of such a “transferist” Theory is Watson. According to him, the Law develops by transplantation rather than by creation *ex nihilo*. Based on his analysis of various legal norms and systems, Watson reached the conclusion that the Law may develop far from social realities, and as such it may be successfully borrowed by other countries

Egmont Paper 54 (The Royal Institute for International Relations, Academia Press, Gent, January 2012), 37, at 37-42.

435 Lavenex and Schimmelfennig, *supra* note 3, at 802 ff. According to them, an additional relevant condition is ‘EU compatibility’ of domestic institutions. The more similar third countries are to the type(s) of states, societies, and administration of the EU Member States and the European multi-level system, the better EU rules are likely to fit.

436 T. Risse, M. Cowles and J. Caporaso, ‘Europeanization and Domestic Change: Introduction’, in Risse, Cowles and Caporaso (eds.), (Ithaca, Cornell University Press, 2001); Mendez, Wislade and Yuill, *supra* note 193, at 584.

437 Petrov, *supra* note 38, at 43-44.

where the relevant socio-economic, political and geographic circumstances are very different from those of the “donor country”.⁴³⁸ According to him, the Law is the scientific creation of clever law-making-elite, the latter being concerned with professional solutions to technical-legal problems, and not with social norms or social change.⁴³⁹ This legal elite, mostly interested in the creation of the Law and its utilization, treats the Law, its means of creation and its sources, as autonomous, given, and almost sacrosanct. As such the Law may operate autonomously and distinctly from the contextual culture and social environment in which it operates. It has a life and validity of its own, existing and operating by its own inherent forces, being insulated and distinct from socio-economic change and from other socio-political institutions.⁴⁴⁰ As such, a good Law, embodying a good idea, is easily transferable and adaptable to local use by competent professionals in the importing country, notwithstanding any socio-cultural differences that may exist between the exporting country and the importing country.

With all due respect, such a formal, detached, technocratic, legalistic treatment of the Law is unwarranted. Law and Society are not two autonomous institutions, but are inextricably linked. It was Montesquieu who argued that "the political and civil laws of each nation should be so closely tailored to the people for whom they are made", and that the Law is therefore not necessarily transferable: As civil laws depend on political laws because they are made for one society, it would be well, when one wants to transfer a civil law from one nation to another to examine beforehand whether they both have the same institutions and the same political right; Otherwise, "...it would be pure chance if the laws of one nation could meet the needs of another..".⁴⁴¹ This approach, which places strong emphasis on the interface between Law and Society, and which is fearful of "unnatural transplants", was later supported by Savigny, who developed the concept of *volksgeist*⁴⁴² (1814), and by numerous

438 A. Watson, *Legal Transplants: An Approach to Comparative Law* (London, The University of Georgia Press, 1974).

439 As analyzed by Markovits, *supra* note 342, at 95.

440 Watson, *supra* note 438, as analysed by W. Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants', 43 *American Journal of Comparative Law* (1995), 489, at 501-503.

441 Montesquieu (1748), Book XXIX, Chapter 13.

442 Savigny (1814).

contemporary scholars, including Kahn-Freund, Small, Northrop, Friedman, Ewald and Legrand, forming together the "Culturalist" camp.

According to them, the Law is a culturally determined artefact, and cannot therefore be severed from the socio-economic circumstances in which it was originally formulated.⁴⁴³ A legal rule is an incorporative cultural form, encoding social experience; just as culture is a source of identity, so are legal rules, serving as an instrument that reflects and shapes socio-political identity.⁴⁴⁴ Culture derives from historical experience, and so do the forms that culture embraces, such as the Law.⁴⁴⁵ The Law changes in response to changes extraneous to it, reflecting the power relations of society, the working of market forces, the ideology of possessive individualism, the cunning of *weltgeist*, the self-interest of the elite, or the political ideology of the age.⁴⁴⁶ Legislation is therefore not detached from its social surrounding but is rather one manifestation of a nation's socio-economic DNA. Different national attributes, including endowments, technologies, preferences, institutions and coalition formation, may legitimately lead to different national legislative and regulatory choices.⁴⁴⁷

It must be remembered in this context that the object of diffusion of the Law, examined from the perspective of the "donor country", extends beyond legal doctrine to include styles of thought, ideology, procedures, norms, and institutions.⁴⁴⁸ In the same vein, and when examined from the perspective of the receiving country, the Law depends on interpretation, the latter being based on interpretive assumptions which are themselves historically and culturally conditioned.⁴⁴⁹ The concept of Law operating independently from Society must therefore be eschewed. As Legrand

443 G. Small, 'Towards a Theory of Contextual Transplants', 19 *Emory International Law Review* (2005), 1431, 1431-1433.

444 P. Legrand, 'The Impossibility of Legal Transplants', 4 *Maastricht Journal of European and Comparative Law* (1997), 111.

445 *Ibid.*

446 Ewald, *supra* note 440, at 490.

447 Leebron, *supra* note 33, at 92-93.

448 W. Twining, 'Diffusion and Globalization Discourse', 47/2 *Harvard Journal of International Law* (2006), 507, at 512.

449 Legrand, *supra* note 444.

convincingly writes, the "legal" cannot be separated from the "non-legal" reality of Society because the two worlds are inextricably linked. The Law is a social sub-system and can thus never be perceived on its own terms. To penetrate the "legal", one must appreciate the "social" that underpins it, otherwise the "legal" literally does not make sense.⁴⁵⁰ The Law should thus be seen, as the "Culturalists" perceive it, as mirroring Society.

As Barkin and Cronin argued, the distinguishing feature of modern nationalism is that nations should be politically self-determining, each pursuing her own particular aspirations.⁴⁵¹ Indeed, it was the American Supreme Court Chief Justice Oliver Wendell Holmes who noted that the Law "embodies the story of a nation's development through many centuries and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics".⁴⁵² Legislation is, after all, one manifestation of a nation's DNA. Different national attributes, including endowments, technologies, preferences, institutions and coalition formation, may legitimately lead to different national legislative and regulatory choices.⁴⁵³ Borrowing from literature on the use of harmonisation of laws in the North American context, jurisdictional divergence in laws may arguably be perceived as a natural barrier that is inherent in the existence of sovereign socio-political jurisdictions.⁴⁵⁴

Law reforms that are inconsistent with deeply held moral and political beliefs may thus contradict fundamental cultural gut reactions and may ultimately be rejected.⁴⁵⁵ The transfer of legal norms in different socio-economic and institutional contexts may create a "transplant effect", the mismatch between pre-existing conditions and institutions and the transplanted law, which would ultimately weaken the effectiveness and legitimacy of the imported legislation.⁴⁵⁶ Given this interface between national particularism and legal differences, any campaign for approximation

⁴⁵⁰ *Supra* note 444.

⁴⁵¹ S. Barkin and B. Cronin, 'The State and the Nation: Changing Norms and Rules of Sovereignty in International Relations', 48/1 *International Organization*, (1994), 107, at 111.

⁴⁵² From the first of twelve Lowell Lectures delivered by Oliver Wendell Holmes Jr. on 23 November, 1880.

⁴⁵³ Leborn, *supra* note 33, at 92-93.

⁴⁵⁴ Boodman, *supra* note 34, at 717.

⁴⁵⁵ Markovits, *supra* note 342, at 99 and 110.

⁴⁵⁶ Berkowitz *et al.*, *supra* note 246, at 171.

of laws can be legitimately affected only where a significant degree of historic, social, cultural and economic commonality exists.⁴⁵⁷ This, however, is not necessarily the case in the ENP context.

The "Culturalist" argument applies with added force to the Israeli context. Israeli society, her political sphere and her legal system are intimately intertwined. The influence of the Law on the political sphere has become more prevalent, while the legal system is increasingly becoming politicized. Israeli law reflects society and *vice versa*. Any importation of legal norms to the State of Israel should therefore to a significant extent reflect the socio-political environment in which they are to be absorbed. Yet, Israel does not in all respects share a common normative, cultural, economic, monetary and social basis with the EU. Israel is not after all a European country *par excellence*. A European country in economic terms, and an Asian one in geographic terms, Israel is torn, from a psychological and sociological perspective, between East and West, between Europe, the United States, and the Orient.⁴⁵⁸ Consequently, Israel and most European states have substantially different cultures, each ascribing different weight to autonomy, egalitarianism and hierarchy values.⁴⁵⁹ Thus, EU legislation may not merge into Israel's social landscape. Some in Israel may fear, for example, that any additional step towards legal integration with Europe might tilt the delicate balance between Western and other elements of Israeli society.⁴⁶⁰

Israel is also very concerned with maintaining her strong Jewish identity. It was Isaiah who prophesized that "...many peoples shall come, and say: "Come, let us go up to the mountain of the Lord, to the house of the God of Jacob; that he may teach us his ways and that we may walk in his paths. For out of Zion shall go forth the Law, and the word of the Lord from Jerusalem".⁴⁶¹ The Jewish People were thus promised that the Law would be "exported" from Jerusalem, not "imported" from Brussels.

457 As, for example, in the early days of the European Economic Community.

458 Tovias and Del Sarto, *supra* note 276.

459 A. Bardi and L. Sagiv, 'The EU and Israel: Comparison of Cultures and Implications', in K. Boehnke (ed.), *Israel and Europe: A Complex Relationship* (Deutscher-Verlag, 2003), 13.

460 Tovias and Del Sarto, *supra* note 276.

461 Isaiah, 2:3.

The "importation" of the EU norms may also be incompatible with the security landscape of the State of Israel. The EU principle of free movement of persons, for example, may not suit the State of Israel, which is very much concerned with security considerations.⁴⁶²

Similarly, the alignment of legislation with that of the EU may not fit the NCs' monetary landscape. Let us take for example the issue of Israel joining the Euro Zone or linking her currency, the Shekel, to the Euro. Subscribing on a unilateral and non-binding basis to the parameters of the EU Stability Pact may be a wise step to be taken in Israel's economic interests.⁴⁶³ Joining the Euro Zone or linking domestic currency in a binding manner with the Euro may, on the other hand, be inappropriate for monetary and political reasons, as indicated by David Klein, the former Governor of the Bank of Israel, and by some of his senior staff.⁴⁶⁴ Such scepticism regarding Israel's suitability to the Euro Zone applies *a fortiori* to the other NCs, whose economies are less mature than that of Israel.

EU Legislation may also not fit the NCs economic landscape. A case in point is in the area of competition policy. As Michal Gal demonstrates, the markets of small economies, such as that of Israel, are usually characterized by certain features that differentiate them from large markets economies.⁴⁶⁵ These differences must be reflected, in her opinion, in the optimal competition policy adopted for the small economy. Competition policy is applied to remedy certain market imperfections and failures, and the optimal competition policy for a small economy, such as Israel, must therefore be carefully designed to address the unique imperfections of her economy, including in particular those stemming from the small size of her market.⁴⁶⁶ As a corollary, Gal argues that competition paradigms, doctrines, legal presumptions and

462 For analysis, see Hirsch et al., *supra* note 104, at 99-102.

463 Reich, *supra* note 76, at 31.

464 For the debate on this issue, see *ibid.*

465 Gal, *supra* note 56, at 1444-1449: These include high concentration levels and high entry barriers. Given the scale economies and high entry barriers, small economies cannot in most cases sustain more than few competitors in most of their industries. The prevalence of concentrated markets structures adversely affects price, output and research levels.

466 See Gal, *ibid.*, at 1452: An optimal policy for a small market must ascribe greater weight to efficiency-enhancement considerations.

models of enforcement prevailing in the large markets of the EU are at times ill-fitted to the needs of small economies, and must therefore not be superimposed, "as is", on them. Any sweeping "importation" of foreign concepts, rules and models might result in insufficient weight being ascribed to the special features of the small economy. A cautious approach towards trade-policy-driven harmonisation is therefore required for a small market economy such as Israel's. Otherwise, Gal concludes, the cost of policy convergence may outweigh the benefits stemming from such a move.⁴⁶⁷ If these conclusions of Gal are relevant to the State of Israel, with her advanced economy, technologies, and relatively competitive markets, they must apply, with added force, to less mature NCs' economies.

Those in the NCs opposing the approximation of their laws with those of the EU may thus argue with some merit that those socio-cultural, monetary and economic differences between the EU and the NCs ought to be reflected in the respective legal environments in which the EU and the NCs operate, and not by a sweeping adoption of EU legal norms. The proponents of approximation of laws with those of the EU may oppose that line of argument, contending that the EU Member States have made significant progress towards harmonisation of laws *inter se*, despite significant social differences. If Portugal, for example, was willing to align her legislation with that of Latvia, Finland and Hungary, why can Israel, Morocco or Tunisia not pursue the same course of action?

It is submitted that the latter argument is not fully convincing. As Krasner demonstrates, the current status of the EU has emerged over a period of time out of complex negotiations designed to deal with specific issues rather than some effort to conform to a set of rules and norms.⁴⁶⁸ Portugal approximates her laws with those of other EU Member States through the use of, *inter alia*, EU directives, adopted by the Council, where Portugal has some voting rights. Portugal has, therefore, some voice in and resultant influence on the EU legislation process. Moreover, EU directives are, to a certain extent, sensitive to different national interests and political wishes. The process of EU integration may thus be seen as a partnership, in which, in our example,

⁴⁶⁷ Gal., *ibid.*

⁴⁶⁸ Krasner, *supra* note 361, at 244.

Portugal is a partner, albeit a junior one. In contrast, and as analysed above, the process of approximating the laws of the NCs with those of the EU is a paternalistic process in which the NCs have virtually no official voice in the decision making process of legal norms affecting them.

The approximation of laws with those of the EU may also adversely affect the coherence of the legal systems of the NCs. The quality and effectiveness of the administration of any legal order would improve if its policies were to be coherently formulated and implemented. After all, "rules and their enforcement do not merely exist. They must be applied with regularity and some degree of consistency...This is administration".⁴⁶⁹ Coherence can also enhance the democratic nature of the legal regime, and improve, in turn, the administration's credibility and legitimacy.⁴⁷⁰ Benign governance is predicated, *inter alia*, on popular credibility. A disharmony between policies or within policies reduces government's credibility and creates an environment of insecurity for private, as well as for public actors.⁴⁷¹ Credibility cannot be achieved when policies are applied in an incoherent manner. Credibility presupposes instead the coherent formulation and enforcement of policies.

The approximation of laws with those of the EU might not advance such coherence and credibility. The Israeli legal system, for example, is a mixed system, drawing on a dominant component of Common Law, and on a secondary component of Civil Law.⁴⁷² In the early days of its existence, the Israeli legal system was heavily influenced by that of England.⁴⁷³ However, as of the early 1980s, more and more American legal concepts, doctrines, legislation and case-law have permeated it. Areas

469 Lowi, *The End of Liberalism, Ideology, Policy, and the Crisis of Public Authority* (W.W. Norton, New York, 1969), 50.

470 See J. Weiler, 'European Democracy and its Critics: Polity and System', in J. Weiler, *Do the New Clothes Have an Emperor? and other Essays on European Integration* (Cambridge University Press, Cambridge, 1999), 264, at 265.

471 P. Buigues, A. Jacquemin, and A. Sapir, A. (eds.), *European Policies on Competition, Trade and Industry: Conflicts and Complementarities* (Edward Elgar Publishing Ltd., Aldershot, 1995), at xi.

472 A. Barak, *Interpretation in Law*, (Volume I, The General Theory) (1992), 184–186 [Hebrew]; D. Friedman, 'The Effects of Foreign Law on Law of Israel: Remnants of the Ottoman Period', 10 *Israel Law Review* (1975), 192.

473 D. Friedman, 'Infusion of Common Law into the Legal System of Israel', 10 *Israel Law Review* (1975), 324.

such as corporate law, intellectual property, internet law and securities are moulded, both in the Israeli Parliament, the Knesset, and in the Israeli courts, by American concepts and jurisprudence.⁴⁷⁴ The "importation" of large segments of the EU *acquis*, while retaining other legislative areas under the influence of the American legal system, may adversely affect the coherence of the Israeli legal system.

Two reservations must, however, be attached to our assertion that the Law should reflect Society and that EU legal norms fail to meet that requirement *vis-à-vis* Israel. The first *caveat* relates to the gradual process of Israel's Europeanisation. As Tovias and Gal argued in two distinct articles, EU enlargement to the East, the massive immigration of Russian Jews to Israel, globalisation and technological advance, cause Israeli society and her macro-economic persona to gradually transform according to European patterns.⁴⁷⁵ Moreover, strong cultural affinity to Europe is evident at times in Israeli daily life, while European culture affects Israeli mores. Many Israelis maintain strong cultural ties with Europe and feel strong cultural and ideological affinity with, and admiration for it. The *acquis* might therefore be more suitable now for transplantation into the Israeli socio-economic landscape than it was few years ago.

The second *caveat* constitutes in fact our chief criticism of the "Culturalist" Theory. The Law should indeed reflect and mirror the society in which it operates, but this must not be its sole task. It can also constitute, shape and improve a nation's social DNA. The Law can and should be not only reflective but also transformative, serving as an engine for reform. Admittedly EU norms may not at all times perfectly match Israeli social norms, and as such they may serve as a social reform instrument. After all, as Hiller argues, transplanted laws carry with them so much imperceptible and incommensurable cultural "baggage" that the receiving country will inevitably experience far more internal cultural change than it either realized, intended or would

474 G. Harpaz, 'European Educational Programmes as a Bridge over Troubled European-Israeli Water', 16/1 *European Foreign Affairs Review* (2011), 123, at 128.

475 A. Tovias, 'Spontaneous vs. Legal Approximation: The Europeanization of Israel', 9/3 *European Journal of Law Reform* (2007), 485; M. Gal, 'The "Cut and Paste" of Article 82 of the EU Treaty in Israel: Conditions for a Successful Transplant', 9/3 *European Journal of Law Reform* (2007), 467.

have intended.⁴⁷⁶ These should not always be seen as negative consequences. Indeed, in recent years Israeli law has played a prominent reformative role, conceiving new and better ways in which Israeli society perceives, for example, gender rights, minority rights and Palestinian rights. This dramatic enhancement of the role of Israeli law was seen to be part of a gradual change of Israeli law and legal education, termed by Mautnar "the decline of formalism and the rise of values".⁴⁷⁷ The argument can thus be made that if the Israeli legal order can serve as an engine of reform in sensitive areas such as gender rights, it can also play an activist role in advancing, for example, superior EU environmental norms.

4.4.2. Institutional and budgetary mismatch

As demonstrated by Magen, socialisation, persuasion, and transfer of social and scientific knowledge are enhanced in dense institutional environments, where epistemic communities interact intensively.⁴⁷⁸ In his opinion, the "influence density" of EU–NCs institutional linkages would be enhanced by regular, prolonged, and intense interaction, high legitimacy of the influence-seeking actor, and supporting financial and technical assistance.⁴⁷⁹ Drawing on the work of Periac of the SEARCH Consortium, it may further be argued that cultural distance between the EU bureaucracy and that of the NC in values and norms provides a thin common cognitive basis, knowledge exchanges or knowledge transfer, rendering approximation of laws and regulatory regimes more difficult to attain.⁴⁸⁰ Thus any institutional mismatch between the EU and the NC requires a socialisation process in order to create an institutional apparatus more conducive to approximation. Yet, as analysed above, such institutional-socialisation processes are long-term and the Arab

476 J.A. Hiller, 'Language, Law, Sports and Culture: The Transferability or Non-Transferability of Words, Lifestyles, and Attitudes Through Law', 12 *Valparaiso University Law Review* (1978), 433, 434.

477 M. Mautner, *The Decline of Formalism and the Rise of Values* (Oxford University Press, Oxford, 2011).

478 Magen *supra* note 102, at 106, drawing on the works of T. Risse, 'Let's Argue! Communicative Action in World Politics', 54/1 *International Organization* (2003), 1.

479 Magen, *supra* note 102, at 106-107.

480 F. Periac, 'Cultural Diversity, Social Capital and Innovative Capacity of Region-Industries', Task 5.2, SEARCH, *supra* note 24; See also Hille and Knil, *supra* note 128, at 540: Implementation problems might be the result of a lack of compatibility of domestic administrative styles and structures with the requirements emerging from European legislation.

Spring may only prolong them in those NCs that are undergoing a socio-political upheaval. A more robust reliance on the EU's TAIEX and Twinning instruments may be helpful in addressing these challenges.⁴⁸¹

In addition, the "importation" of EU legislation may be undesirable on budgetary grounds. NCs may, in principle, support, for example, the adoption of EU environmental regulation, but may not be in a position to allocate the required supportive budget for that purpose.

481 For support, see Magen, *supra* note 102, at 107, drawing on the works of T. Freyburg, 'Transgovernmental Networks as Catalysts for Democratic Change? EU Functional Cooperation with Arab Authoritarian Regimes and Socialization of Involved State Officials into Democratic Governance', 18/4 *Democratization* (2011), 1001.

5. Summary and conclusions

The completion of the two waves of enlargement of 2004 and 2007 obliged the EU to redefine its relations with those NCs who will not join it as Member States, at least in the short and medium run. This need led to the adoption of the European Neighbourhood Policy (ENP). The ENP is designed to upgrade bilateral and regional relations between the EU and its neighbouring countries (NCs) in the Middle East, North Africa and Eastern Europe, integrating their economies, to an extent yet to be determined, with the enlarged EU, in order to contribute to increased stability, security and prosperity for the EU and those neighbours.

The ENP embodies the principle of approximation of laws. In return for enhanced trade and investment relations, with resultant improved access to the Internal Market, the ENP requires, *inter alia*, the NCs to align their legislation, standards and regulatory schemes, to an extent to be negotiated, with its *acquis*. Thus the EU attempts to use the ENP, in general, and the concept of approximation of laws, in particular, as a transformative instrument to promote economic as well as socio-political reforms in the NCs.

The extensive usage of the *acquis* by the EU in its external relations has been researched, mainly from the perspective of integration theory, external governance theory and the multi-level governance approach. Scholarship indicates that the credibility of positive conditionality, the effectiveness of socialisation processes and the robustness of domestic institutions are the main factors that may determine the effectiveness of the transformative impact of the ENP.

The ENP's ambitious agenda, coupled with its ten years of operation, when examined in the light of its potential benefits, analysed in this Working Paper, raised expectations for comprehensive alignment of legislation by the NCs with resultant significant socio-economic reforms. Yet the results of the ENP on the eve of its tenth anniversary are much less impressive and the initial high hopes for a comprehensive and systematic legislative and regulatory alignment have not been realized. Extensive scholarship, including that conducted by the SEARCH Consortium, indicates that

such alignment is limited, partial, selective and uneven.⁴⁸² In that respect the ENP, which was modelled on the institutional and procedural experience of the successful enlargement policy and which adopted the enlargement's ethos, instruments, procedural and institutional aspects, bears in fact more resemblance to the unsuccessful European Mediterranean Policy.

This Working Paper addressed this state of affairs by offering a typology and analysis of the various factors that hindered the more meaningful realization of the approximation of laws agenda embodied in the ENP. Drawing on scholarship that examines the effectiveness of "accession Europeanisation" and relying on the work conducted in the spheres of external governance and Europeanisation, it analyses these various factors, classifying them according to whether they pertain to the ENP itself (*e.g.*, lack of meaningful incentives, lack of definitiveness and weak mechanisms of conditionality), to the EU (*e.g.*, expectation-capacity gap, weakening trade prominence), to the NCs (*e.g.*, local perceptions, veto players, institutional weakness and high adaptation costs) or to the interface between the EU and its NCs (institutional and normative mismatch). The analysis was intended to be conducted in a comprehensive and holistic manner, thereby attempting to avoid an EU-centric perspective, which is characteristic of much of the scholarship in this area.

The typology and analysis offered are meant to add to the work of Work Package 5, which is focused on the socio-cultural and institutional environment in the NCs and the manner in which such environment affects the transformative role of the ENP.

The Working Paper does not purport to establish which factors most hinders the transformative agenda of the ENP; whether it is the deficiencies of the rationalist logic of consequentialism (in accordance with which instrumental calculations and strategic adaption are prejudiced by lack of credible positive conditionality) or the weakness of the cognitive-sociological, identity-forming logic of appropriateness (in accordance with which the social learning processes of engagement, argumentation and persuasion are less effective in the ENP environment).

482 See Chapter Three of the Working Paper.

Instead the Working Paper advances more nuanced arguments. First, the ENP's light definitiveness and legalism and weak mechanism of conditionality impair its effectiveness. Second, this light legalism coupled with the lack of EU-NCs "joint ownership" in formulating and implementing the ENP should not be perceived solely in a negative light, the Working Paper identifies some of the positive repercussions of these features. Third, the EU should offer a much more comprehensive and generous set of incentives in order to reinforce the mechanisms of positive conditionality and overcome veto players in the NCs. Fourth, positive conditionality should be re-oriented more towards trade and regulatory expectations as opposed to political expectations, *vis-à-vis* NCs such as Israel, where strong veto players exist. Yet, given that the NCs have no prospect of becoming EU Member States in the short and medium term and in light of the (almost ten years) failure of the ENP to offer alternative meaningful incentives, it will be very difficult for the EU to reinvigorate, at least in the short-term, the credibility of the ENP's positive conditionality. This difficulty (accentuated during the current economic and monetary crisis and the ensuing rise in Euro-scepticism), only underscores the limits of the Law as a transformative instrument in the ENP context and the importance of instruments of social learning and institutional building in order to enable the ENP to serve as a robust (economic and political) reform anchor. The EU should thus do more to establish enhanced cooperative ties and closer institutional linkages and networks that may better succeed in advancing, on an *ad hoc* basis, specific-issue, trade-related, less politicized regulatory and legislative alignment.

Yet as this Working Paper has attempted to establish, the EU continues to surmount challenges in the spheres of social learning and institutional building. The fear raised by Bartlett, Čučković, Jurlin, Nojković and Popovski of the SEARCH Consortium, that if the EU fails to pursue a more active and robust role, the ENP's promise of legislative regulatory and institutional reforms may stagnate, run out of steam, or even backfire, appears to be more daunting than ever.⁴⁸³ Such eventuality may have severe repercussions for the EU, which was acknowledged by it in May 2013: "...the EU's credibility as a global player will depend to a great extent on its capacity to act

483 Bartlett *et al.*, *supra* note 24.

decisively in its neighbourhood”.⁴⁸⁴ The EU together with the NCs should rise to that challenge.

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484 Join Communication to the European Parliament, the Council, the European Economic and Social Committee of the Regions, Delivering on a New European Neighbourhood Policy, Brussels, 15.5.2012, JOIN(2012) 14 final, at 21.



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