

**CHANGING DYNAMICS OF THE  
DANUBIAN REGION  
NEW NEIGHBOURHOOD POLICY IN THE EU**

**István Tarrósy – Susan Milford (eds.)**

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# UKRAINE'S HUMAN RIGHTS POLICY AND THE EUROPEAN UNION

## WHEN AND HOW DOES COOPERATION TRANSFORM INTO ASSOCIATION?

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ILINA GENEVSKA

### INTRODUCTION

It can be argued that the European Neighbourhood Policy (ENP) as a policy is one of the most ambitious common projects that the European Union (EU) and its Member States have jointly developed in the framework of the broader Common Foreign and Security Policy of the Union. The basic underlying goal for the creation of such a policy was the establishment of an area of political stability and balanced economic and social development in the states that are the Union's (i.e. the Union member states') immediate neighbours (Milczarek and Nowak, 2007: 72). The European Commission started developing this policy in 2003 by deciding to take a new integral as opposed to the then fragmentary approach toward the countries "from the other side of the border with the EU" who have the required potential and willpower to implement a wide array of political, economic, legal and social standards that the EU itself is based upon by transferring these to their respective societies and political and legal realities. *Inter alia*, there are other factors that prompted the creation of this 'integral' approach towards the European neighbourhood. This approach was conceived in anticipation of the biggest enlargement of the Union so far with ten new member states in May 2004, which in itself triggered the creation of a series of specific legal and political instruments which were to regulate the EU's relationship with its neighbours. That is why part of the reasons for bringing about the creation of the concept of the ENP and its complex machinery of instruments was, in its essence, of a preventive or rather an anticipative nature. With the enlargement of 2004 the Union enlarged both in terms of territory and population, thereby extending its borders and becoming an immediate neighbour with some countries which the Union had not up until then had any significant political and/or economic links. By virtue of the fact of

becoming an immediate neighbour with these countries, the Union's institutions were prompted to look for more comprehensive and more elaborate modalities and mechanisms to regulate relations with the countries forming part of the ENP: Morocco, Algeria, Tunisia, Libya, Egypt, Jordan, Lebanon, Syria, Israel, the Palestinian Authority, Moldavia, Ukraine, Belarus, Georgia, Armenia Azerbaijan, Russia and Kazakhstan.<sup>1</sup>

Another fact that goes against the theories of the "over-extensiveness" of the ENP and what differentiates this policy from the separate but somewhat similar enlargement policy of the Union is the fact that the ENP framework does not comprise the countries that are already candidates for EU membership (Macedonia, Croatia and Turkey) as well as potential membership candidate countries from the Western Balkans (Bosnia and Herzegovina, Albania etc.) currently undergoing the "Stabilization and association process".

#### **LEGAL BASIS FOR DEVELOPING THE ENP**

Like any other common policy of the broad array of common policies pursued by the Union and its Member States, the ENP finds an adequate legal basis in several EC/EU treaty provisions. Namely, there are currently two treaty provisions that serve as an express legal basis for the ENP (Article 181a TEC and Article 310 TEC) which refer to the Union's cooperation with third countries and the different available modalities of this kind of cooperation.

Article 181a TEC concerns the economic, financial and technical *cooperation* between the Union and third states and it provides that this type of cooperation shall be established by way of signature of special agreements. Article 310 TEC on the other hand refers to the competence of the Community to conclude agreements with third countries, thereby establishing an "*association*" type of relationship that presupposes the existence of reciprocal rights and obligations for both of the parties of the association agreement. Article 7a of the Lisbon Treaty, which is aimed at reforming the institutional functioning of the Union (and which at the time of writing has still not entered into force), offers a more concise legal basis for the existence of the ENP. It provides for the establishment of 'special relations' with the countries from the Union neighbourhood, with the goal of establishing an area of prosperity and good neighbourliness based on Union values and close and

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<sup>1</sup> The official website of the ENP - [http://ec.europa.eu/world/enp/policy\\_en.htm](http://ec.europa.eu/world/enp/policy_en.htm)

peaceful cooperation. In order to accomplish this, the Union shall conclude special agreements with the neighbouring countries.

The nature of the ENP and the different competences that stem from it cannot be strictly narrowed down as belonging to only one Community or Union pillar, although it predominantly falls under the auspices of the second Union pillar—the Common Foreign and Security policy. However, although predominantly falling under the competences of the second pillar, there are several significant aspects of the ENP that transcend over to the other two Community/Union pillars. The reason for this is that even though the ultimate existential goal is to secure a certain level of security throughout the European neighbourhood, this is not the sole *raison d'être* for the existence of this policy.

The goals and functions of the ENP are multilayered and multi-aspected in their nature—they relate to fields such as economic development, economic integration, energy policy (which are areas that fall under the Community pillar auspices), through the securing of domestic political stability and cooperation in the field of regional conflict resolution (areas that are part and parcel of the CFSP), to the intensive cooperation in the field of combating organized crime and terrorism (which fall primarily under the Justice and Home Affairs pillar) (Cremona and Hillion, 2006: 24).

### **COOPERATION VERSUS ASSOCIATION**

Something that has always created terminological differences among theoreticians of European integration is the differentiation between the notion of association and the notion of cooperation, as well as giving these two terms a precise definition that would adequately convey the different types of relations between the EU and the third states the two provide for. What has also always been viewed as problematic is the precise determination of the point in time when the process of cooperation terminates and evolves into the upper level of association. Moreover, what is equally difficult is to find an exact terminological denominator that would convey the mentioned transition from cooperation into association. The crucial difference between the two terms remains that cooperation never implies a future, potential membership in the EU, whereas an associative status towards the EU implies and guarantees future membership as such. This is the parameter that helps differentiate

the status regarding the EU that on the one hand the countries from the Western Balkans possess, whereas on the other the countries that are part of the ENP do not.

Even though the Western Balkan countries are in fact, territorially part of the wider notion of European neighbourhood, they nevertheless, unlike the ENP countries, do have a secured EU future, of course provided that they implement all the required reforms and satisfy all the required membership criteria. That is precisely why the enlargement policy of the Union and the policy towards its neighbours are two separate and indeed separable policies that only sometimes make use of similar (sometimes identical) instruments and mechanisms, but nonetheless, the reasons for their existence and their respective effects are significantly different.

The Mediterranean countries that are part of the ENP i.e. the countries that are members of the Euro-Mediterranean partnership (Morocco, Algeria, Tunisia, Libya, Egypt, Lebanon, Syria, Israel, The Palestinian Authority) have signed with the EC and the Member States<sup>2</sup>. These are the so-called Euro-Mediterranean association agreements which only terminologically coincide with the association-type agreements mentioned earlier, which at the beginning of the '90s were signed with some of the countries from the former Eastern bloc—now member states of the EU (such as Poland, Hungary, The Czech Republic, Slovakia etc.). The Euro-Mediterranean association agreements are in essence cooperation-type agreements.

On the other hand, the relation of the rest of the ENP countries (such as Moldavia, Ukraine, Belarus, Armenia and others) with the EU is governed by the partnership and cooperation agreements with the EU. The implications stemming from the signature of these two types of agreements (the E-Mediterranean association agreements and the Partnership and Cooperation agreements) are almost identical—the contracting party ventures to employ gradual political, social, legal and economic reforms in return for which the EU bestows upon the country a number of benefits and preferences in the form of financial and technical assistance for the enforcement of these reforms, and in some cases the EU can decide to guarantee free access to the domestic products of the country for all or some of the EU markets (market of agricultural goods, industrial goods etc.).<sup>3</sup>

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<sup>2</sup> In the interest of textual precision and conciseness, from now on in the paper, although we deal with agreements (the PCAs, SAAs etc.) that are in fact signed between the European Community and the Member States on one side and the ENP country on the other, for reasons of terminological simplicity we shall refer to these agreements as agreements signed between the European Union and the ENP country. The reason for this is that the EU as an entity still lacks competence to conclude international agreements, whereas the Community indeed has this kind of competence.

<sup>3</sup> Source: [http://ec.europa.eu/world/enp/policy\\_en.htm](http://ec.europa.eu/world/enp/policy_en.htm)



Once a country from the ENP has signed a Partnership and Cooperation Agreement (PCA), the next step the EU institutions proceed to make is the drafting of a country report that deals with the political, economic, legal, social and other circumstances in the country concerned and on the basis of which the EU institutions, in cooperation with the national institutions, draft an Action Plan that comprises the directions on which the planned reforms will focus for a time period that is most often set for 3 years.<sup>4</sup> Unlike the Stabilisation and Association agreements, these agreements do not contain a 'potential membership clause' for the country concerned.

It was previously mentioned that sometimes the ENP borrows instruments and mechanisms typical of the enlargement policy—a clear example for this is that one of the required legal reforms in the context of the ENP partnership the Action Plans most often envisage is the gradual incorporation of the EU legal norms and standards (the *acquis communautaire*) in a large part of the national legal domains (thereby practically making the legal set of the Copenhagen membership criteria contingent on the country in question) and moreover, in order to satisfy the EU political and economic standards they are additionally required to fulfil the infamous Copenhagen economic (free market economy) and political (stable political institutions, rule of law, human rights) criteria.

Essentially, the EU estimates the progress accomplished by the ENP partners according to the criteria and parameters peculiar to and inherently linked with the EU enlargement policy. This means that the Union, in fact, looks through the same prism of criteria when it judges both the ENP partners' progress and the progress made by the countries that already are (potential) membership candidates. Certainly the threshold of the requirements and the level of scrutiny is higher in the latter case, but the fact remains that it all boils down to the same list of criteria (benchmarks) that serve as a starting point in the progress assessment. This inevitably leads to the conclusion that in this respect there is a potentially dangerous overlap between the notions of membership criteria and partnership criteria.

The result of a persistent '*carrot and stick*' approach on the part of the EU in its relations with the ENP partners (a practice whereby for every sufficiently well enforced reform there is a certain 'carrot' that counterbalances it in the form of a compensation or a benefit from the EU) is that the ENP countries, especially

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<sup>4</sup> Source: [http://ec.europa.eu/world/enp/policy\\_en.htm](http://ec.europa.eu/world/enp/policy_en.htm)

the ones that used to be part of the Eastern bloc, lack incentive to successfully implement reforms since they are aware that the estimation of the accomplished reforms and the intensity of their rapprochement to the EU will be conducted by way of applying criteria that are essentially membership criteria, and no matter how high the level of progress, the final outcome of the estimation will always be a zero-sum-game for the ENP countries since they are still not (at least not expressly) perceived by the EU as its future members (Petrov, 2007; Milczarek and Nowak, 2007) but rather as countries with whom the EU has a relationship of 'perpetual' and 'lingering' partnership. The weaknesses detected in the approach employed towards the ENP countries are expected to be overcome with the planned signature of the new and enhanced EN Agreements that in the near future are to replace the present PCAs (Petrov, 2007: 13).

#### THE EU AND ITS HUMAN RIGHTS POLICY

The Union, as originally conceived, was a *sui generis* regional organisation functioning primarily on the concept of economic integration between its Member States which only later on evolved into a more comprehensive and far-reaching political and legal integration in a substantial number of domains. Even today, the Union is viewed as an entity with a predominantly economic predicate. Hence, the specific and delicate nature of the question on the EU's involvement in promoting human rights protection both internally and externally and the issue on whether the EU rightfully merits this, for some, 'self-appointed' mandate for human rights promotion, arises as an issue. This is primarily because the legal aspects of human rights protection have never been considered as Community competence (the treaties provide for no explicit legal basis for this), since the standards of human rights protection have been, more often than not, decided and developed upon individually, by each MS. This human rights mandate for the EU has been further strengthened and rubber stamped as such by the ECJ with such activist judgments as *Stork v. High Authority* (C-1/58), *Stauder v. City of Ulm* (C- 26/69), *Internationale Handelsgesellschaft* (C-11/70), *Hauer* (C-44/79), *Portugal v. Council* (C-268/94) and many others (Tridimas, 2007: 299).

There are a few treaty provisions that define the EU as a Union based on values and principles among which human rights protection finds its place (Eeckhout, 2005: 465–69). Article 6 TEU mentions human rights protection as

one of the cornerstones of the Union and this article actually partly codifies the Copenhagen political criteria agreed upon at the Summit of the European Council in 1993. Furthermore, art. 11(1) TEU defines human rights protection as one of the goals of the EU's CFSP. Article 181a TEC, introduced with the Treaty of Nice of 2001, concerns the cooperation between the EU and third countries, explicitly mentioning the contribution that the EU aims to provide in the field of human rights protection in the context of cooperation. It is undeniable that these articles offer a solid starting ground for the management and development of a consistent external human rights policy on the part of the Union.

Let us now concentrate on the nature of the agreements the EU signs with third countries as defined by art. 181a TEC (regardless of whether they are trade agreements, PCAs, or indeed association agreements). These agreements frequently contain one or more human rights protection clauses since human rights protection is an inevitable part of the political reforms that the third country is required to undertake in terms of respecting the partnership agreement.

The human rights clause/s, unlike before, today represent what is called an *'essential element'* of the cooperation agreements, which practically means that the non-respect of these clauses entails a suspension or nullification of the agreement (Eeckhout, 2005: 477). This indicates that the EU, by putting itself forward as human rights promoter in its external relations towards non-member countries, takes human rights seriously and values them highly not only as a principle underlying all democratic order, but what is more, as an accomplishment of humanity or as a humanity *acquis*.

Taking into consideration the importance attached to human rights protection in the EU, especially having in view their function as one of the political criteria for Union membership, I would now like to focus on the specific status of Ukraine as a 'front-runner' among the other ENP countries as regards the pace at which its rapprochement with the EU is going and the particular situation in the field of human rights protection in this country.

The paper will further focus on an analysis of the legal and political instruments/acts adopted by the EU institutions that specifically deal with Ukraine's progress in this field. It could be argued that the satisfactory accomplishment of this criterion serves as an indicator of the pace of rapprochement with the EU. The comparative analysis is intended to help discern an interesting pattern—the more seriously the

Union scrutinizes the fulfilment of these criteria in the ENP progress assessment instruments, the more this is encouraging for the country since it is an indication that the institutions have shown the country the green light in terms of allowing a further wider and deeper EU-integration, in the general sense of the term. In nuce, it could serve as a beacon that the country is a step closer to being awarded the 'potential candidate for membership' status.

### **UKRAINE, THE EU AND THE CONCEPT OF 'SHARED VALUES'**

The frequent invoking of the concept of 'shared values' that the EU and the ENP partner countries share is present in the texts of almost all of the official documents adopted under the ENP framework (the latest of which are the final conclusions of the EU-Ukraine Summit held on Sept. 9<sup>th</sup> 2008 in Paris where it was again reiterated that Ukraine shares a common history and common values with the countries of the Union<sup>5</sup>.

Human rights protection is certainly one of the common values which immanently call for a terminological and teleological analysis of the named documents with the final aim of establishing the level of rapprochement with the EU that a country has accomplished. It is interesting to observe the manner in which the mandate of the EU as an "exporter of values" can be reconciled with the concept of the values that it shares with other countries. Are these 'common values' in fact values that have previously been 'exported' by the EU to these countries?

Ukraine is today torn between optimistic statements concerning Ukraine's EU membership perspective and sobering comments that state that the enlargement agenda of the EU is already sufficiently saturated. Ever since it acquired its independence from the Soviet Union in 1991, through the signature of the PCA with the EU in 1995 and the election of the first pro-European president in 2004 (the well known 'orange revolution') Ukraine has been demonstrating its determination and willpower to move towards the West with the perspective of one day becoming a member of the European family. Compared with the rest of the ENP countries, Ukraine has accomplished the most significant progress in the field of implementing the required EU standards, but, nonetheless, has, in the same way as the rest of them, been experiencing the same hot/cold treatment from EU institutions. This can be

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<sup>5</sup> [http://www.ue2008.fr/webdav/site/PFUE/shared/import/0909\\_UE\\_Ukraine/09.09\\_UE-Ukraine\\_association\\_agreement\\_EN.pdf](http://www.ue2008.fr/webdav/site/PFUE/shared/import/0909_UE_Ukraine/09.09_UE-Ukraine_association_agreement_EN.pdf)

attributed to the cautiousness on their part to explicitly or implicitly state any kind of firm attitude towards any future change of the Ukraine's status towards the EU.

The analysis of the human rights provisions in the ENP instruments will be a chronological one, starting out with the PCA of 1994<sup>6</sup>, The Commission Staff working document on Ukraine of 2004, The Action Plan for Ukraine adopted in February 2005<sup>7</sup>, concluding with the Commission Staff Working Document on Ukraine dating from April 2008.

*The Partnership and Cooperation Agreement* between Ukraine and the EU in title 1 "General Principles", article 2b<sup>8</sup> states that respect for the democratic principles and human rights as these were defined in the Final Act at the Helsinki Summit and the Paris Charter for New Europe form a vital part of the foreign policies of the contracting parties and they are an essential element of the PCA.

*The Commission Staff Working Document of 2004*<sup>9</sup> acknowledges that Ukraine has ratified a large number of the most important international instruments in the field of human rights protection. The Commission asserts that respect for media freedom, which is a crucial part of the political reforms in Ukraine, is in a worrying state, especially since a significant portion of the media is owned or indeed controlled by members of political or economic elites, while the percentage of independent media is insignificant and financially weak. Torture and inhuman treatment of detainees and prisoners are a big issue and challenge for Ukraine's reforms. Some progress is noted in the development of the non-governmental/civil society sector, but still it is an insignificant progress largely dependent on foreign donations.

*The Action Plan of 2005*<sup>10</sup> expresses in a general manner the need for further reforms in the direction of converging Ukraine's human rights protection standards with the international and EU standards. The accent is put on the development of the civil society sector, assuring a proper functioning of the legal and administrative framework in the exercise and guaranteeing media freedom, passing legislation on the guaranteeing of rights for the national minorities, prevention of inhuman behaviour and torture. The need to guarantee the rights of the trade unions and

<sup>6</sup> This agreement entered into force in March 1998 and established three important bilateral organs: Cooperation Council, Cooperation Committee and subcommittees of experts ( source: website of the Commission's delegation in Ukraine <http://www.delukr.ec.europa.eu/home.html>)

<sup>7</sup> The Action Plan was adopted by the Cooperation Council established by the PCA and covers a time frame of 3 years.

<sup>8</sup> <http://www.delukr.ec.europa.eu/en/Data/pca-eng.pdf>

<sup>9</sup> [http://ec.europa.eu/world/enp/pdf/country/ukraine\\_enp\\_country\\_report\\_2004\\_en.pdf](http://ec.europa.eu/world/enp/pdf/country/ukraine_enp_country_report_2004_en.pdf), p. 8, 9

<sup>10</sup> [http://ec.europa.eu/world/enp/pdf/action\\_plans/ukraine\\_enp\\_ap\\_final\\_en.pdf](http://ec.europa.eu/world/enp/pdf/action_plans/ukraine_enp_ap_final_en.pdf)

generally all workers in accordance with the standards of the International Labour Organisation is expressed.

*The Commission Staff Working Document on Ukraine's progress of 2008* notes several significant developments that mark Ukraine's progress: the start of negotiations for the signature of a new enhanced agreement between the EU and Ukraine (New Enhanced Agreement), the finalisation of the process of Ukraine's accession to the WTO as well as the start of the negotiations on the establishment of a Free Trade Area with the EU as a vital element of the new Agreement.<sup>11</sup>

The Commission welcomes pluralism in both the electronic and printed media as well as the success accomplished in consolidating media freedom. The ratification of the Protocol to the International Covenant of civil and political rights on the abolishment of the death penalty is mentioned. As far as the civil sector is concerned, the registration fee for the NGOs has been comparatively reduced whereas there is no registration fee required for trade unions. There is also improvement in the treatment of minorities, bearing in mind that the situation with the Roma population is still highly worrying.<sup>12</sup>

## FUTURE PROSPECTS

It is clear that what underlies the persistent 'carrot and stick' approach of the EU towards its neighbourhood is the lack of a thoroughly differentiated approach towards each individual ENP country, thereby leaving the countries that have been busy doing a lot to Europeanize and the ones that have reformed 'poorly' practically in the same basket. The newly elaborated European Partnership Instrument of 2007 seems to have the capacity to improve these deficiencies of the ENP. In the case of Ukraine it is expected to provide for more intense political *cooperation* with the EU and, which is extremely important, a gradual *economic integration* by establishing a free trade area now that the accession to the WTO is fully completed. (European Neighbourhood and Partnership Instrument—Ukraine—Country Strategy Paper 2007–2013)<sup>13</sup>

It is peculiar that none of the instruments mentioned envisages any future political *integration* of Ukraine into the EU, which goes to prove that in the foreseeable future the dominant concept that will dictate political EU-Ukraine

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<sup>11</sup> [http://ec.europa.eu/world/enp/pdf/progress2008/sec08\\_402\\_en.pdf](http://ec.europa.eu/world/enp/pdf/progress2008/sec08_402_en.pdf), p. 2

<sup>12</sup> [http://ec.europa.eu/world/enp/pdf/progress2008/sec08\\_402\\_en.pdf](http://ec.europa.eu/world/enp/pdf/progress2008/sec08_402_en.pdf), p. 5

<sup>13</sup> [http://ec.europa.eu/world/enp/pdf/country/enpi\\_csp\\_ukraine\\_en.pdf](http://ec.europa.eu/world/enp/pdf/country/enpi_csp_ukraine_en.pdf), p.5

relations will continue to be the general ENP concept of 'sharing everything with the EU but the institutions'

As Tocci rightfully indicates, the fact is that the EU in its relations with the ENP countries has been more prepared to focus on accomplishing the so called *possession goals* (such as improving trade relations with its neighbours, border control, migration control and energy security) as opposed to the attainment of the so called *milieu goals*—which concern the political and societal change by promoting of peace, democracy, human rights protection and the rule of law everywhere throughout the European neighbourhood (Tocci, 2007: 29).

Nevertheless, despite all, it is largely due to the existence of such a far-reaching and comprehensive European neighbourhood concept that Ukraine has been able to evolve in the time period of around 13 years (since the initial signature of the PCA up until today) into a modern democratic state with a developing market economy and an unshakeable determination to one day join the European bloc of countries—something that is one of the principal goals of its foreign policy.

The analysis of the instruments that was conducted showed that the situation in the field of attaining an EU-level of human rights protection is generally satisfactory, though there is still lot to be done in the future. It is noticeable that EU institutions have not gone into a deeper or a more thorough analysis of the human rights situation in Ukraine, especially since they have not supported Ukraine's progress with any concrete numbers or figures and have proceeded with a 'general vocabulary' in the description of the human rights situation on the field. Despite the existence of obvious economic and political pitfalls, what is striking is the optimism and strong willpower on the part of both the Ukrainian governmental and non-governmental institutions concerning future developments in this context.

At this point one must inevitably indicate a certain lack of level playing on the part of the institutions in Brussels regarding Ukraine's progress when counter-positioned with the rest of the ENP countries from the ex-Soviet Bloc (like Moldova). It is recommended that the time has come for the EU to revise its selective politics of carrot and stick towards all its ENP neighbours and to offer the 'orange' Ukraine some fresher and figuratively 'oranger' carrots.

The conclusion to what was previously said is essentially a presumption—a crucial aspect that still remains unclear is whether the new, enhanced European Neighbourhood Agreement will contain a provision that would determine

Ukraine's status as a potential candidate for EU membership, analogous with the corresponding 'potential membership' clause present in all the Stabilization and Association Agreements signed with the countries from the Western Balkans.

What could be proposed as a way out of "multilaterality" as one of the indicated weaknesses of the ENP would be the introduction of a multi-speed ENP similar to the present model of "Europe of many speeds" among the member states. This would allow the more progressive and faster reforming ENP countries to advance to higher levels of integration with the EU while at the same time remaining part of the ENP purview.

The recently held EU-Ukraine summit of Sept. 9 2008 in Paris has brought on a new, positive wave in the relations between the EU and Ukraine. Both the EU and the Ukrainian leaders have envisaged an upcoming establishment of a free trade area and another highly significant development- the signature of a new, association agreement that is to replace the current Partnership and Cooperation Agreement. The final conclusions of the Summit are sketchy as to the details of the new agreement, but in this context, a certain statement of promise is given: that is, that this future agreement is expected to be "as ambitious as possible" in terms of the prospective goals for wider and deeper political and economic integration.<sup>14</sup>

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<sup>14</sup> Summit Press Release [http://www.ue2008.fr/webdav/site/PFUE/shared/import/0909\\_UE\\_Ukraine/09.09\\_UE-Ukraine\\_association\\_agreement\\_EN.pdf](http://www.ue2008.fr/webdav/site/PFUE/shared/import/0909_UE_Ukraine/09.09_UE-Ukraine_association_agreement_EN.pdf)



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