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Europe and China: Cooperation with Complex Legal Dimensions

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Abstract

This article aims to evaluate legal aspects of the content and implementation of the 'strategic partnership' between the EU and the People's Republic of China. In the absence of a category of 'emerging countries' in international economic law, the Union must adapt its foreign policy with regard to this major economic and commercial power.

Relations between the European Community and China are currently governed by a second-generation agreement signed in 1985. However, a new dynamic has been set in motion since 2003, by the drawing up of preparatory documents by both parties and joint declarations at annual summits bearing on the 'strategic partnership'. Seen in a long-term perspective, this partnership helps provide a measure of predictability in relations between the two partners, through combining elements of 'soft law' and 'hard law'.

The insertion of political dialogue into the strategic partnership seems to alter the coherence of the Union, notably with regard to the difficulties of implementing the dialogue on human rights. The added value of the partnership lies essentially in its economic and commercial aspects, through not only the putting into place of non-binding 'economic dialogues' which cover a large spectrum of the relationship, but also by the multiplication of sector-based accords in numerous areas (maritime transport, customs cooperation, etc.). This constant development has thus allowed parties, at the last annual summit, to envisage the conclusion of a new framework agreement. The Commission in December 2005 was then given the mandate to conclude a Partnership and Cooperation Agreement.

The present paper will sketch out a forecast of the legal framework, measured against the yardsticks of Asia regional reconfiguration and the law of the World Trade Organization (WTO). The commercial risks of the relationship could imply the integration of the domains known as 'WTO plus' into the future agreement, notably the domains of investments and intellectual property rights, it would involve a mixed agreement[1]. That being the case, the negotiations

[1] Within the current treaties, the doctrine distinguish two types of mixity in the external agreements : a "vertical mixity" (or "classical") : i.e. the content of the agreements refers to the European Community (EC) pillar (1st pillar), but in shared domains or competences between the EC and the Member States (agreement concluded by "the European Community and its Member States")., and an "horizontal mixity" (or "cross-pillar"), i.e. the content of agreements refers to the 1st pillar and/or

risk to be fragile at the political level, in particular concerning the insertion of a clause of democratic conditionality in the future agreement. Any clash between the values and the interests of the EU and China would be uncomfortably highlighted during negotiations.

the 2nd (Common and Foreign Security Policy, [CFSP]) / 3rd (Police and Judicial Co-operation in Criminal Matters [PJCC]) pillars (agreement concluded by "the European Community and its Member States acting in the framework of the European Union").

Introduction

On 28th November 2007, the European Union (EU) and China celebrated the 10th anniversary of the annual summits between the two partners. A real "global partnership"[2] has been set up. However, the negotiations between the two partners are difficult, largely because of the EU's trade deficit. The main problem for the EU is the necessity to adapt its policy to a partner who is both a developing country and a developed country. Father Jean-Baptiste du Halde, whose encyclopedia on China was to influence Voltaire's positive view of China, noted in 1735 that the trade of the flourishing Chinese Empire was incomparably superior to that of Europe[3]. Seen through a long-term perspective, China is on track to renew its pre-colonial history, and gradually to regain the place which it held before 1800, when it was one of the powerhouses of the world economy and the premier manufacturing power on the planet[4]. Today we see not so much an 'emergence' of China as a first-rank economic player on the international scene, but rather a "retour au centre du monde'"[5].

The "Re-Emergence" of China and the International Legal Order

The process of economic liberalization and political reform which started in 1978 under Deng Xiaoping's rule and led to the accession of China to the World Trade Organization in 2001[6], has led to the 're-emergence' of China as a major economic and commercial power. Thus, the People's Republic of China experienced an average growth

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[2] *Joint Statement of the 10th EU-China Summit*, available at <www.europa.eu.int/>, 28 November 2007, Beijing.

[3] J. B. Du Halde, *Description géographique, historique, chronologique, politique et physique de l'empire de la Chine*, Lemercier, BNF, 1735.

[4] In 1800, China represented 40% of the world's gross national product.

[5] « Return to the centre of the world », P. Gentelle, « Géo-histoire: de l'an mil à l'an 2000, un centre bousculé entre le continent et la mer », in M. Foucher (ed.), *Asies nouvelles*, Belin, 2002.

[6] Protocol on the Accession of the People's Republic of China to the WTO, Decision of 10 November 2001, WT/L/432, 11 December 2001.

of almost 9, 5% in the period 1980–2005[7], becoming in 2006 the fourth economic power after the EU (seen as an integrated economic region), the USA and Japan[8]. Thanks to these reforms and to the growth they engendered, China saw its gross domestic product (GDP) per person grow from 148 US dollars (US$) to 1 700 US$ between in 1978 and 2005[9]. Despite growing social inequalities, particularly in the countryside[10], a middle class of around 105 million consumers appeared[11]. This growth has been particularly evident in the recent period, since real GDP[12] has grown by 9% per annum between 1998 and 2005 and more than 11% in 2006 and 2007[13].

Since 2001, this growth rested essentially on manufacturing and commercial power integrated into the world trading system, and is founded principally upon exports and investments. Thus, China has become the third largest global exporter[14] and one of the principal destinations for foreign direct investment, a large part of which went into manufacturing industry, centered on exports[15]. The rapid growth

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[7] Organization for Economic Cooperation and Development, *Synthesis, Economic Study of China*, Paris, OECD, September 2005.

[8] H. Siebert, China, *Understanding a New Global Economic Player*, Kiel Working Paper No. 1278, Kiel Institute for World Economics, June 2006) at 3. China represents 4.7% of global GNP, with a GNP of US$2.2 trillion. See Vienna Institute for International Economic Studies, *Country Expertise: China*, available at <http://www.wiiw.ac.at/e/china.html>. For a global presentation of China as an economic and political player, see J. Lun, *A Political and Economic Introduction to China*, Research Paper 06/36, Library House of Commons, 19 June 2006.

[9] National Office of Statistics (2005b). Nevertheless, according to the authorities, the GNP per person was still ranked 107th in the world in 2004. See “China Remains Largest Developing Country”, available at <http://english.gov.cn/2005-12/20/content_132456.htm>, 20 December 2005.

[10] The inequalities are in fact “deepened in that the distribution of revenue and jobs ends to favour urban and coastal zones at the expense of the rural and less developed regions”. See Trade Policy Review Mechanism of the WTO (TPRM), People’s Republic of China, Report of the Secretariat (WT/TPR/S/161, 28 February 2006), Economic Environment, General Survey, point 1.

[11] See the evaluation of the French Mission to China, which uses the official statistics taking into account the under declaration of the incomes (30 % correction) and uses a specific criteria (an annual income more than 25 000 RMB), Mission économique - Chine, « La classe moyenne chinoise : évaluation et perspectives », available at <www.missioneco.org/Chine/documents_new.asp?V=1_PDF_127738>, December 2006.

[12] The number reached by valuing all the productive activity within the country at a specific year's prices. When economic activity of two or more time periods is valued at the same year's prices, the resulting figure allows comparison of purchasing power over time, since the effects of inflation have been removed by maintaining constant prices.

[13] World Bank, *China: Key Indicators*, Washington, World Bank, 2007. For an analysis of the economic situation in 2007, see the World Bank Report, « *China Quarterly Update* », Beijing, September 2007, available at <www.worldbank.org>.

[14] The second largest global exporter if one includes Hong Kong. In 2005, the total amount of exported and imported goods represented some 63.9% of GNP, compared to less than 10% in 1978.

[15] More than 50% of the external trade of China is conducted by enterprises with foreign participation which have set up in China (General Administration of Customs

of China is linked to a unique combination of factors, notably a plentiful supply of inexpensive labor, the low prices of abundant natural resources, the catalyst effect of accession to the World Trade Organization (WTO) on the domestic reforms concerning direct investment abroad, and export-centered growth.

Trade between the EU and China has reached 210 billion euros and represents 9.4% of the entire external trade of the Union[16]. Nonetheless, trade between the EU and China is substantially out of balance, with Chinese exports to the EU of 158 billion € and EU exports to China of 52 billion €, a trade deficit of 106 billion €.

In spite of all these considerations, China remains a developing country[17]. However, in economic terms, it can to a large extent be considered as coming under the category of "emerging countries". This category does not exist in international economic law, which institutes an expedient, particularly at the level of international trade negotiations, in the legal and economic treatment of the People's Republic of China[18] by the industrialized countries. In fact, there is no 'upper category' of developing countries,[19] in contrast to the category of 'least developed' countries[20]. There is only a single umbrella category of 'developing countries'. International organizations use different procedures to identify developing countries: the establishment of lists using abstract criteria (whether a single criterion or a number of criteria), and the principle of self-selection[21].

Concerning the lists, although the notion of development has been broadened to include different factors (social development, human development and sustainable development[22]), it is the

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of the People's Republic of China, Statistics 2005, available at <www.customs.gov.cn>).

[16] China was thus the second largest trading partner of the EU, after the USA (18.5 % of the external trade of the Union).

[17] The Human Development Indicator (HDI) is revealing in this regard, since China remains 85th in the world with a HDI of 0.755 (above the HDI average of 0.718). One notes however that the progression of the index has nonetheless been spectacular: from 0.525 in 1975 to 0.755 in 2005. See United Nations Development Programme (UNDP), World Report on Human Development 2005 (Economica, 2005), at 236.

[18] The categorization of developing countries poses a problem, to the extent that a certain number of rights are attached to this status by international organizations: system of aid and international cooperation (Organization for Economic Cooperation and Development, World Bank), application of specific provisions to developing countries in the General Agreement on Tariffs and Trade texts, delays on implementation, application of special and differentiated treatment (WTO).

[19] For an analysis of legal transformations in international law arising from the demands of the Third World, see P. Burette-Maurau, *La participation du Tiers Monde à l'élaboration du droit international* (Bibliothèque de droit international, 1983) and G. De Lacharrière, « L'influence de l'inégalité de développement des États en droit international », 1973, 139(II) RCDAI, at 227.

[20] A qualification which can be seen as a 'categorization by the lowest'.

[21] See for a global analysis of methods for identifying developing countries, G. Feuer, Droit international du développement, Dalloz, 2nd edn, 1991, at 66–74.

[22] Social development: see Resolution 2542 (XXIV), entitled 'Declaration on Social Progress and Development' and the 'World Summit on Social Development' (United Nations, March 1995); human development: see the implementation of the HDI from

economic aspect which remains at the heart of our understanding of development. The United Nations Conference on Trade and Development (UNCTAD)[23], the World Bank and the Organization for Economic Cooperation and Development (OECD)[24] all use GDP per capita as the criterion for the establishment of lists. If these different organizations class China as a country with weak income (UNCTAD) or less than average income (World Bank and OECD), the thresholds determining the levels of gross national product (GNP) vary according to the organizations. There are no homogenized categories. In addition, the UNCTAD report of 2005[25] already systematically excludes China from macro-economic analysis (evaluation of GDP, volume of exports), showing the distinctive characteristics of Chinese economic and commercial power. The treatment of China by these organizations will thus be bound to evolve when the level of per capita GNP follows the growth in the real GDP of the country, which is forecast to happen in a middle term.

WTO law has its own way of categorizing developing countries[26]: in theory, each country is free to declare itself a 'developing country'. The "developing country" status implies the application of specific provisions (decided at the Uruguay Round): the Special and Differential Treatment[27] and application of the Generalized System of Preferences (GSP)[28] by the developed members of the WTO. Thus, China declared itself to be a developing

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the UNDP, which utilizes this criteria to list developing countries which benefit from aid; sustainable development: see notably the Earth Summit held at Rio from 3 to 14 June 1992 under the auspices of the United Nations. The conference adopted several texts, one of which, the Rio Declaration, affirms, in the context of a 'global partnership', the link between the environment and development, aiming to assure sustainable development for the common good of present and future generations

[23] The organization lists developing countries on the basis of the work of the Statistics Division of the UN Department of Economic and Social Affairs (DESA).

[24] The list of beneficiaries of Public Development Aid (APD) was established by the Comité d'aide au développement (CAD).

[25] Trade and Development Report 2005, Chapter 1: Current Issues in the World Economy (UNCTAD/TDR/ 2005, 2 September 2005), at 5, 6 and 8.

[26] See on this question B. Taxil, L'OMC et les pays en développement (Collection Montchrestien, 1998), at 180

[27] See for a synthesis of provisions relating to Special and Differential Treatment (SDT) in a selection of WTO agreements, the work of R. Safadi, The WTO & Development: Learning to Walk & Chew Gum at the Same Time S&D in the DDA, paper presented within the framework of the international conference organized by the Institut Français de relations internationales (IFRI) and the Agence Française de Développement (AFD), available at http://www.ifri.org. See infra.

[28] Concerning the differentiation between developing countries in the GSP scheme of the European Community, see the Report of the Appellate Body of the WTO, European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R, 7 April 2004. See notably J. Lebullenger et C. Avril, « Le système communautaire de préférences tarifaires généralisées », *Jurisclasseur Europe*, fascicule 2350, juin 2007, and S. de La Rosa, « Le différend Communautés européennes – Condition d'octroi des préférences généralisées – Une validation inattendue des différenciations dans l'attribution des préférences généralisées ? », *L'Observateur des Nations unies*, n° 16, printemps-été 2004, at 95 to 109.

country in the Report of the Working Group on the Accession of China to the WTO[29]. However, some members considered "the considerable size of the Chinese economy, its rapid growth and its character as an economy in transition"[30], and found that they had to take a pragmatic approach to determine China's needs, resorting to transition periods and to other special dispositions of the WTO Treaty in favor of developing-country members. The whole of specific provisions is contained in the Accession Protocol to WTO[31].

WTO membership, by virtue of the instituting Agreement (article II of the GATT), implies the automatic acceptation of all the annexed multilateral agreements[32], without potential Chinese reservations[33]. Prior to acceding to the WTO, China made significant modifications to its trading system. Upon accession, China assumed commitments to liberalize its trading regime[34], including making further significant reductions in its tariff and certain non-tariff barriers. However, China's accession to the WTO in December 2001 was not the culmination of the transformation of its trading system. Members of the WTO recognized that China needed to accomplish huge changes over a period of years before it would be in full compliance with all of its WTO obligations[35]. WTO members, in particular the US and the EU, established an annual monitoring mechanism to oversee the progress of China's compliance with its WTO commitments. With the « Transitional Review Mechanism »[36] (TRM) under Section 18 of

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[29] Report of the Working Group on the Accession of China to the WTO (WT/ACC/CHN/49, 1 October 2001), point 8. The Chinese representative declared that, "while having made important progress in its economic development, China remained a developing country and, as a result, must have the right to fully benefit from the differential and more favorable treatment accorded to developing-country Members by virtue of the WTO Agreement".

[30] *Ibidem*, point 9.

[31] Accession Protocol of China to WTO, WT/L/432, 21 November 2001.

[32] China is part of the « GATT 1994 », but also member to all sectoral agreements concerning trade in goods (annex 1), notably the agreement on Trade-Related Investment Measures (TRIMs, annex 1A) , the General Agreement on Trade in Services (GATS, annex 1B), and the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS, annex 1C). But China has not accepted to be a member of the plurilateral agreements (optional), for instance the Agreement on Trade in Civil Aircraft (observatory status), or the Agreement on Government Procurement.

[33] The article XVI § 5 stipulates that "no reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements. Reservations in respect of a provision of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement".

[34] Especially in the fields of intellectual property rights (no transition periods) and in services.

[35] See Kong Quingjiang, *China and the WTO: A Legal Perspective*, Singapore; New Jersey: World Scientific, 2002, p. 157-181.

[36] See P. Farah, « L'accession de la Chine à l'Organisation mondiale du commerce : les règles internationales et les barrières culturelles internes », *Lettre de l'antenne franco-chinoise*, janvier 2006, p. 1-12 ; T. P. Stewart, *China in the WTO – Year 3*, Washington, DC, 2005 ; T. Rumbaugh, N. Blancher, « China : International Trade

the Protocol of Accession, China is requested to provide information on the major legal problems[37] concerning the implementation of its WTO commitments.

The Current Legal Framework of the Relations Between EU and China

The EU must equip itself with a foreign policy adapted to the economic characteristics of its partner, the People's Republic of China. The economic and trading relations between the European Community and China are currently governed by an agreement for economic and commercial cooperation dating from 1985[38], a non-preferential agreement of the kind known as 'second generation' concluded on the basis of ex-Article 113 of the EEC Treaty (common commercial policy) and of Article 235 of the same treaty (subsidiary competences)[39]. The political dialogue takes place informally, on the basis of annual summits, meetings on the troika's model[40], and subject-specific meetings of experts, notably relative to non-proliferation and human rights[41]. Apart from the Agreement of 1985, the legal framework of relations is completed by a certain number of sector-based agreements[42]. Because of the specific characteristics of China (both a developed and a developing country), China is also a subject of the "Development Policy" of the EU, in its unilateral aspect[43].

Even if the 'Canada' clause[44] allowed contracting parties to enrich the material content of their relations, the conventional

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and WTO Accession », Washington, DC, FMI, « IMF Working Paper », 2004,WP/04/36, at 7-8.

[37] See L. Choukroune, « L'accession de la Chine à l'OMC et la réforme juridique: vers un État de droit par l'internationalisation sans démocratie » *in* M. Delmas-Marty, and P. E. Will (dir.), *La Chine et la démocratie,* Paris, Fayard, at 617-661.

[38] Agreement on Commercial and Economic Cooperation between the European Economic Community and the People's Republic of China [1985] OJ L250/1.

[39] For an analysis of the generations of agreements, see C. Flaesh-Mougin, J. Lebüllenger and J. Kasmi, 'Relations de la Communauté européenne avec les pays d'Amérique latine et d'Asie (ALA)—Cadre général', (2005) July Jurisclasseur Europe 2230, points 33–45.

[40] The troika is the form in which the Union is represented in terms of the Common Foreign and Security Policy. According to Article 18(4) of the Treaty on European Union (TEU), 'The Commission shall be fully associated in the tasks referred to in paragraphs 1 and 2. The Presidency shall be assisted in those tasks if need be by the next Member State to hold the Presidency'.

[41] Current Architecture of EU–China Relations, available at <ec.europa.eu/comm/external_relations/ china/docs/architecture.pdf>. See infra.

[42] Notably a plurilateral agreement on ITER project, see infra.

[43] That is to say all the unilateral instruments in the framework of the Common Development Policy (CDP) of the EU. This article will focus only on the relations between EU and China, as an emerging country.

[44] In terms of what is known (due to its origin) as a 'Canada' clause, the Member States can, in parallel with the Community, conduct bilateral activities, including the ability to conclude their own cooperation agreements. This possibility—which must

framework no longer seems adapted to the ambitions of the Community and China in the absence of an 'upgrade' clause[45].

Consequently, the European Commission drew up in 1995 an orientation document on a 'long-term policy for relations between China and Europe'[46]. The document signaled the return to political dialogue after the events in Tiananmen Square which had led to a suspension of bilateral contacts. It is in line with the Asiatic strategy approved by the European Council at Essen[47] and it takes into account the emergence of China as an economic and political power. The Community strategy has since been regularly updated and re-evaluated in 1998, 2000, 2001, 2003 and in 2006[48]. The different updates lead to an evolution of the semantic terms used by the Community from a 'global partnership' in 1998 to a 'mature partnership' in 2003. The partnership with China is to be linked with the EU's attempt to elaborate an Asiatic strategy[49] and with 'strategic partnerships' signed with other countries like India[50] or emerging regional groupings like South-East Asia[51]. The Communication of 2003 insists for the first time on the fact that "the EU and China have

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not however impinge upon Community competences and which requires a consultation procedure to be respected (Decision No. 74/393/EEC of 22 July 1974 [1974] OJ L208/23)—reflects a realistic approach and stems from the principle of subsidiary.

[45] The « upgrade clause » stipulates the parties are being on leave to examine the extension of the agreement to fields which are not included into the agreement. Cf. C. Flaesh-Mougin, J. Lebullenger, J. Kasmi, *op. cit*. [39], point 40.

[46] Communication from the Commission relative to a Long-Term Policy for Relations with China, COM (95) 279.

[47] Communication from the Commission to the Council, 13 July 1994, towards a New Asiatic Strategy, COM (94) 314.

[48] Respectively : Commission Communication, "Building a Comprehensive Partnership with China," COM (1998) 181 ; Report of the Commission to the Council and to the European Parliament on the implementation of the Communication 'Towards a Global Partnership with China', COM (2000) 552 final ; Commission Communication to the Council and the European Parliament, "Strategy of the EU vis-à-vis China: Implementation of the 1998 Communication and Measures to Take to Strengthen Community Policy," COM (2001) 265 final ; Orientation Document from the Commission to forward to the Council and to the European Parliament, "Common Interests and Challenges of the EU–China relationship—Towards a Mature Partnership," COM (2003) 533 final ; in 2006, two orientation documents were published : a political one fixing the global framework, and the second document on trade and investments questions. Communication from the Commission to the Council and the European Parliament of 24 October 2006 entitled "EU-China: closer partners, growing responsibilities", COM(2006) 631 final, and "Strategic document on EU-China trade and investments: competition and partnership", COM(2006) 632 final.

[49] Commission Communication, A Strategic Framework to Strengthen the Europe–Asia Partnership, COM (2001) 469 final.

[50] Commission Communication to the Council, to the European Parliament and to the European Economic and Social Committee, An EU–India Strategic Partnership, COM (2004) 430 final.

[51] Commission Communication, A New Partnership with South-East Asia, COM (2003) 399 final. We have to underline that this communication doesn't talk about a "strategic partnership", but includes references to a "strategic dialogue" between the EU and ASEAN. See Infra.

never had so much common interest to collaborate in the framework of a strategic partnership to maintain and encourage sustainable development, peace and stability"[52].

The term 'partnership' has different meanings depending on the legal framework in which it evolves. The term appeared in the 1990s in the works of various international organizations[53] under the form of 'partnership for development' that referred to the rebalancing between North and South. In the law of EU external relations, the term takes on the special meaning of a "many-sided notion tending to become a principle of action, a structuring method in the external relations of the European Union"[54]. The partnership implies at least three characteristics: adherence by the partners to a minimum of common benchmarks, equal relations between the partners and a dynamic process for the construction of a common future. For some, the partnership is an « objet non identifié des relations extérieures de l'Union »[55].

The concept of partnership is unclear. Thus, it is advisable to link it to the legal forms it takes. There are a number of such forms, the legal nature of which varies. It can be the subject or the objective of a bilateral agreement[56], orientation documents, common declarations or action plans. Concerning China, there is no conventional formalization of the notion of partnership in the second-generation agreement. In light of the formula 'towards a mature partnership'[57], the partnership is the objective of the updated communication of 2003, approved by the Council. The term 'strategic' returns to geopolitical vocabulary[58]. It implies EU and China common outlooks on the world environment, as well as a long-term commitment to common action. This new dimension appeared simultaneously in the 2003 Communication, but equally in China's strategic document concerning the EU[59]. The combination of 'partnership' and 'strategic' introduces the idea of priority in the

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[52] *Ibidem*, at 3.
[53] Notably within UNCTAD and the OECD.
[54] P. Moreau-Defarges, « Partenariat, mondialisation et régionalisation », in M. F. Labouz (ed.), *Le partenariat de l'Union européenne avec les pays tiers, conflits et convergences*, Bruxelles, Bruylant, 2000.
[55] « Unidentified legal object in the Community's external action », see R. Balock, « La notion de partenariat en droit communautaire », in R. Balock (ed.), *Mélanges en l'Honneur à Guy Isaac: cinquante ans de droit communautaire*, Presses de l'Université des Sciences Sociales de Toulouse, 2004, at 506.
[56] J. Raux, 'Association et perspectives partenariales', in C. Christophe-Tchakaloff (ed.), *Le concept d'association dans les accords passés avec la Communauté: essai de clarification*, Bruxelles, Bruylant, 1999, at 89–137.
[57] Orientation Document from the Commission to forward to the Council and to the European Parliament, "Common Interests and Challenges of the EU–China relationship—Towards a Mature Partnership," COM (2003) 533 final, at 1.
[58] Etymologically designating a 'military government'. Dictionnaire historique de la langue française, tome 3 (Le Robert, 1998), at 3650.
[59] Ministry of foreign affairs of China, China's EU Policy Paper (October 2003), available at <www.fmprc.gov.cn/eng/topics/ceupp/>

implementation of common actions for the two players, even if the banality of resorting to this terminology in the external action of the Union alters the scope of the concept[60].

Legally, the strategic partnership, as laid out in the orientation documents and developed in the course of annual summits, appears as an instrument of soft law[61] which helps to complete and re-evaluate the legal framework of relations between the EU and China. Different kind of soft law instruments used by the EU can be distinguished: unilateral global acts (communications, country strategy paper [CSP], multi-annual programs), bilateral global acts (joint declarations[62] during the annual summits), sectoral bilateral acts (Memorandum of Understanding [MoU], administrative agreements between the European Commission and China), and sectoral dialogues (economic dialogues largo sensu and political dialogues, including the Human Rights).

This qualification of 'soft law' must be analyzed in light of the distinction between 'soft' and 'hard' norms as traditionally conceived in law. It is equally important to appreciate the importance of these instruments in the field of the law of the external relations of the EU. If the decision-making mechanism follows, in principle, the Community model the passage to international negotiation with a third country often supposes the mobilization of soft instruments, a fortiori with the Asiatic partners of the Union whose legal traditions differ sometimes from the Western positivist conception[63]. In addition, the relations with China are not limited to the first pillar "European Community", especially during the annual summits. The content of the relationship refers to the institutional problematic of the 2nd pillar (Common and Foreign Security Policy) and 3rd pillar (Police and Judicial Co-operation in Criminal Matters), taking into account the Treaty of Lisbon (adopted the 18 October 2007), also known as the Reform Treaty[64].

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[60] The term 'strategic partnership' is in fact often used with third countries, notably certain partners in Latin America, the Mediterranean countries, Canada, or even South Africa. See infra.

[61] The concept of 'soft law' can be defined as 'rules of conduct which lie in a sphere which is legally non-binding (in the sense of restrictions and sanctions), but which, according to the intention of their author, must be considered as being part of the legal sphere': K. C.Wellens and G. M. Borchardt, 'Soft Law in European Community Law', (1989) 14 European Law Review 267.

[62] In terms of typology, the Joint declaration is less advanced than the Common Plan of Action (PoA), (more functional). See for instance the last PoA EU-India, *India-EU Joint Action Plan: Implementation Report, India-EU Summit, New Delhi*, 30 November 2007, available at <www.delind.ec.europa.eu/>, or the first PoA with ASEAN, *To implement the Nuremberg Declaration on an EU-ASEAN Enhanced Partnership*, available at <ec.europa.eu/>.

[63] See M. Delmas-Marty, *Les forces imaginantes du droit—Le relatif et l'universel*, Seuil, September 2004.

[64] The formal title of the treaty is Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European

It is appropriate, therefore, to make an initial evaluation of the 'strategic partnership' since its elaboration in 2003, and to envisage a prospective study. Close analysis shows that the partnership has developed simultaneously as a ***para-legal instrument***[65] ***which adds dynamism to economic dialogues, which assists to conclude sector-based agreements and to integrate the political dimension***, and also as a ***pre-legal instrument which allows one to envisage the conclusion of a new framework agreement***—an element of hard law indispensable to the reality of the challenges posed by the EU–China relationship that implies difficult negotiations.

Actually, the challenges are sizeable. Normally, the term of partnership implies a situation of equal partners, a real reciprocity, especially in commercial matters. If the main objective is to obtain more open Chinese markets, the European Union has to adapt its economic and commercial policy. For the first time maybe, the EU is no more in position of force to influence the negotiations. But in any case, the EU must maintain the coherence between political and commercial dimensions of its relations with China. In this context, the political negotiation will be a "funambulist act". In fact, the asymmetry between Chinese and European pretensions could imply two separate agreements (a global one and a commercial one), with the risk to distend the link between trade and political clauses, or a worth scenario: no agreement.

Community. See for a consolidated version of the treaties, amended by the Reform Treaty, <www.iiea.com/publicationx.php?publication_id=33>

[65] In other words, the strategic partnership developed during the annual summits implies new commitments for China and the EU, which are off the point of the 1985 agreement.

The Strategic Partnership: a Para-Legal Instrument Stimulating Economic Cooperation and Political Dialogue

The conclusion of sector-based agreements does not date from the formulation of the strategic partnership. However, through summits and within the framework of those elements of soft law, economic and commercial cooperation is expanded. Moreover, one of the essential factors of the added value of the strategic partnership is that it allows the two partners, without binding engagements, to exchange on specific subjects and to advance political dialogue step by step in a flexible manner.

It is important, first of all, to understand how the strategic partnership is integrated into the foreign relations of the Union with China, in order to grasp the legal and political problems posed by the integration of political dialogue into the strategic partnership.

The Methods of Integrating Political Dialogue within the Strategic Partnership

On the Community side, the first formulation of the strategic partnership dates from the Commission Communication of 2003 concerning the implementation of the 'mature partnership', approved by the Council[66]. The concept of 'strategic' clearly shows the taking into account of the world environment and echoes the European security strategy in which the Council "recognizes China as a major partner of the EU" [67] and inscribed the sharing of aims and values resulting from the implementation of strategic partnership, notably the

[66] Orientation Document from the Commission to forward to the Council and to the European Parliament, "Common Interests and Challenges of the EU–China relationship—Towards a Mature Partnership," COM (2003) 533 final, at3.
[67] 2532nd Session of the General Affairs Council, Luxembourg, 13 October 2003, at 8, point 1.

idea of an international order founded on 'effective multilateralism' [68]. Following the 2003 Communication, a Chinese document on strategic relations with the EU supported for the first time the idea of common values[69]. Resulting largely from awareness of the role played by the EU in the international negotiations regarding China's accession to the WTO[70], this political document underlines that "China sets out on the path of a global, stable, long-term partnership with the European Union"[71]. The orientations of the two political documents are more or less identical concerning the principles of mutual respect and contribution to world peace, even if the vocabulary used by the European Commission is stronger, speaking of a "shared responsibility of the EU and China in the promotion of world governance"[72]. The Commission also shows its preoccupation with sustaining "the transition of China towards an open society based on the rule of law and respect for human rights"[73], prompted by its definite concern for coherence in its external action. Interestingly, the European Parliament retains no more than the economic dimension of the strategic partnership in stating—reversing the logic—that "the starting point for commercial relations between the EU and China is a strategic partnership implying reciprocal access to markets on the basis of WTO rules and fair competition"[74], thus reserving its position on the reality of the community of values between the two partners (see *infra*).

The strategic implementation of the partnership, as set out by the Communication of 2003, manifests itself above all in the annual summits between the EU and China, in accordance with the principle of the equality of the partners. The concept here takes on a new meaning, since it is accompanied by discussions and negotiations with partners allowing new agreements (sectoral or global) to be envisaged, and proceeds to an exchange of views on the key subjects of world governance. The strategic partnership as developed by the annual summits constitutes also the global platform of negotiations, restructuring the relations in the absence of an efficient legal framework.

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[68] J. Solana, *A Secure Europe in a Better World, European Security Strategy*, adopted by the Heads of State and Heads of Government, meeting at the European Council in Brussels, 12 December 2003, at 15.
[69] China's EU Policy Paper, *op. cit.* [58].
[70] See H. Dejean de la Bâtie, "L'Union européenne vue de Chine: un partenaire majeur?" , Centre Asie ifri, 2003.
[71] China's EU Policy Paper, *op. cit*. [58], part 2.
[72] Orientation Document from the Commission to forward to the Council and to the European Parliament, "Common Interests and Challenges of the EU–China relationship—Towards a Mature Partnership," COM (2003) 533 final, at 9.
[73] *Ibidem*, at 13.
[74] Commission on International Trade, Report of the European Parliament on the Future of Commercial Relations between the European Union and China (2005/2015(INI); A6-0262/2005), 5 September 2005, point D.

It was at the time of the sixth EU-China summit that, for the first time, the two parties—guided by the two political documents—endorsed the "development of a global strategic partnership"[75]. During the ninth summit[76], the notion was formally deepened: "leaders of the two sides agreed that the past decade had seen significant changes in the EU and in China and a progressive deepening of the relationship, which was maturing into a comprehensive strategic partnership"[77]. The last summit, on 28 November, 2007, also focused on "global partnership"[78] and the parties underlined the maturation of the relations[79]. In this way, the annual summits constitute the main framework for political dialogue.

In concrete terms, the insertion of political dialogue in the external action of the EC with regard to China does not date from the formulation of the 'strategic partnership' by the Communication of 2003. The Agreement of 1985 on economic and commercial cooperation did not institute political dialogue[80]. From that time on, political dialogue as properly understood dealt with the dispositions of the Common Foreign and Security Policy (CFSP) where the Member States retained their competences[81], specifically from Article 26 TEU (Treaty on the European Union), not excluding the possibility of resorting to the TEC for the implementation of Community actions, notably in the field of cooperation.

A political dialogue was formalized without an agreement in 1994 by an exchange of letters[82]. The european document that recognized the status of China as an emerging power in the international order, was put into concrete terms at the time of the first EU–China heads of government summit in April 1998 in London. On this basis, the annual summits are thus the preferred forum for political dialogue. The idea of reinforcing this dialogue, as a prelude

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[75] "They stressed their resolve to further expand and deepen China–EU relations, guided by the two policy papers, which promote the development of an overall strategic partnership between China and the EU", *Joint Press Statement of the 6th EU–China Summit*, Beijing, 30 October 2003, point 28.

[76] *Joint Statement of the 9th EU–China Summit*, Helsinki, 9 September 2006.

[77] *Ibidem*, point 2.

[78] *Joint Statement of the 10th EU-China Summit*, *op. cit.* [2].

[79] "Leaders expressed their satisfaction with the comprehensive cooperation between the two sides in broad fields and at all levels, and with the growing maturity of the China-EU comprehensive strategic partnership," *Joint Statement of the 10th EU-China Summit, op. cit.* [2], § 2.

[80] Unlike Association Agreements (named or unnamed), partnership and cooperation agreements, specific agreements on political dialogue, or even certain third-generation agreements, notably the *sui generis* third-generation agreement between the European Community and its Member States on one hand, and the Republic of Korea on the other.

[81] See ECJ, 14 January 1997, Case C-124/95, Centro-com [1997] ECR I-114, para. 25 and 26. However, States have competences 'retained in respect of Community Law'.

[82] *Overview of the political dialogue*, <ec.europa.eu/comm/external_relations/china/intro/ index.htm>. However, this Agreement, in the form of an exchange of letters, has not been published.

to substantial expansion of relations, already figured in the communication of 1998[83]. However it was really put into concrete terms by the Communication of 2001, a 'strategy'[84] document for the Union (without bracketing together 'partnership' and 'strategic') which aimed at reinforcing the policy of the Union. The document envisaged "to codify the framework in which the Sino-European dialogue takes place"[85] and proposed structures of dialogue at different levels[86]. These proposals have been formalized by a new framework of reinforced dialogue, convened between the two parties by an exchange of letters dated June 2002[87].

The Communication of 2003 laid out the structural renovation of political dialogue: annual summit, ministerial troikas (1 or 2 per year), meetings between the President of the General Affairs Council and the Chinese ambassador in the capital of the state holding the presidency and meetings between the Chinese foreign minister and the heads of the EU Mission to Beijing, political and regional troikas, and regular meetings of experts on different topics (illegal immigration, Asian affairs, human rights, non-proliferation, exports of conventional weapons[88]). During the eighth EU–China summit, the partners have also convened a dialogue qualified as strategic at the level of deputy ministers for foreign affairs[89], thus instituting a mechanism of coordination. At this point one should note the special place accorded to human rights, a subject discussed not only in the framework of this political dialogue, but also through an informal dialogue on human rights established in 1994 between the gover-nment of the People's Republic of China and the troika of the Council of the Union. This informal dialogue was suspended unilaterally by China, and then recommenced in 1997, in the troika format, twice per year.

The formulation of a strategic partnership has, despite the renewal of the dialogue framework, impacted in three important ways on political dialogue in its entirety[90]. In the first place, the summits

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[83] "The European Union has committed itself to a strategy of total engagement with China. The renewal and reinforcement of the bilateral EU–China political dialogue and the encouragement of increased participation by China in regional or multilateral initiatives must constitute the two essential keystones of this approach", 1998 Commission Communication, *op. cit.* [48], at 5.
[84] 2001 Commission Communication, *op. cit.* [48].
[85] *Ibidem*, at. 3.
[86] *Ibidem*, at. 8-10.
[87] Nonetheless, the 'codification' announced by the 2001 Communication remains in the field of soft law, in that the exchange of letters of 2002—like that of 1994—has no binding force, short of publication. This is linked to the practical impossibility of examining the content of the agreement to escape restrictive rules, subject to a check of legality. See notably ECJ, March 1971, Case C-22/70, ERTA Case [1971] ECR 263, para. 42, and ECJ, 9 October 1990, Case C-366/88, France v. Commission [1990] ECR I-3571, para. 8.
[88] 2003 Commission Communication, *op. cit.* [48], Annex 1, at 30.
[89] Joint Statement of the 9th EU–China Summit, Brussels, 5 September 2005, point 5.
[90] Numerous subjects concerning the political dialogue can be dealt with here, notably the topics of illegal immigration and re-admission (Council's mandate for

have allowed the partners to take into account the emergence of new forums for regional dialogue such as the Association of Southeast Asian Nations[91] (ASEAN), or trans-regional dialogue—like the Asia-Europe Meeting[92] (ASEM) in a lateral way, or the Asian Regional Forum[93] (ARF) on the specific topic of Asiatic security—thus allowing a Euro-Chinese dialogue to reassess its priorities.

In the second place, the summits from 2003 to 2007 display a broadening and deepening of the subjects 'of common interest' on the international scene[94]. The sixth summit of 2003 provided the first opportunity to affirm that "the EU and China were determined to promote peace, security and sustainable development throughout the world"[95]. The following summits have revealed a certain convergence of views on numerous regional and international conflicts: the North Korean problem[96], the resolution of the Iraq conflict, the reconstruction of Afghanistan, or even the hostilities between Israel and Hezbollah and the resolution of the Israel–Palestine conflict on the basis of the pertinent Security Council resolutions. However, the disagreements are sometimes really deep. On the Darfur's crisis, the "elements of language" are more nuanced. The *in extremis* inclusion of a reference to the Sudan's conflict in the Joint Declaration of the last summit[97] cannot conceal the ambiguous position of China concerning the Omar el-Beshir regime.

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negotiations with China, agreements with Hong Kong and Macao), which offer an illustrative choice.

[91] The ASEAN comprising Brunei, Burma, Cambodia, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand, Vietnam and East Timor. See *infra*.

[92] Informal Process of discussions between the EU and mostly Asian countries, see A. Sautenet, "relations entre l'Union européenne et les pays d'Asie', Annuaire de droit européen, vol. I, II, III et IV, ed. Bruylant, Bruxelles, 2005, 2006, 2007 (2008 forthcoming).

[93] ARF is a regional security forum in Asia, gathering all major world powers (US, China, India, Japan, Russia, plus Australia and Canada) as well as ASEAN countries. It meets yearly at ministerial level and is an important occasion for interactions at high level with regional partners. It has allowed the development of a consensus approach on major security issues such as terrorism and on regional issues (such as North Korea, Burma or South China Sea).

[94] Towards a 're-balancing' of relations. See Dejean de la Bâtie, *op. cit.* [71], at 39.

[95] *Joint Statement of the 7th China–EU Summit*, La Haye, 8 December 2004, point 11.

[96] We can regret that the point 12 (*10th summit Joint declaration*) doesn't include references to the 1695 resolution of the Security Council.

[97] *Joint Statement of the 10th EU-China Summit*, *op. cit.* [2], at 9. "Leaders recalled the successful cooperation since the last Summit, at all levels, in the efforts of the international community to facilitate a solution to the Darfur crisis and underlined the need to make further progress as regards the Darfur peace negotiations as well as the implementation of the Comprehensive Peace Agreement. The leaders expressed the objective to see the Africa Union/UN hybrid peace keeping operation UNAMID soon to be deployed; they noted the progress in preparation of the operation MINURCAT and EUFOR Chad/RCA recalling the common aim of contributing to peace and stability in Darfur and the neighbouring regions". We must underline that an external pressure (agitating for a boycott of the 2008 Beijing Olympics) may be convinced Beijing to adopt a more conciliatory approach.

The 10th summit was the opportunity of a deepen dialogue on the African development. Apart of the taking into account of their respective existing dialogues with Africa (Forum on China-Africa Cooperation and the EU-Africa Summit) in a context of a "Chinese offensive in Africa"[98], the two sides "agreed to continue their dialogue on African issues, and actively explore effective ways and channels of cooperation among China, the EU and Africa in appropriate areas" [99]. For that goal, the EU invited China to attend the EU-Africa Summit as an observer[100]. The real objective of this EU-China dialogue on Africa is to invite China to respect the principle of "good governance", especially in the domain of aids, while China prefers the concept of effective governance and particularly the principle of non-interference into others' internal affairs[101].

In addition, we must note two statements on regional and international issues during the last annual summit: the taking into consideration of the situation in Myanmar, in spite of potential Chinese reservations[102], and the first mention of Kosovo[103]. On the subject of Taiwan, the EU maintains the 'One China' policy[104] while expressing constantly "its hope for a peaceful resolution of the Taiwan issue through constructive dialogue"[105]. Actually, the 10th summit was focused on the question of Taiwan, because of the project of the Taiwanese Presidency to organize a referendum on its candidature to the United Nations (UN) with the name of Taiwan, and

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[98] V. Niquet, *L'Offensive africaine de la Chine,* Paris, Ifri, « La lettre du centre Asie Ifri, n°11, 2 février 2007 », available at <www.ifri.org>.

[99] *Joint Statement of the 10th EU-China Summit*, *op. cit*. [2], point 10.

[100] EU-Africa Summit in Lisbon, 7-9 December 2007, see <ec.europa.eu>. We have to note the production of a "common strategy" between EU and Africa (going further than a classical "joint declaration" such as with China), and a first PoA concerning the implementation of the strategic partnership.

[101] *Joint Statement of the 9th EU-China Summit*, *op. cit.* [77], point 15. See B. Bernt et U. Wissenbach, *EU-China-Africa Trilateral Development Cooperation: Common Challenges and New Directions*, Bonn, Deutsches Institut für Entwicklungspolitik, « Discussion Paper », n° 21, at. 16. In other words, from a Chinese perspective, it's European soft imperialism *versus* Chinese Pragmatism.

[102] *Joint Statement of the 10th EU-China Summit, op. cit.* [2], point 11. "The EU and China confirmed their full support for the good offices efforts of Prof. Ibrahim Gambari, Special Advisor of the UN Secretary General, with a view to advancing democracy in Myanmar. Both sides agreed on the need to see tangible progress in the domestic process, with dialogue among the parties concerned". Actually, China was against international sanctions during the monk protests in Burma. But the Foreign ministers of the Member States decided to impose the interdiction of trade and European investments concerning wood and precious stones. See Council conclusions on Burma/Myanmar, 2824th General affairs and External relations Council meeting, Luxembourg, 15-16 October 2007, available at <www.consilium.europa.eu>. However, we can have some doubts on the utility of these new sanctions. See notably V. Niquet, « L'UE désemparée face à la Birmanie », *Le Nouvel Observateur*, 28 October 2007.

[103] See the United Nations Office of the Special Envoy for Kosovo, <www.unosek.org>. The Kosovo is now independent.

[104] Declaration in the framework of the CFSP, Taiwan: Principle of one China, 10256/99, 20 august 1999.

[105] *Joint Statement of the 9th EU-China Summit*, *op. cit.* [77], point 5.

the prospective of presidential elections in the island in March 2008[106]. The EU reiterated "its concern over the intended referendum on UN membership in the name of Taiwan as this could lead to a unilateral change of the statu quo across Taiwan straits to which the EU is opposed"[107]. In this context, the EU expressed its concern about the change of *statu quo*[108], going further than recent declarations of Javier Solana[109].

In the third place, political dialogue allowed the expression of concerns about international legal instruments[110]. The 7th summit of 2004 provided the occasion for the partners to underline "their engagement to cooperate with the mechanisms of the United Nations"[111]. Actually, the whole declaration is a compromise between the partners and are integrated with pragmatism. For instance, in the field of counter-terrorism, the two sides reaffirmed during the 10th summit "their recognition of the United Nations as the only truly global forum for the fight against terrorism"[112], in accordance with the United Nations Global Counter-Terrorism Strategy adopted by consensus on 8 September 2006[113]. However the references to a certain number of international conventions are often vague and cannot conceal the reduced number of pertinent international conventions ratified by China[114]. For instance, the two sides noted during the 10th summit "the importance of the International Criminal Court"[115], even though

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[106] See M. Chang King-yu, « Déterminants et perspectives pour les relations Chine-Taiwan », compte rendu des « Débats Asie » n°10, Taipei, Foundation on International and Cross-Strait Studies, available at <www.centreasia.org>. Actually, the Kuomintang has won the presidential election (Ma Ying Jeou), without a referendum.

[107] *Joint Statement of the 10th EU-China Summit, op. cit.* [2], point 3.

[108] But the EU doesn't accept to be pronounced on the principle of Taiwan independence.

[109] See J. Solana, *EU High Representative for the CFSP, concerned by Taiwanese leaders' comments on Taiwan's application for UN membership*, Doc S307/07, Bruxelles, 25 October 2007 (« The proposed referendum risks making it harder for Taiwan to enjoy the pragmatic participation – which we support – in the activities of specialized multilateral fora, when there are clear public interests for this and when statehood is not required. I therefore want to encourage both sides to take further initiatives aimed at promoting dialogue, practical cooperation and confidence building»).

[110] In concrete terms, each Member State, essentially within the COASI, Asia-Oceania Working Party (a 'geographically fused' group notably covering the CFSP), sets out their positions prior to the annual summit, thus forming a veritable 'register of grievances'.

[111] *Joint Statement of the 7th EU – China Summit, op. cit*. [96], point 11.

[112] *Joint Statement of the 10th EU-China Summit, op. cit*. [2], point 8.

[113] *Ibidem*. See Resolution n° 60/288 adopted by the General Assembly, 8 September 2006, A/RES/60/28, <www.un.org>. A reference to this resolution could be done in the future partnership and cooperation agreement between the EU and China.

[114] On 40 « pertinent » international conventions (human rights, terrorism, etc.), China has ratified 16 conventions against 34 ratifications for the EU or its Member States. Cf. Z. Laïdi, *La Norme sans la force. L'énigme de la puissance européenne,* Paris, Presses de Sciences Po, 2005, at. 110-115.

[115] *Joint Statement of the 10th EU-China Summit, op. cit.* [2], point 6.

China has not signed the Rome Statute on the International Criminal Court (ICC)[116]. We must note that out of the 24 countries in Asia, only 5 (Afghanistan, Cambodia, Mongolia, the Republic of Korea and Timor-Leste) have ratified the Rome Statute. Asia is a region that remains significantly under-represented at the Court, although civil society has been strong in advocating for international justice and the rule of law across the continent.

Currently, the cooperation in strategic domains is mainly on bilateral declarations. On the basis of the Joint Declaration of the European Union and the People's Republic of China on Non-proliferation and Arms Control, the two sides have reaffirmed during the 10th summit that they "will continue to enhance dialogue and deepen practical cooperation, building on the successful record in several areas, such as export control"[117]. There are no references here on the main international conventions in this field, particularly the Comprehensive Test Ban Treaty (CTBT)[118].

In any case, the machinery of dialogue and of relationship are partly 'bunged up' by the current political desire of the EU to maintain the arms embargo on China[119], even if the EU recognized, during the 10th summit in a diplomatic way "the importance of this issue and confirmed its willingness to carry forward work towards lifting the embargo on the basis of the Joint Statement of the 2004 EU-China Summit and subsequent European Council Conclusions"[120].

The Political Coherence of the EU Challenged: The Human Rights Dialogue

The respect for democratic principles, human rights and the rule of law forms part of the 'founding principles' of the external action of the European Communities and Union[121]. The informal dialogue on human rights with China—formalized in 1994—is always at the heart

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[116] Statute of Rome on the International Criminal Court (ICC), Doc. A/CONF.183/9, available at <www.icc-cpi.int/>.
[117] *Joint Statement of the 10th EU-China Summit, op. cit*. [2], point 5.
[118] Comprehensive test Ban Treaty (CTBT), New York, 10 September 1996, see <www.untreaty.un.org>.
[119] See the Council resolutions on maintaining the EU's embargo on the sale of arms to China, and in particular its resolution of 18 December 2003 [2004] OJ C91/679. In December 2004, the leaders of the EU announced their intention to replace this embargo with a code of conduct for exports. Including provisions on the arms trade and technology transfers, this code of conduct should not give rise to an increase in either the quantity or the quality of arms sold to China. Equally, however, it will not be binding and therefore will have no effect on those members who wish to sell more sophisticated systems to the Chinese (M. Wolf, 'Why is China Growing so slowly?' Financial Times, 22 January 2005). See A. Berkofsky, 'EU Weapons Embargo with China to Remain in Place', (2004) 8(1/2) EurAsia Bulletin 3.
[120] *Joint Statement of the 10th EU-China Summit, op. cit*. [2], point 4.
[121] See C. Flaesh-Mougin, J. Lebullenger, J. Kasmi, *op. cit*. [39], point 67.

of the annual summits. Its insertion as an 'essential element of political dialogue'[122] has appeared since the Communication of 2003.

The 7th summit, 2004, was the occasion for the EU to warmly welcome China's resolution to ratify "as soon as possible" the International Covenant on Civil and Political Rights[123]. This Covenant constitutes—along with the Covenant of 1966 on Economic Social and Cultural rights and the Universal Declaration of Human Rights—'the international charter on human rights'[124], and forms part of the priorities of the Council in its conclusions of March 2002[125]. Now, China's engagement to ratify also figures in the joint declaration of the 10th summit of 2007[126], showing the lack of progress made on this subject, even though China has created a working group to address it. One notes that it has not signed the protocols of the Covenant, in particular the second one which aimed at abolishing the death penalty[127], the European Parliament being particularly sensitive on this question[128].

The 7th summit seemed to have taken into consideration respect for 'minority rights'. Now, it must be made clear that the situation has changed little, with regard to the successive reports and resolutions of the European Parliament[129], notably on Tibet and the Uighur Autonomous Region of Xinjiang, and to the reports of non-governmental organizations (NGOs), particularly Human Rights Watch in China and Amnesty International[130]. During the 24th round of the EU-

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[122] 2003 Commission Communication, *op. cit*. [48], at 12.

[123] International Covenant on Civil and Political Rights, adopted and opened to signature, ratification and adhesion signature, by the General Assembly in Resolution 2200 A (XXI) of 16 December 1966, entered into force 23 March 1976, in accordance with the provisions of Article 49. *Joint Statement of the 7th EU-China Summit*, *op. cit.* [96], point 9.

[124] Article 1 of this treaty states that "All peoples have the right of self-determination". By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'. Article 2 enshrines the principle of non-discrimination in guaranteeing rights arising from the treaty. There then follows a detailed list of freedoms and civil and political rights: the right to life (Art. 6), protection against torture and other cruel, inhuman or degrading punishments (Art. 7), and security of the person (Art. 9), as well as equality before the law (Art. 26), etc. The Covenant also affirms numerous rights concerning the family. Article 23 accords special protection to the family, 'the natural and fundamental group unit of society'.

[125] Conclusions of the Council on Human Rights in China, Adoption by the General Affairs Council on 11 March, EU Bulletin 3-2002, point 1.2.3.

[126] *Joint Statement of the 10th EU-China Summit, op. cit.* [2], point 6.

[127] CCPR-OP2-DP, UN High Commissioner for Human Rights, Status of Ratifications (10 January 2003).

[128] Report of the European Parliament on the EU-China relations, A6-0257/2006, 20 July 2006, points 3 and 59.

[129] See, by way of example, Resolution of the European Parliament on 'Tibet: Case of Tenzin Delek Rinpoché' [2005] OJ C201E/95 and Bulletin 1/2-2005, point 1.2.4, Resolution of the European Parliament on Tibet [2005] OJ C 247E/99, Resolution of the European Parliament on the annual report on human rights in the world in 2004 and European Union policy on human rights, EU Bulletin 4-2005, point 1.2.2.

[130] See the 2005 Report of Amnesty International on the human rights situation in China, available at <www.amnesty.fr/>.

China Human Rights Dialogue, the 17th October 2007[131] (at the same time that the XVII Congress of the Chinese Communist Party), the EU insisted on the situation of the human rights in Tibet. It's interesting to underline the "partnership dimension" of this dialogue, because China pointed some racial discrimination problems in certain Member States of the EU[132]. From this perspective, the 10th summit has shown some tensions between the two partners and divergences between European countries, especially France and Germany. If Chancellor Merkel has received the Dalai Lama on 23 September 2007[133] (implying diplomatic tensions with Beijing), the French President Sarkozy had a carefully and conciliatory approach concerning the human rights situation during the meeting with Hu Jintao[134].

The results in the field of human rights seem unsa-tisfactory. The General Affairs Council on 22–23 January 2001 under-lined that "this dialogue is not an acceptable solution unless progress is made on the ground. The EU will assess the results of this dialogue at regular intervals to determine to what extent it has borne fruit". The EU-China human rights dialogue, which is formalized *a minima*, does not accurately take into account the players on the field. This has been the case, for example, with Human Rights Watch, which, in an open letter sent before the meetings scheduled with the Chinese government at Beijing in November 2003, deplored the secret and closed character of these meetings. According to this letter: "Neither side releases information about the agenda or the outcome of the talks… If these talks are to have any credibility, it is necessary that they establish transparent and measurable benchmarks to measure any progress on China's part. More of the same would be tantamount to doing nothing"[135]. These criticisms have spurred the Commission to extend the existing annual forum of NGOs on human rights[136]. On the subject of the evaluation, the European Parliament, often denounced for "its impotence in foreign affairs within the institutional framework of

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[131] *24th Round of the EU-China Human Rights Dialogue*, 17 October 2007, available at <www.eu2007.pt/>.
[132] *Ibidem*.
[133] See « La chancelière Angela Merkel reçoit le dalaï-lama et mécontente Pékin », *Le Monde*, 25 September 2007.
[134] See for the synthesis of the meeting, <www.euractiv.fr>, and the analysis of V. Niquet, « Nicolas Sarkozy va découvrir qu'en Chine, la rupture, c'est difficile », *Le Figaro*, 26 November 2007.
[135] Human Rights Watch, available at <hrw.org/english/docs/2003/11/25/china6530.htm>.
[136] Commission Communication to the Council and to the European Parliament, "Systematic Program of Promotion of Democracy and Human Rights in the World within the Framework of Future Financial Viewpoints (2007–2013)", COM (2006) 23, Brussels, 25 January 2006, point 1.

the EU"[137], underlines, with each resolution, the "lack of substantial results obtained from this dialogue"[138].

A number of observers, such as Lu Haina, deem that "The EU's "policy of dialogue" on human rights issues seems to have little significance in terms of changing the current human rights situation in China in the short or even medium-term"[139]. However, it should be underlined here that the 'human rights' dimension heavily influences certain actions taken under the Community pillar, compared with the intergovernmental domain. In a coherent approach, beyond the specific dialogue on human rights, the Development Policy of the EC contributes larger[140] to "the general objective of development and consolidation of democracy and the rule of law, as well as to the objective of respect of human rights and fundamental freedoms"[141]. By way of example, aiming to offer a legal basis for all the actions of the EU in the field of human rights and democratization under Chapter B7-70, the Council adopted two regulations on 29 April 1999 on the development and consolidation of democracy and the rule of law as well as respect for human rights and fundamental freedoms, in accordance with Articles 179 and 308 TEC[142]. This chapter entitled 'European Initiative for Democracy and Human Rights', was created on the initiative of the European Parliament in 1994 and aimed at collecting a set of budget lines dealing specifically with the promotion of human rights. Within this framework was launched, with regard to China, a project concerning the promotion of good governance, constitutional government and the rule of law, on the initiative of the UK[143]. Equally, China is one of the priority countries in the annual work schedule for 2006, which underlines the taking into account of work accompanying the process of China's economic opening-up. While China has made a certain amount of progress, the Council's

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[137] Y. Lan, "The European Parliament and the China-Taiwan Issue: An Empirical Approach", in *European Foreign Affairs Review*, Kluwer Law International, 2004 vol. 9, n° 1, Springer 2004, at 134.

[138] See the Resolution of the European Parliament on Human Rights Violations in China, notably Religious Freedom, 8 September 2005, point 7.

[139] H. Lu, "EU–China Human Rights Dialogue", *EurAsia Bulletin*, vol. 7, June July 2003, at 6. One notes that the EU also attempts to put pressure on China within the framework of the ASEM. See Sixth ASEM Summit, Helsinki, 11 September 2006.

[140] See the *Country Strategy Paper*, *China, 2007-2013*, available at <www.ec.europa.eu/>.

[141] Article 177 § 2 of the Treaty of the European Community (TEC).

[142] Council Regulation No. 975/1999 of 29 April 1999 laying down the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms [1999] OJ L120/1 and Council Regulation No. 976/1999 of 29 April 1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation, which, within the framework of Community cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries [1999] OJ L120/8.

[143] Project Democracy, Good Governance and the Rule of Law, DGR 2004, available at <ec.europa.eu/>.

2005 annual report on human rights notes “the absence of progress made concerning respect for the rights of persons belonging to minorities, that the death penalty continues to be broadly applied and that torture continues to be used”[144].

In other words, the EU does not, in its relations with China—apart from the arms embargo—implement a ‘political front’ on fundamental rights. It opts for a cooperative approach—slow and progressive—rather than for an approach based on coercive diplomacy faced with the “intentional deprivations of rights”[145] under way in China. The external action of the Union in the field of human rights, of democracy and of constitutional government thus seems to be characterized, in the Chinese case, by its subordination to other interests (economic and geo-strategic) and to *realpolitik*[146]. It is, in fact, the dynamism of the economic and commercial aspects of the strategic partnership which are essential to EU–China relations, although they themselves are not exempt from tensions.

A Dynamic Vehicle for Economic and Commercial Cooperation

The strategic character of the partnership, as formulated in 2003, is revealed above all in the economic and commercial sphere, partly through a matrix of ever-wider ‘economic dialogues’ (ranging from space technology to competition policy and environmental questions) accentuating the strategic character of the relationship, but also through sector-based agreements in certain domains—allowing the EC and the Union to take concrete steps towards cooperation through instruments of hard law.

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[144] Annual Report of the EU on Human Rights, 2005, adopted by the Council on 3 October 2005.

[145] Report of Human Rights in China (HRIC), “Human Rights in China and the Dialogue on Human Rights”, 28 July 2000, available at <www.hrichina.org/public/contents/article?revision%5fid=14289&item%5fid=2577>.

[146] K. Smith, « The Use of Political Conditionality in the EU’s Relations », *European Foreign Affairs Review*, n° 3, 1998, p. 253 ; A. Ward, « Frameworks for Cooperation between the European Union and Third States: a Viable Matrix for Uniform Human Rights Standards? », *European Foreign Affairs Review*, n° 3, 1998, at 505.

A Vehicle of Hard Law: Negotiation and Conclusion of Sectoral Agreements

The 1985 agreement for economic and commercial cooperation with China is founded on a double legal basis: the ex-Articles 113 and 235 of the Treaty of the European Economic Community (TEEC). It has a larger field of cooperation than the agreement of 1978, but preserving a purely *Communautaire* character. The 1985 Agreement, in contrast to other third-generation agreements lays out a determined number of fields of economic cooperation in Article 10. The parties "agree to develop economic co-operation in all the approved domains of a common agreement: the industrial and mining sectors, the agricultural sector including agro-industry, science and technology, energy, transport and communications, environmental protection, cooperation with third countries"[147]. The mixed commission are instructed to study "the means and new possibilities for development of commercial and economic co-operation"[148]. The strategic partnership, as laid out in the orientation document of 2003 and developed from the sixth summit onwards, anticipates cooperation in fields of shared competences that are not covered by the Agreement of 1985 but are permitted by the intergovernmental nature of summits and coordination within the pertinent committees[149].

In total, numerous sector-based agreements have been concluded, covering a broad spectrum of the strategic relationship: *agreements involving the European Community alone* (agreement of cooperation and mutual administrative assistance in the field of customs[150], protocol agreement between the European Community and the National Tourism Administration of the People's Republic of China, concerning visas and linked questions associated with tourist groups from the People's Republic of China[151]) and *agreements involving the European Community and its Member States*

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[147] 1985 Economic and Commercial Cooperation Agreement between the EEC and the PRC, *op. cit.* [38], article 10.
[148] *Ibidem*, article 15 al. 2.
[149] Committee 133, Committee for Relations with Asian Countries (COASI) and Committee of Permanent Representatives [COREPER]).
[150] Council Decision of 16 November 2004 on the conclusion of the agreement of cooperation and mutual administrative assistance in the field of customs between the European Community and the government of the People's Republic of China [2004] OJ L375/17.
[151] Drawn up within the framework of the Sixth EU–China summit, then signed at Beijing on 12 February 2004, Council Decision of 8 March 2004 concerning the conclusion of the Memorandum of Understanding between the European Community and the National Tourism Administration of the People's Republic of China on visa and related issues concerning tourist groups from the People's Republic of China (ADS) [2004] OJ L83/12.

(agreement on maritime transport[152], cooperation agreement in the area of satellite navigation[153]). Thus we can discern through chosen examples (conclusion of sector-based agreements, significant advances in negotiation and possibilities of other agreements to come), the density of agreements, both existing and planned.

Customs Cooperation and Anti-Counterfeiting

Regarding the achievements, the 7th summit of 2004 led to the conclusion of the agreement on cooperation and mutual administrative assistance between the European Community and China[154] The aim of the agreement is to simplify and render more efficacious customs relations between the two contracting parties, through the institution of a mixed committee on customs cooperation, clauses on information, exchange and assistance. In this framework, the EU will engage itself to fight commercial fraud and counterfeiting, which constitutes a major problem in China and a growing threat to the EU economy. This agreement will facilitate the struggle against the development of the illicit trade in products of creators bearing a 'name' or a 'brand' (counterfeit products), as well as goods made without first having obtained the intellectual property rights to do so (pirate products)[155]. Nonetheless, this agreement must not hide the looming problems linked to the protection of intellectual property rights, an area to be given special treatment in the next framework agreement (see *supra*). It should be noted that this sector-based agreement already figured in the objectives of the communication of the Commission of 2001, the exploratory discussions being intensified following high-level talks held in June 2003[156]. Besides, the European Commission wished the 23 October 2007 that the Member States given a mandate in order to negotiate a new counterfeiting agreement with main commercial partners, notably the US and Japan[157].

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[152] Decision of the Council and representatives of the governments of Member States united within the Council concerning the signature, in the name of the Community, of the agreement between the European Community and its Member States, on one hand, and the People's Republic of China on the other, concerning maritime transport (Doc. 8390/02, Brussels, 6 May 2002), now entering into force (mixed agreement), as well as the protocol of agreement relative to enlargement of the Union, signed at Beijing on 5 September 2005.

[153] Cooperation agreement concerning a global navigation satellite system (GNSS)—GALILEO between the European Community and its Member States, and the People's Republic of China (Beijing, 30 October 2003), in the course of being implemented (mixed agreement).

[154] Signature of the agreement at the 7th Summit, The Hague, 8 December 2004.

[155] This agreement would equally allow for debate on new customs measures to be adopted, within the framework of security of the chain of supply while furnishing reliable operators with the means to facilitate trade.

[156] See 2003 Commission Communication, *op. cit.* [48], at 20.

[157] The aim of the « Anti-counterfeiting trade agreement » (ACTA) is to ameliorate the cooperation among custom authorities in order to elaborate new common rules, especially new legal sanctions. The recent case of Chinese toys illustrates the real

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Regarding the projects in process, one of the priorities fixed by the orientation document of 2003 was China's integration into the implementation of Project ITER[158], enacted at the 7th summit[159]. The ITER project is a cooperative Endeavour of international research of unequalled scale, associating the EU, US, India, China, South-Korea, Russia and Japan. The seven parties engaged in the project met at Brussels on 24 May 2006 to ratify the agreements negotiated in the course of the past year, following the decision to retain Cadarache, in the south of France, as the site for the construction and exploitation of ITER in Europe. The geopolitical dimension was essential regarding to the Chinese support for the French project, China opposing to the Japanese candidature. The agreement comes into force the 24th October 2007, 30 days after the last ratification (China)[160].

Civil Aviation

Regarding the future, the negotiation of a horizontal agreement in the field of aviation was envisaged at the 8th summit in the EU–China joint declaration[161], and reiterate at the 10th summit[162]; Following the problems posed by the bilateral agreements between the Member States and China "leaders stressed the necessity of restoring legal certainty to the existing bilateral air services agreements between the People's Republic of China and EU Member States"[163]. After the condemnation of bilateral agreements between Member States and the USA in the European Court of Justice decisions known as 'Open Skies'[164], the Commission, supported by the European Parliament[165], thus wishes to conclude, in the name of the Community, using a 'horizontal' mandate, agreements on air transport covering industrial cooperation and more general questions concerning aviation (such as airline security, air traffic control, technology and research). If adapted with the general Community approach of handling external relations in the field of air transport[166], this desire runs the risk of causing

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will of the EU to envisage this new agreement. See Doc Press IP/07/1573, Bruxelles, 23 October 2007.

[158] International Thermonuclear Experimental Reactor. See < www.iter.org.>

[159] *Joint Statement of the 7th Summit, op. cit*. [96], point 19.

[160] Doc. IP/07/1586, « L'accord ITER entre en vigueur », Bruxelles, 24 October 2007.

[161] *Joint Statement of the 8th Summit, op. cit.* [90], point 23.

[162] *Joint Statement of the 10th Summit*, *op. cit*. [2], point 38.

[163] *Joint Statement of the 9th Summit, op. cit*. [77], point 31.

[164] ECJ, 5 November 2002, Cases C-466/98–C-476/98, Open Skies Decisions [2002] ECR I-09427. Following on from the ERTA jurisprudence, it was found that bilateral agreements between the Member States and third countries on air transport were contrary to Community law (foundation of discriminatory treatment between European countries). However, the highly complex division of competences makes it difficult to negotiate new agreements.

[165] Report of the European Parliament on relations with the Russian Federation and China in the field of air transport (2005/2085(INI)), Notes of the Meeting 29 November 2005, Doc. A6-0375/2005.

[166] See Communication from the Commission, Developing the Agenda for the Community's External Aviation Policy, COM (2005) 79 final.

further litigation before the court, in that the Member States retain certain competences in the field of air transport, which in theory would also be covered by the horizontal mandate. In fact, though the court, in line with its approach of analyzing the methods for applying the theory of implicit external competences[167], has determined the exclusive competence of the court, it has also restricted the fields to which it applies, on the basis of an incomplete harmonization[168]. In any case, civil aviation is one of the strategic priorities of the EC on the basis of the new financial instrument for cooperation[169], with regard to the financial prospective for the cooperation in the multi-annual indicative programme (MIP) 2007-10 concerning China[170].

The sectoral agreements which exist or are under negotiation thus come under the framework of the 'economic dialogues and agreements' aspect of the institutional architecture of the EU–China relationship (whether covered or not by the framework agreement). The depth of the relationship between the two partners is equally shown by the multitude of economic and commercial dialogues allowing the strategic relationship to be kept up to date in a pragmatic manner.

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[167] See V. Michel, « Les compétences externes implicites : continuité jurisprudentielle et clarification méthodologique », *Revue Europe n° 10*, october 2006, p. 4-8, et J. V. Louis, « La compétence de la CE de conclure des accords internationaux », *in* M. Dony, J.-V. Louis (dir.), *Commentaire Mégret*, *Relations extérieures*, Bruxelles, Université de Bruxelles, vol. 12, 2005, point 31.

[168] Apart from the domains which are specifically identified by the court as being Community competences, the application of the ERTA jurisprudence to international civil aviation implies mutatis mutandis Community competence in several other fields covered by the agreements at issue and by Community law; in particular, the following areas: security (Regulation 1593/2002), commercial possibilities, including stopover assistance (Directive 96/67), taxes and custom duties (Directive 92/12/EEC), restrictions linked to aircraft-related noise (Directives 92/14/EEC and 92/81/EEC), compensation for refusal to board (Regulation 91/295/EEC), the responsibility of aerial transporters (Regulation 2027/97), travel, holidays, package holidays (Directive 90/314/EEC), data protection (Directive 95/46/EC), insurance (Regulation 2002/2320/EC). In contrast, for matters which do not come under Community competence, Member States can make engagements with third countries. But the scope which Member States enjoy in concluding these international engagements is already restricted, and they must inform the Commission of their activities in this regard.

[169] Regulation (EC) n° 1905/2006 of the European Parliament and of the Council establishing a financing instrument for development cooperation (DCI), *OJ*, n° L 378, 27 December 2006, at 41.

[170] Multiannual Indicative Program (MIP)-China, 2007-2010, at 9-12, available at <www.europa.eu.int>.

A Vehicle of Soft Law: The 'Economic Dialogues' Matrix

According to F. Cameron, "the numerous EU–China sectoral dialogues reflect the growing importance of the relationship and the attempt to provide some structure. These dialogues have flourished in recent years and now cover more than 20 different areas, ranging from environmental protection to science and technology and from industrial policy to education and culture"[171]. If it is true that the density of dialogues reflects the intensity of relations between the EU and China, it is appropriate to select some examples to understand their aim, their operation and their limits linked to their legal qualification. In principle, beyond the framework of sectoral agreements, economic and commercial dialogues are the subject of regular examination on the possible development of cooperation in the framework of the mixed committee—instituted by the agreement of 1985—composed by representatives of the European Commission and senior Chinese officials[172]. These dialogues are thus essentially supervised by the 'economy and trade' working group. Since the sixth summit in 2003 underlined the strategic relationship, various instruments are used to reinforce economic and commercial cooperation: apart from the Memorandum of Understanding[173]—which allows not only recapitulation of the points of convergence between the parties, but is also an instrument preliminary to the definitive signing of an agreement—framework agreements, allowing for the establishment of a dialogue in a specific area, are concluded within the context of summits.

Industrial Policy and Intellectual Property Rights

Certain instruments come under the Community competence as it is decided by the Common Commercial Policy. It was the case for the Framework Agreement for Establishing Industrial Policy Dialogue between the Commission of the European Community and the Government of the People's Republic of China[174], concluded in the

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[171] F. Cameron, « EU-China Relations, Towards a Strategic Partnership", *EPC Working Paper*, Brussels, July 2005, at 28.

[172] 1985 Economic and Commercial Cooperation Agreement between the EEC and the PRC, *op. cit.* [38], article 15.

[173] MoU, it means « letter of intention » in private law, sometimes constituting a real agreement. See for instance MoU on the export of certain Chinese Textile and Clothing Products to the European Union between the European Commission and the Ministry of Commerce of the People's Republic of China, available at <ec.europa.eu/external_relations/china/intro/memo05_201.htm>

[174] Framework Agreement for Establishing Industrial Policy Dialogue between the Commission of the European Community and the Government of the People's

framework of the 1985 agreement[175]. It was an "unnamed administrative agreement"[176] between the European Commission and the Chinese government, which—in this sense—does not include obligatory dispositions or any control of legality. It was no more than the institution of a specific dialogue (exchange of views)[177].

Some other agreements come under shared competence. This is the case in the dialogue on intellectual property rights originating from the signature at the 6th summit of a Framework Agreement on a Structured Dialogue on Property Rights. It is somewhat surprising here that the conduct of the dialogue would be coordinated by the European Commission's Directorate General Trade (and the Chinese Minister for Commerce) and that the progress of linked relations would be subject to the Economy and Trade Working Group, intellectual property rights being a shared competence and the 1985 Agreement, a purely "Communautaire" agreement. However, in the same manner, the 'agreement' in question contains no binding provisions[178], which shows the limits of these soft law instruments. It remains the case that this type of dialogue on intellectual property can allow negotiations to advance in a pragmatic manner in the prospects of 'WTO plus', in the hypothesis where dispositions relative to this field would be inserted in a framework agreement, as is shown by the latest report from the EU–China Intellectual Property Working Group[179], notably on the subject of counterfeit products and concerning sanctions.

The Joint Declaration on Climate Change

Some specific "joint declarations" are signed between the two partners during the annual summits. Notably, a "Joint Declaration on Climate change" was convened at the 8th summit, where the two sides "were determined to tackle the serious challenges of climate change through practical and results-oriented cooperation"[180]. However, we can have doubts concerning the impact of that type of instruments, especially regarding to the Joint Statement of the 10th Summit. Actu-

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Republic of China, available at <ec.europa.eu/comm/external_relations/china/intro/ipd_291003_en.pdf>.

[175] Notably in the article 10 of the 1985 agreement, op. cit. [38]. This agreement was convened at the 6 *h* summit; see *Joint Statement of the 6th Summit*, *op. cit.* [76], point 6.

[176] In an extensive interpretation of the EC Treaty (article 300 and 302 ECT), the European commission has an attribution of competences to conclude administrative agreements, normally with international organizations. In the absence of legal basis, we can conclude that this "framework agreement" is an administrative agreement.

[177] And regarding to the expressions used ('should'). See Case C-233/02, France v Commission [2004] ECR I-2759, Para. 56.

[178] Also, only the Community—and not its institutions—have legal personality, according to Art. 181 EC. See ECJ, 9 August 1994, Case C-327/91, France v Commission [1994] ECR I-3674, Para. 24.

[179] Outcome of the Second EU–China IP Working Group, 5 June 2006, available at <http://trade.ec. europa.eu/doclib/docs/2006/September/tradoc_130361.pdf.>

[180] *Joint Statement of the 8th Summit, op. cit.* [90], point 4.

ally, the point 21 of the Joint Statement provides concessions for developing countries concerning their responsibility in the struggle against climate change, in contradiction with the intra-European position[181]. Although the developed countries must find an arrangement on the "post-2012 regime" before the end of 2009, the applicable date for developing countries should be different ("no later than 2010"[182]), implying difficulties to set up a common position for the European negotiator in the framework of the United Nations Climate Change Conference in Bali[183].

A High Level Economic and Trade Dialogue

In addition, we must underline that, at the 10th summit, the two parties have created two new comprehensive frameworks for the dialogue in domains where the European claims are really strong: the trade imbalance and the devaluation of the Yuan. The main innovation is a very High Level Economic and Trade Dialogue[184]. It will cover issues affecting the trade imbalance (including *inter alia* effective market access, intellectual property rights, environment, high technology and energy in order to find concrete means to increase trade in a balanced way[185]). In addition, the two sides will continue to deepen financial dialogue, and conduct exchange and cooperation in China-EU macroeconomic situation[186]. The high level of these dialogues and the extent of its attributions underline the political importance accorded by the EU to the new comprehensive framework, which will supervise the whole of existing inferior dialogues[187].

A New "Country Strategy Paper" on China

In order to supervise all these process, the new "country strategy paper" concerning China (2007-13)[188] provides strategic elements, pertinent domains and projects, and makes budgetary provision with a view to developing sectoral dialogues. These dialogues thus have as their principal objective a certain regulatory convergence—China being interested by the importation of a part of the 'European

[181] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Limiting Global Climate Change to 2 Degrees Celsius. The Way Ahead for 2020 and Beyond*, COM (2007) 02, 10 January 2007.
[182] *Joint Statement of the 10th Summit, op. cit.* [2], point 21.
[183] United Nations Climate Change Conference, Bali, 3-14 December 2007, see <unfccc.int>.
[184] Ministerial Level (High Level Economic and Trade Dialogue between the European Commission and the State Council of China at the level of Vice-Premier).
[185] *Joint Statement of the 10th Summit, op. cit.* [2], point 24.
[186] *Ibidem*, point 26.
[187] Notably, the Trade Dialogue at Vice-Minister Level.
[188] See the *Country Strategy Paper, China*, 2007-2013, *op. cit*. [141].

model'[189], the seeking of consensus by a sustained exchange of views, and also the eventual prevention of conflicts at the WTO. They undoubtedly help the relationship to prosper in a calm climate, in conformity with a certain legal tradition which is Asian in general and Chinese in particular[190]. However, resort to *soft law per se* is not enough, not always producing the concrete effects desired—far from it. Equally, today, it is advisable for the partners to consolidate the progress made so far by the strategic partnership, which is possible in large part due to these dialogues, and to face up to the challenges of the relationship—especially since China's accession to the WTO—in proposing a new framework agreement.

[189] Sectoral Dialogues between China and the European Commission see <www.ec.europa.eu/>.
[190] See M. Delmas-Marty, « Present-Day China and the Rule of Law: Progress and Resistance », Chinese Journal of International Law, 2003, p. 1.

The Strategic Partnership: a Pre-Juridical Instrument Towards a New Partnership and Cooperation Agreement (PCA)

It was during the 7th summit that the will to negotiate a new framework agreement manifested itself: "the two parties declare that the uninterrupted development of relations between the EU and China in recent years leads them to actively study the feasibility of a new EU–China framework-agreement"[191]. The partners then decided to "begin negotiations on a new framework-agreement… which will fully reflect the intensity of the strategic partnership between China and the EU"[192] at the 8th summit. A mandate of directives of negotiation was adopted by the Council on 12 December 2005 on a "Project of agreement of partnership and co-operation (PCA) between the European Union and China"[193]. This qualification refers back to the typology of agreements concluded between the European Community and its Member States and certain East European and Central Asian countries, principally the Russian Federation[194]. The qualification does not prejudge the nature of the act in question, the legal basis defining often at the end of the negotiations.

Now, the negotiation balance is not in favor of the European Union. In conformity with the coherence requirement, the EU will opt for a horizontal approach, that is to say a single PCA integrating commercial and political dimensions of the relations. On the political level, the question is raised as to the insertion of a clause of democratic conditionality in the new framework agreement. The Human rights clause is considered as an "essential element"[195]

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[191] *Joint Statement of the 7th Summit, op. cit.* [96], point 5.
[192] *Joint Statement of the 8th Summit, op. cit.* [90], point 6.
[193] EU Bull.12-2005, point 1.6.71.
[194] Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States on one hand and the Russian Federation on the other [1997] OJ L327/1.
[195] An "essential clause" (or clause as an essential element of the agreement) allows the EU to suspend in whole or in part the agreement in the conditions of the Vienna Convention. See article 60 (1) of the Vienna Convention on the Law of Treaties (VCLT): "A material breach of a bilateral treaty by one of the parties entitles the other

clause, before being integrated *a priori* in all types of agreement[196]. Nonetheless, with regard to China's reservations and difficulties on the subject of human rights, doubts persist regarding formalization of that type of clause. In addition, a conventional insertion of a political dialogue and the integration of political clauses (non-proliferation of weapon mass destruction [WMD], counter-terrorism, International Criminal Court) should be demanded by the EU. Most of these clauses are called as "standard clauses"[197], but the EU wished to obtain the recognition of the "essential" character of the WMD clause. On the economic level, the Communication from the Commission "Global Europe"[198] introduces the imperative to concentrate on the new growth sectors or "Singapore subjects": Intellectual property rights (IPR), services, investments, public procurement and competition. Therefore, the European negotiator should required the integration of commitments going beyond WTO rules ("WTO plus") in the future framework agreement. The Commission, in its "commercial" orientation document concerning the EU-China relations, clarifies that the new agreement should "focus on the trade exchanges and investments issues"[199]. In addition, the European negotiators wished to integrate a chapter on employment and social affairs, a dialogue on small and medium-sized enterprises (SME), and maybe a clause on tax system.

On the Chinese side, the Market Economy Status (MES) and the lift of arms embargo are at the heart of Chinese claims. In addition, the Chinese negotiator could require the integration of a "Taiwan clause" in the preamble of the agreement, stipulating that the Community and the Member States oppose Taiwan independence, including *de jure* independence of Taiwan and Taiwan's participation in any international or regional organization whose membership applies only to sovereign states.

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to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part."

[196] As such, the Commission considers 'the fact of including questions of human rights and democracy in the political dialogue more systematically would give a foundation to the clauses on the essential elements and would allow the two parties to list the most effective measures to establish political and economic stability'. See Commission Communication to the Council and the European Parliament, Role of the European Union in the promotion of human rights and democratization in third countries, COM (2001) 252, at 10.

[197] Opposite to the "essential clauses", the "standard clauses" doesn't constitute an essential element of the agreement. From a legal point of view, they are part of commitments of each of the parties, such as the other provisions of external agreements. The integration of theses clauses refer to a Council decision. The commitment is here purely political, and only the negotiation directives can force the Community negotiator to set them up.

[198] Commission Communication to the Council, to the European Parliament, to the European Economic and Social Committee and to the Committee of the Regions, 'A Competitive Europe in a Globalized Economy', COM (2006) final, at 10.

[199] 2006 Strategic document on EU-China trade and investments: competition and partnership, *op. cit.* [48].

This is why, with regard to the asymmetry of the ambitions, different scenarios are possible: a single PCA, a double agreement (commercial agreement and global agreement with a number of political provisions[200]), which would greatly call into question the political and institutional coherence of the Union, or no agreement. There is still a necessity for the Union to deepen trade and investment aspects of its relationship, in view of the current multilateral check of the Doha Agenda and regional restructurings underway in the field of free trade, in order to insert the 'WTO plus' domains into the new agreement.

The Deepening of the Trade and Investment Aspects

At this point, in order to appreciate the economic and commercial issues at stake for the EU, it is advisable to note both the stalling of multilateral negotiations and the Asian regional restructurings under way; that is to say, to ensure the implementation of WTO agreements by China, and to acknowledge 'WTO plus' domains in a renewed framework.

The Risks for the Strategic Partnership Faced with Multilateral Stalemate and Regional Restructurings in Asia

The stalemate faced by multilateral negotiations under the Doha Round and the multiplication of free trade initiatives implies a 'proactive' approach for the EU to avoid being outstripped by its competitors, particularly the USA, in the Chinese markets. Despite its ambitions relative to an 'effective multilateralism'[201], the approach must be based on bilateral level

At the level of multilateral negotiations within the framework of the Doha agenda, during the fifth Ministerial Conference of the WTO at Hong Kong, the ministers adopted a final declaration[202], with the aim of relaunching negotiations on the liberalization of world trade. Amongst other things, the agreement foresees the elimination, by the end of 2013, of rich countries' subsidies for agricultural exports, in response to a long-standing campaign from developing countries. Furthermore, the developed countries must undertake to import 97%

[200] Corresponding to the content of the standard and essential clauses, see *infra*.
[201] See *European Security Strategy, op. cit.* [69], p. 1.
[202] Ministerial Declaration issued at the Hong Kong conference (WT/MIN (05)/DEC, adopted 18 December 2005.

of products from least developed countries (LDC) free of any duties or charges as of 2008. Finally, subsidies for exports of cotton, particularly in the USA, must end as of 2006. In contrast, certain sensitive questions such as access to the market in agricultural and industrial products, and the liberalization of the market in services, have not been progressed.

Also, on 24 July 2006, the WTO suspended *sine die* the cycle of multilateral trade negotiations: five years after their launch at Doha, the negotiations on the liberalization of world trade, centered on development, entered stalemate on the agricultural question of the industrialized countries. Pascal Lamy indicated clearly that the deadlock was due to the stumbling block of negotiations on the agricultural sector, this area catalyzing the negotiations and thus upsetting other aspects of the Doha Round (industrial goods and non-agricultural market access [NAMA]). In the words of Lamy, "without the clauses on agriculture and NAMA, it clearly would not be possible to conclude the Round of negotiations for the end of 2006"[203]. The decision of suspension had the effect of freezing the work done up to that point, as the International Chamber of Commerce (ICC) explained, "the inability of the WTO members to make the compromises necessary to successfully conclude the Doha Round this year means that the positive results already achieved in various areas of the negotiations stand to be lost"[204]. However, in October 2007, the Doha negotiations were boost with the impulsion of the WTO General Director[205], the governments of Brazil, India and South-Africa reaffirming their attachment to the WTO process[206]. But the majority of WTO Members, especially the emerging countries, are now convinced that bilateral agreements are the better way to reduce tariff and non-tariff barriers[207].

Altogether, these considerations risk encouraging the EC to go down the bilateral route, even though multilateral rules could allow the 'mutualization' of regulatory efforts. This would become a necessity with regard to the free trade initiatives taken by the People's Republic of China[208]. In fact, at the bilateral level, China

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[203] Declaration by the President of the Comité des Négociations Commerciales (CNC), M. Pascal Lamy at the CNC meeting of 24 July 2006, "Today, There are only Losers", available at <www.wto.org/french/news_f/news06_f/tnc_dg_stat_24july06_f.htm.>

[204] See the website of the organization, available at <www.iccwbo.org/>

[205] Report of the Président du Comité des négociations commerciales, 4 october 2007, available at <www.wto.org>.

[206] Tshwane IBSA Summit Declaration, 17 October 2007, <www.dfa.gov.za/docs/2007/ibsa1018.htm>.

[207] See J. Bhagwati, P. Krishna et P. Panagariya, Trading blocs: Alternative Approaches to Analyzing Preferential Trade Agreements, Cambridge (MA), MIT Press, 1999.

[208] For a presentation of Regional Trade Agreements (RTA) in Asia and the conformity with WTO law, see J. J. Schott et G.C. Hufbauer, « Multilateralizing Regionalism Fitting Asia-Pacific Agreements into the WTO System », communication to the « Conference on Multilateralizing Regionalism Sponsored and organized by

shows important diplomatic activity. Jiang Yu Wang notes that this is a recent development, previously centered on China's 'Near Abroad': "China has only very recently jumped onto the bandwagon. This trend was initially embodied by the formation of the China–Hong Kong Closer Economic Partnership Arrangement (CEPA) and the China-Macao CEPA"[209]. Recently, China is launching negotiations for free trade agreements (FTA) with Australia, New Zealand and MERCOSUR[210] and signed an ambitious agreement centered on economic cooperation covering trade in goods with the ASEAN countries[211] with the aim of creating an ASEAN–China free trade zone[212]. The regional restructuring of the Asia region is thus focused on East Asia with a China–ASEAN free trade zone, all the more so since there are political moves to create an 'East Asian Community'[213], allowing political coordination between the partners, as well as with Japan and South Korea[214].

However, we have to nuance this regional integration process. On the economic level, the China-ASEAN agreement covers only the trade in goods, field where restrictions are less important. Above all, the prospective of a China-ASEAN FTA is unrealistic in a short term, because of the ASEAN Free Trade Area (AFTA), which knows some implementation problems[215]. On the political level, the lack of institutionalization of ASEAN[216] takes problem for a larger regional

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WTO – HEI », co-organized by the Centre for Economic Policy Research (CEPR), 10-12 September 2007, Geneva, see <www.wto.org/>.

[209] J. Wang, « China's Regional Trade Agreements Approach: The Law, Geopolitics, and Impact on the Multilateral Trading System », *in* C.L. Lim and Lee Tye Beng (dir.), *Singapore Year Book of International Law*, Singapore, National University of Singapore, 2004, at 1.

[210] Australian Government, Department of Foreign Affairs and Trade, see <www.dfat.gov.au/trade/fs_fta_essential_guide.html> ; New Zealand Ministry of Foreign Affairs and Trade, New Zealand-China Free Trade Agreement under negotiation, see <www.mfat.govt.nz/Trade-and-Economic-Relations/Trade-Agreements/China/index.php> ; Marché Commun du Cône Sud (Brazil, Argentina, Uruguay, Paraguay), V. Department of Latin American Affairs Ministry of Foreign Affairs and Trade of China, see <www.fmprc.gov.cn/eng/wjb/zzjg/ldmzs/default.htm>. It should constitute the first trans-regional free trade area south/south.

[211] Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China, November 2004, see <www.aseansec.org/16646.htm>. Notification to WTO, 21 December 2004, WT/COMTD/N/20, see <www.wto.org/english/tratop_e/region_e/eif_e.xls>.

[212] With a bilateral dispute settlement system, see <www.aseansec.org/13196.htm>.

[213] See the recent creation of the Council on East Asian Community, with the impulsion of the process ASEAN + 3, see <www.ceac.jp/e/index.html>.

[214] With the possibility of a free trade zone covering all of these countries, see in particular H. Kang, « A Free Trade Agreement among China, Japan, and Korea », *in* M. Fratianni (dir.), *Regional Economic Integration*, Londres, Elsevier, 2006.

[215] Ph. Dee, « East Asian Economic Integration and its Impact on Future Growth », *The World Economy*, vol. 30, n° 3, 2007.

[216] For a legal analysis of ASEAN, see V. Muntarbohrn, *The Challenge of Law: Legal Co-operation Among ASEAN Countries*, Bangkok, Institute of Security and international studies, Université de Chulalongkorn, 1987, 238 p., et P.J. Davidson, *ASEAN: the Evolving Legal Framework for Economic Cooperation*, Singapoure, Times Academic Press, 2002, 288 p.

restructuring, the East-Asian Community constituting at present time a “coquille vide”[217]. The EU provides the reinforcement of ASEAN as regional integration, through the APRIS Programme[218]. However, fundamentally, Wang is correct to underline that “the proposed China–ASEAN Free Trade Area, with a nice acronym “CAFTA”, stands on a par with the North America Free Trade Area (NAFTA) and the European Union (EU) and creates one of the world’s largest F.T.As. It is also the largest F.T.A. made up of developing countries”[219]. The reasons for this free trade agreement are many, notably the creation of regulatory standards appropriate for this region of the world, and, as is shown by Zhang “the lack of institutional arrangement and consolidation, which was evident in the past financial crisis in China”[220].

In this context, the EU, but also the USA, faced the risk of being excluded from this open Asian regionalism, notably centered on China. In fact, the USA has not yet investigated a draft trade agreement with China anticipating ‘WTO plus’.[221] This is why, faced with the stalemate of multilateral negotiations, the EU must integrate elements of added value into the next agreement of partnership and cooperation with China—in order to prevent commercial tensions arising from the WTO and to guarantee Community operators a better presence on the Chinese market. It is interesting that after the failure of multilateral negotiations, the Commission, in its communication Global Europe of October 2006—while wishing a priori to relaunch this international effort—also wishes to go down the bilateral route, envisaging free trade agreements [222]:

“[...] the key economic criteria for new FTA partners should be market potential (economic size and growth) and the level of protection against EU export interests (tariffs and non tariff barriers). We should also take account of our potential partners’ negotiations with EU competitors, the likely impact of this on EU markets and economies, as well as the risk that the preferential access to EU

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[217] See notably M. Malik, *China and the East Asian Summit: More Discord than Accord*, Hawaï, Asia Pacific Center for Security Studies, February 2006.

[218] The ASEAN-EU Program for Regional Integration Support (APRIS) is financed by the EU and ASEAN and is managed directly by the ASEAN secretariat, see <www.aseansec.org/apris>. The EU gives as well a support to the Integration initiative for the ASEAN integration (IAI) of the Member States of the regional organization, which has as objective to reduce the development gaps between the Members of ASEAN, see <www.aseansec.org/14013.htm>.

[219] J. Wang, « China's Regional Trade Agreements: The Law, Geopolitics, and Impact on the Multilateral Trading System », *op. cit.* [211], p. 2

[220] Y. Zhang, « Future Perspective on EAFTA and China's Strategy », Tokyo, Research Institute of Economy, Trade and Industry, 24 October 2005, available at <www.rieti.go.jp/>.

[221] C. Barfield, « The United States, China and the Rise of Asian Regionalism », communication for the « Western Economics Association Annual Conference », Vancouver, British Columbia, 29 June 2004.

[222] It’s here a breaking with the « Lamy doctrine ».

markets currently enjoyed by our neighboring and developing country partners may be eroded.

Based on these criteria, ASEAN, Korea and Mercosur (with whom negotiations are ongoing) emerge as priorities. They combine high levels of protection with large market potential and they are active in concluding FTAs with EU competitors. India, Russia and the Gulf Co-operation Council (negotiations also currently active) also have combinations of market potential and levels of protection which make them of direct interest to the EU. China also meets many of these criteria, but requires special attention because of the opportunities and risks it presents."[223]

So, if complete liberalization of trade presents obvious risks for the Union, unlike India, ASEAN and South Korea where a new generation of free trade agreements could be concluded with the Community and its Member States (see *infra*), limited 'WTO plus' chapters could be envisaged with China.

The Necessary Adaptation of the EU

The EU faced to a very important trade deficit, which shows the EU need to adapt itself to China's commercial power (competitive prices of imports, the deficit of the balance of trade, technological challenges, see *supra*). The textile example in 2005 showed the difficulties to implement requires new European macro-economic policies[224]. Trade negotiations in the textile and clothing sector have always been a delicate subject. The Multi-Fibres Arrangement of 1974 constituted an important derogation from the fundamental rules of the General Agreement on Tariffs and Trade (GATT), in authorizing the imposition of quotas on trade, differentiated according to country. The WTO agreement on textiles and clothing of 1995 aimed to return the trade in textiles and clothing to the 'normal' regime of the WTO. It provided for the abandonment of the Multi-Fibres Arrangement in four stages, with the last consisting of the suppression, on 1 January 2005, of quotas on those products not liberalized in the preceding phases, ostensibly half of imported products. Only four members of the WTO still resorted to quotas in 2004: the EU, USA, Canada and Norway.

The massive influx of Chinese textile products onto the European market led the EC to regulate, by the signing of a bilateral agreement, the imports of these products until the end of 2007 (see

[223] 2006 Commission Communication « Global Europe », *op. cit*. [199], at. 10.
[224] See A. Comino, « A Dragon in Cheap Clothing: What Lessons can be Learned from the EU-China Textile Dispute? », *European Law Journal*, vol. 13, n° 6, November 2007, at 818-838.

infra)[225]. The basis of this agreement is the special safeguard clause concerning textile products (MSTT) figuring in China's WTO accession protocol[226]. Under the terms of this compromise, the EU, having under-estimated the scale of Chinese textile imports[227], without a coherent forward vision[228] which would provide for the adaptation of the European industrial fabric, thus put in place a temporary limit on the growth of imports for 10 out of the 35 products liberalized as from 1 January 2005[229]. However, this agreement remains not only incomplete (certain sensitive products such as socks are excluded) [230], but above all temporary, implying that the Community and the Member States need to look at the long-term future for production of textiles and clothing in the Union[231]. It should also be noted that the agreement does not cover 2008, the last year in which MSTT is in force[232].

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[225] MoU on EU-China textile, *op. cit.* [174]. On 29 April 2005 the Commission opened a safeguards enquiry concerning imports into the Community of nine categories of products from China (Notice of opening of a safeguards enquiry on the importation of certain textile products textiles originating from the People's Republic of China [2005] OJ C104/21) six of which had been covered by the memorandum of agreement concluded afterwards.

[226] Protocol of Accession of China to the WTO, WT/L/432, 11 December 2001, § 242. For an analysis of the MSTT vis-à-vis other instruments of GATT/WTO, see A. Borsos, « Les instruments de défense commerciale de la CE face à la Chine », Master's Thesis 2, 'Droit approfondi de l'Union européenne et droit de l'OMC' (Université de Rennes I, September 2005, at 42–53.

[227] As an example, imports of pullovers grew 413% from the January–March period in 2004 to the January– March period in 2005, see MoU on EU - China textile, *op. cit.* [174].

[228] It was only on 27 April 2005, five months after the liberalization took effect, that the Commission published a communication on the application of the specific safeguards clause concerning textile products: Commission Communication on the application of Article 10a of Council Regulation (EEC) No 3030/93 on the specific safeguard clause concerning textile products [2005] OJ C101/2.

[229] Limitation on the growth of imports of ten products concerned in the margin of 8–12.5 % for years 2005, 2006 and 2007.

[230] Equally, the safeguards enquiry of April 2005 closed concerning three categories of products covered by the enquiry which were not included in the protocol of the agreement signed with China, namely category 12 (stockings and socks), category 15 (women's coats) and category 17 (linen fabrics): Closing Opinion of the Safeguard Enquiry on the Importation of Certain Textile Products Originating from the People's Republic of China [2005] OJ C170/9.

[231] See the Resolution of the European Parliament on trading prospects *op. cit*. [75], and for an analysis of this question, see M. Subhan, « Textiles: Rising Asia - Whither Europe? », *EIAS Bull.*, vol. 9, n° 3, march-April 2005, at 9-12.

[232] Report of the Working Group on China's Accession to the WTO (WT/ACC/CHN/49, 1 October 2001), section 11. Given the length of the enquiry procedure, it would be in the EC's interest to negotiate limitations for 2008.

Obstacles to Chinese Market Access

Beyond the question of adaptation faced to China, the EU must address the numerous obstacles concerning access to the Chinese market. With regard to tariff barriers, even though they have lowered considerably since China's accession to the WTO (an average reduction of 8.8% on non-agricultural products)[233], steep tariffs remain concerning certain industrial sectors which are important for the EU, notably textiles/clothing, ceramics, steel and the car sector—all of which points to an incomplete fulfillment by China of its WTO commitments. In addition, numerous non-tariff barriers restrict access to the Chinese market, in particular in the guise of product certification, application of national standards (which differ from international standards), or again from sanitary or phyto-sanitary norms. These barriers are combined with an application of customs procedures that varies from one Chinese region to another, which creates extra costs and delays for European businesses, particularly small and medium-sized enterprises[234]. Another extremely important problem concerns government procurement. Like many of the Union's third partners - as a result, notably, of the suspension of discussions on a multilateral WTO Agreement on Transparency in Public Procurements [235] - China operates restrictive practices in respect of government procurement, consequently it either exclude EU contractors from public invitations to tender or prejudice their submissions[236]. Currently, the EU integrates provisions relative to government procurement into the body of certain free trade agreements, notably the agreement with Chile[237]. The European Community and its Member States could be inspired to reinforce the protection of European businesses, notably to avoid the 'forced' transfer of technology.

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[233] *Trade Policy Review Mechanism (TPR),* China*, op. cit*. [10], at 77.
[234] *Ibidem*, at 90-105.
[235] See the Working Group on Transparency of Government Procurement, available at <www.wto.org/ french/tratop_f/gproc_f/gptran_f.htm.>
[236] *TPR,* China, *op. cit*. [10], at 111.
[237] Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part—Final act [2002] OJ L352/1440, Annexe XI: Entités responsables des marchés publics dans la Communauté, Annexe XII: Entités responsables des marchés publics au Chili, Annexe XIII: Mise en oeuvre des dispositions de la partie IV, titre IV.

The Integration of "WTO Plus" Rules Into the Future Framework Agreement: Investments and Intellectual Property Rights

Investments is undoubtedly the field where restrictions are the most sensitive, whether they manifest themselves in the industrial domain (cars, semiconductors, the naval sector) or in numerous local restrictions on investment (the problem of deregulation), or in the domain of manufacturing and services, or the requirement to establish joint ventures with Chinese operators, as well as requirements in terms of capital (telecommunications, financial services). The terms of the exchange are thus inequitable. The Chinese government practices a policy of aiding 'national champions' (through subsidies and privileged access to the banking sector)[238].

The protection of intellectual rights is also not assured[239], in the fields of innovation and high technology that European enterprises have a real added value. Despite the progress made by China, the European Commission underlines the lack of coordination between the principal bodies responsible for ensuring respect of the laws protecting intellectual property rights, the local protectionism and corruption, and the insufficient dissuasive power of administrative, civil and criminal sanctions, and the lack of training for the personnel of enforcing agencies. In its "commercial" orientation document of 2006, the European Commission underlined that "the adequate protection of intellectual property rights such as patents, copyrights and trademarks is central to the exercise of Europe's comparative advantage in innovation, design and high-value production"[240].

The next agreement may in any case turn upon trade and investment, with a particular focus on intellectual property rights, that is to say, the 'new sectors of growth' as identified by the Commission

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[238] *TPR,* China, *op. cit*. [10], at 131-132.

[239] That being so, the report of the Secretariat notes that: 'In recent years, China has brought in important modifications to its legal framework for IPR protection. It has modified its law on patents (2000), the law on trademarks (2001) and the law on copyright (2001) and adopted new regulations on software protection (2001), protection of plant extracts (2001) and protection of layout of integrated circuits (2001); further modifications to the law on patents are forecast. In addition, it has put in place a complete and complex mechanism to administer and ensure respect of IPR. This mechanism is administered at two levels, that of official organs coming under the Central Administrative Court, and also that of local authorities. The central organs for the examination, granting and registration of IPR, while the local authorities are responsible for administration at the local level. China has reinforced the means for ensuring respect of IPR, notably in creating a National Working Group on IPR and an Intellectual Property Court (Third Civil Chamber), inaugurated in 1996; however, there are still many infringements of IPR'. *TPR,* China, *op. cit*. [10]), p. 171.

[240] COM (2006) 632, *op. cit*. [48], point 2.4.

in its 'Global Europe' communication of October 2006[241], with the aim of obtaining real added value with a framework agreement.

On the protection of intellectual property rights, it remains necessary to reinforce the existing mechanisms, like the 'IPR helpdesk' or the 'network' of information centers in Europe, known as the "increased sensitivity to IPR questions in the businesses of the EU"[242]. But "TRIPS plus" provisions [243] should be integrated in the future agreement in order to impose "European standards" to China[244]. Provisions concerning global commitments in the field of IPR (stipulating for instance that «The Parties shall provide suitable and effective protection of intellectual, industrial and commercial property rights, in line with the highest international standards »[245], or « shall accede to the multilateral conventions on the protection of intellectual, industrial and commercial property, which the EC and its Member States are a part »[246]) or specific rules (copyright[247], patent's protection[248], dispute settlement[249]) could be inserted, following the models of associations agreements or Cotonou agreement.

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[241] 2006 Commission Communication « Global Europe », *op. cit*. [200], at 7.
[242] COM (2006) 632, *op. cit*. [48], at 12, point v.
[243] It's necessary to note that the TRIPS (trade-related aspects of intellectual property rights) agreement of the WTO is today the more complete multilateral agreement on the protection of IPR. See A. Thillier, « Politique commerciale commune – Délimitation – Instruments – Contrôle », *Jurisclasseur Europe*, fasc. 2300, 2007.
[244] See on the normative influence of the EU, Z. Laïdi, *La Norme sans la force, op. cit.* [115].
[245] Art. 39 (1): The Parties shall provide suitable and effective protection of intellectual, industrial and commercial property rights, in line with the highest international standards. This shall encompass effective means of enforcing such rights". Council and Commission Decision of 24 January 2000 on the conclusion of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part *OJ*, n° L 70, 18 mars 2000, p. 1.
[246] Annex 7 of the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, *OJ*, n° L 97, 30 March 1998.
[247] Art. 12 : «Reaffirming the great importance they attach to the protection of intellectual property rights (copyright — including the copyright in computer programmes and databases — and neighbouring rights, the rights related to patents, industrial designs, geographical indications including designation of origins, trademarks, topographies of integrated circuits, as well as protection against unfair competition as referred to in Article 10a of the Paris Convention for the Protection of Industrial Property and protection of undisclosed information), the Parties undertake to establish the appropriate measures with a view to ensuring an adequate and effective protection in accordance with the highest international standards, including effective means to enforce such rights ». Council Decision of 28 September 2000 concerning the conclusion of the Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part, *OJ,* n° L 276, 28 October 2000, p. 44.
[248] Council Decision 2005/599/EC of 21 June 2005 concerning the signing, on behalf of the European Community, of the Agreement amending the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part,

In the field of investments, the European policy is in theory conducted in the line of the General Agreement on Trade in Services (GATS)[250] and of the OECD Guidelines for Multinational Enterprises [251]. Until a recent period, the EC didn't set up common provisions in the field of investments in the framework of its bilateral agreements. It's only since ten years ago that the European Commission wishes to introduce more and more deepen commitments[252]. Notably, ambitious provisions were integrated into the EC-Chile agreement, concerning the "progressive liberalization of investments"[253] and stipulating the attribution of the "National Treatment" (NT) and the "Most-Favored-Nation"[254] treatment (MFN) clause in the field of services and financial services, with an extension of the NT to the other sectors of the agreement[255]. The European Commission already possesses the political will[256] and could use the rules of its agreement with Chile as a template.

In addition, the set up of a minimal platform concerning investments, integrated in all the future FTA of the EU[257], could be potentially extended to China with regard to the commercial challenges of the relation. The idea of this platform is to establish a sort of "Bilateral Investments Treaty"[258] applicable for the whole of the European Community. In other words, the aim of the proposition (built

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signed in Cotonou on 23 June 2000, *OJ*, n° L 209, 11 August 2005. Article 46 (Munich Convention).

[249] EU-Marocco Agreement, *op. cit*. [246], art. 39 (2).

[250] See on the website of the European Commission, <trade.ec.europa.eu/>.

[251] The Guidelines are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide voluntary principles and standards for responsible business conduct in a variety of areas including employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation. See the OECD website, <www.oecd.org/>.

[252] Notably in EC-Jordanian, EC-Mexico, and especially EC-Chile agreements, see A. Hervé, « L'accord d'association entre la Communauté européenne et ses États membres et le Chili », thesis in european law (M2) , Université de Rennes I, at 92-94.

[253] Article 164-2 of the association agreement between the EC and its Member States and Chile, *op. cit*. [253].

[254] National treatment affords foreign individuals and firms the same competitive opportunities, including market access, as are available to domestic parties. "Most-Favoured-Nation treatment", which requires Members to accord the most favourable tariff and regulatory treatment given to the product of any one Member at the time of import or export of "like products" of all other Members, is one of the bedrock principles of the WTO.

[255] Article 163 of the association agreement between the EC and its Member States and Chile, *op. cit*. [253].

[256] Speech of Peter Mandelson, « Les échanges et les investissements de l'UE avec la Chine : changements, challenges et choix », Bruxelles, 7 juillet 2006, <<trade.ec.europa.eu/>.

[257] Notably the future FTA with South-Korea, ASEAN and India, see *infra*. See Commission Communication, *A Competitive Europe in a Globalized Economy*, *op. cit.* [199].

[258] The most of the Member States have concluded bilateral investments treaties (BIT), see <www.bilaterals.org/rubrique.php3?id_rubrique=59>.

on the basis of the GATS[259]) will be to cover pre-investments and post-investments[260] (to the question of a dispute settlement State/Investors), with an extension of the scope of the establishment provisions to other sectors than services. Now, the shared competences between the EC and the Member States are a major difficulty. The EC competence covers only the market access and the promotion of investments in the framework of the Common Commercial Policy (CCP). But it does not cover the reciprocal protection of investments, which refers to the Member States competences. It follows from the above that the Community's exclusive competence for the regulation of foreign investments is limited. To the extent that the Community has no explicit exclusive competence (such as the one based on Article 133(1) to (4) of the EC Treaty) and has not yet exercised its non-exclusive competence in all areas, the Member States remain competent with respect to the regulation of foreign investments. In accordance with the European Court of Justice (ECJ) Case law[261], the Community's non-exclusive powers can become exclusive as a result of internal harmonization. It would thus be necessary, in a concrete case, to ascertain whether the matters covered by the international treaty (free-trade agreement or BIT) are already the subject of internal legislation containing provisions on the treatment to be accorded to foreign-controlled undertakings, or empowering the institutions to negotiate with non-member countries, or effecting complete harmonization of the rules governing the right to take up an activity as a self-employed person.

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[259] Refers to the mode 3 of services furniture by a Member (a company from one country setting up subsidiaries or branches to provide services in another country, officially known as "commercial presence". See article I (2) (c) of the GATS.

[260] The provisions of "pre-admission", define the rights of the foreign investors in entrance and in establishment in certain economic areas of the country guest (market access level), cf. D. Carreau et P. Julliard, *Droit international économique*, Paris, Dalloz, éd., 2003, at 423. The dispositions of "post admission" correspond to the regulation regime applicable to the foreign investors after their establishment in the country guest. The principes of NT and MFN should be implemented (contrary to the EC-Chile agreement).

[261] ECJ, Opinion 2/92, [1995] ECR I-521. The article 133 ECT can't confer an exclusive competence to conclude the 3rd OECD decision on National Treatment which affect the CCP but also the intra-community trade (the internal market). Actually, other aspects of foreign investments can fall under the non-exclusive Community competence under the internal market legal bases of the EC Treaty (such as Articles 44, 47 and 95). This may in particular be the case to the extent that post-establishment national treatment provisions relate also to the participation of foreign-controlled enterprises in intra-Community trade. According to the ECJ (*Opinion 1/94, [1994] ECR I-5267*), some provisions on foreign investments, which are covered by the GATT 1994 and the WTO Agreement on Trade-Related Investment Measures, fall under the exclusive Community competence under Article 133(1) to (4) of the EC Treaty. Only when internal legislation has provided for common rules in the sense of a *complete harmonization* does an implied exclusive external competence of the Community have to be recognized in order to avoid such common rules being affected if the Member States retained their individual freedom to negotiate with non-member countries.

As the provisions of the market access in non-service sectors do not exclude the service sectors mentioned in Article 133(6) of the EC Treaty, and relate at least partially to post-establishment national and most-favored-nation treatment, including in sectors where the Community has not yet exercised its internal powers, any agreement including these type of provisions would therefore need to be concluded, with China, by the Community and the Member States and would thus be a *mixed agreement*. This mix will have a « vertical » nature (inside the EC pillar) and imply a double legal basis: article 133 (Common Commercial Policy) and 308 (subsidiary competences) of the EC Treaty[262]. In a prospective approach, we can't ignore the Lisbon Treaty (which complete and reinforce the Common Commercial Policy) as much as negotiation of the agreement should be spread out several years. The "foreign direct investments" are now expressly included in the scope of the Common Commercial Policy, defined by the article 207 of the Treaty on the Functioning of the EU[263] (substitution to the article 133 EC Treaty), which imply the disappearing of the mixity aspect[264]. However, a new problem could appear: the Common Commercial Policy becoming an exclusive competence of the European Union[265] opens possible conflict of influence between the new High Representative of the Union for Foreign Affairs and Security Policy and the EU Commissioner for external trade.

In any case, in exchange for Chinese concessions deemed crucial to EU balancing trade ties, China could impose the EU to give it the Market Economy Status (MES). At present, the non-Market Economy Status of China is used by the EU as an Anti-Dumping tool. But the Chinese authorities believe that this treatment is unfair for a number of reasons. First, increasing numbers of Chinese firms – especially those in the export sector – are operating within market environments with inputs purchased at their real cost and finance raised on a commercial basis. Secondly, Chinese trade officials point out that Russia, a country hardly known for its transparency and openness, is recognized by Europe as a market economy. For the EU, the Market Economy Status is a technical question. The EU – unlike the United States – reclassified China as an 'economy in transition' in 1998. This means that it considers complaints on a case-by-case basis, using five tests to judge whether the Chinese firm against which the dumping complaint has been filed is operating

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[262] See M. Dony, « Les accords mixtes », *in* M. Dony, J.-V. Louis (dir.), *Commentaire Mégret*, *op. cit.* [168], at 167.
[263] See note [65].
[264] Apart of the ratification of the Reform Treaty, it will depend to the interpretation of the ECJ on the expression « foreign direct investments". But, it seems to fall under the exclusive Community competence.
[265] Article 207 (1) of the TFEU: "The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action".

within a market environment[266]. Now, the main problem is that the more the negotiation lasts, the more the relative value of the Market Economy Status recognition for the negotiation "deal" goes down[267].

Also, China could oppose to the whole of EU demands. In this case, the failure of European diplomacy would be flagrant, with regard to the commercial challenges of a new framework agreement. Following that, the European Union must set up, as a central objective, a 'proactive' systematic surveillance of the implementation of WTO obligations, i.e. to use effectively the combinations of legal tools and political pressure which constitute the Dispute Settlement Understanding (DSU) of the WTO. Surprisingly, the EC requested WTO consultations only once (3 April 2006) with China on auto parts tariffs[268]. The EU believes that Chinese tariff laws for spare auto parts are WTO-incompatible. Chinese rules apply the tariffs for "whole vehicles" to the import of spare parts making up 60% or more of the value of a final vehicle. The EU believes that this may contravene China's WTO obligations not to impose obligatory 'local content' rules: to avoid the 'whole car' tariff rates a car-maker has to source 40% or more of the spare parts by value in China[269]. The EU believes it may constitute an internal tax on imported goods - because the tariff is levied on a finished product constructed with imported parts and the same rates are not applied to cars produced with local spare parts. The World Trade Organization issued its first official condemnation of Chinese commercial practices, siding with the United States, the European Union and Canada in this dispute over car parts[270]. The recent wishes of the EC (with the US) to haul China before the World Trade Organization (WTO) over the country's refusal to allow financial news services to interact directly with customers[271], is maybe a change of the European strategy concerning the use of the DSU.

The European Union will have to try to reach a compromise on a new agreement allowing a better access to markets for the European firms, notably in term of improvement of the situation of the direct investments. A settlement on the EC-Chile System template could be integrated in the future framework agreement.

However, within the current treaties, the inclusion of the domain of investments is not the only domain which can imply a mixed agreement. In accordance with its traditional policy in external

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[266] In fact, if some countries such as UK are for a status change, other countries (Spain, Italy), are fundamentally against the recognition of the MES.
[267] In its WTO accession agreement, China agreed that other WTO members could treat it as a non-market economy until 2015 (appendix A of the Protocol).
[268] China–Measures Affecting Imports of Automobile Parts, WT/DS339/1 (3 April 2006).
[269] Chinese Measures for the Administration of Importation of Automotive Parts and Components for Complete Vehicles (Decree No. 125), which entered into force on 1 April 2005.
[270] See on the Hong Kong Trade Council website, <http://marketinfo.tdctrade.com>.
[271] See Europolitique, 7 February 2008.

policy, the Union likes to include a political dimension in future agreement, domain which refers principally to the Common and Foreign Security Policy (CFSP). Intergovernmental policy was developed as part of the EU. CFSP does not dispossess the Member States of their diplomacy (principle of concerted diplomacy). In other words, the integration of a political dialogue and political clauses will imply an agreement concluded by the EC and its Member States. Actually, difficulty is fond of the distrust of China on numerous political questions, particularly on human rights. These are the many obstacles to the conclusion of an agreement.

Constraints on the Political Dimension of the Negotiation: Single Agreement or Double Agreement?

Uncertainty exists as to what legal form a future framework agreement(s) would take. Theoretically, it would be possible for the Community and its Member States to conclude two agreements—one political and the other economic—with regard to China's reservations about including a clause of political conditionality under the form of the 'human rights clause'. However, this would seem to pose difficulties for the EU from a political point of view, while even a PCA would equally call into question the political and institutional coherence of the Union. However, the PCA would seem to be the most credible route, and in line with the projected mandate of negotiation.

The Prospect of a Double Agreement

The possibility of two separate agreements, one purely commercial, the other political, stems from the 'specific' formula chosen in the joint declaration of the 9th summit and iterated at the last summit[272].

> *"In order to reflect the full breadth and depth of today's comprehensive strategic partnership between the EU and China, the two sides agreed to launch negotiations on a new Partnership and Co-operation Agreement which will encompass the full scope of their bilateral relationship, including enhanced co-operation in political matters. These negotiations will also update the 1985 EEC-China Trade and Economic Co-operation Agreement, which will be administered in a relatively independent manner,*

[272] *Joint Statement of the 10th Summit*, *op. cit.* [2], point 2.

taking into consideration the global objectives of the EU-China strategic partnership."[273]

The sibylline formula - *which will be administered in a relatively independent manner* – is ambiguous concerning the form of the future agreement. This expression constitutes a position of wait, revealing the implicit possibility of a double agreement (the first on trade and the other one more global), risking distending link between trade and political clauses. Upstream, on the European side, the publication of two strategic documents (communication and working document) on the EU-China relations in October 2006[274] illustrates the tensions between the DG Trade and the DG external relations. The DG "external relations" is firmly tied to a global approach (or "comprehensive approach") including the political dimension of the relation. In practice, the political and commercial issues should be the object of two separate negotiations, the legal form of conventional commitment to be traditionally fixed at the end of the process of negotiation. But, especially, in the framework of bilateral negotiations, the Chinese Government may also wish to obtain two agreements from the Europeans, in order to isolate the political questions. Inside China, the positions are divergent between the ministry of foreign affairs – wishful to keep the last word on these negotiations – and the Ministry of Commerce of the People's Republic of China (MOFCOM). This last prefers having the free hands and would therefore be rather favorable to a double agreement.

Actually, it is principally on the political aspect which negotiation risks being particularly arduous, and could draw away two separated agreements (or any agreement). In accordance with its traditional practice of bilateral agreements, the European Union wishes to insert political clauses, particularly on human rights, into future agreement (see *infra*). But so much the incorporation of the political clauses does not pose problem in a traditional asymmetrical relation where the European Union is in position of force, so much China is virtually capable of imposing its own clauses in the corpus of future agreement. In particular, the Chinese negotiator could require the integration of a "Taiwan clause" in the preamble of the agreement, stipulating that the Community and the Member States oppose Taiwan independence, including *de jure* independence of Taiwan and Taiwan's participation in any international or regional organization whose membership applies only to sovereign states. This type of reference (only one indivisible China) appears in a certain number of joint declarations establishing diplomatic relations between China and certain African countries[275].

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[273] *Joint Statement of the 9th Summit*, *op. cit.* [77], point 4.

[274] Communication "EU-China: closer partners, growing responsibilities", COM(2006) 631 final, and Strategic document on EU-China trade and investments: competition and partnership ,COM(2006) 632 final, *op. cit*. [48].

[275] See for instance the Joint Statement between the People's Republic of China and the Federal Republic of Nigeria of 15 april 2002, sp. point 7, see on the website of

In compensation, China asserts being different from habitual practices of cooperation (principle of non interference, no conditionality). Apply to the EU-China negotiation, this clause risks to slow down, or even founder the process of negotiation. In addition, a compromise is properly impossible at the level of the Member States of the EU. The People's Republic of China should also ask for the lifting of the arms embargo, in compliance with its traditional claims expressed notably during the annual summits. There still, in the absence of consensus, it appears delicate for the Union to give in on this sensitive point.

Difficulties in the political aspect of the negotiation could theoretically drive to the end of negotiations (translating then a real failure of European diplomacy with return to the informal discussion process), or, at the end of the negotiation process, to two separate agreements. Then, they could fear that, as underlines François Godement, "l'économique prime sur le politique dans la relation stratégique"[276], damaging the external relations coherence of the EU.

Concerning the legal form of the two separate agreements, a comparison can be established with the process engaged by the EU with the Member States of ASEAN. Actually, the European Community wishes to conclude new Partnership and Cooperation Agreement with certain countries of ASEAN[277], which don't have "third generation" agreement[278], and to negotiate a FTA with the "ASEAN Group"[279]. We can underline two dialectics here: the institutional link between FTA and Partnership and Cooperation Agreement on one hand and the insertion of political clauses in the Partnership and Cooperation Agreement on the other hand – and therefore their legal nature. The first point is specific to ASEAN: the negotiations of FTA could be conditioned by the conclusion of Partnership and Cooperation Agreement. Directives of negotiation should therefore authorize the Commission to open negotiation with ASEAN, without excluding the possibility of concluding first bilateral agreements with some of these countries[280].

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the Chinese ministry of foreign affairs, available at <www.fmprc.gov.cn/eng/wjb/zzjg/fzs/gjlb/3059/3060/t16553.htm>

[276] F. Godement, « La relation Chine-Europe et ses implications stratégiques », Paris, Observatoire stratégique de la Chine/Centre Asie Ifri, mars 2005, available at <www.ifri.org>.

[277] This process will concern principally the six Founder Member States of ASEAN (Brunei, Indonesia, Malaysia, Philippines, Singapore, and Thailand). See COM (2003) 399, *op. cit.* [51].

[278] With the possibility to examine the third generation agreement with Vietnam. Myanmar is clearly excluded form this approach (human rights problems), and Timor-Leste is part of African, Pacific and Caribbean countries.

[279] 2006 Communication *Global Europe*, *op. cit*. [199], p. 10.

[280] With two options during the negotiations: an infra-regional FTA with the countries which have concluded a PCA (with institutional and legal links between FTAs and PCAs), or "integrated" bilateral agreements with each partner, even if FTA and PCA are negotiated separately.

On the second point, Partnership and Cooperation Agreement should contain provisions concerning the different domains of cooperation (trade and investments, environment, transport, energy, industrial policy, science and technology, migration, drugs, etc.), but also including the clause on democracy and human rights as an essential element and the "standard" clauses (non-proliferation of weapon mass destruction [WMD][281], counter-terrorism, International Criminal Court [ICC]). *The introduction of these essential or standards clauses in external agreements of the EU will have a repercussion on the nature of negotiated agreement*. In the state of treaties, two scenarios are possible as much as these dispositions can refer at the same time to the conventional competences of the Community, of Member States, and the Union, as 2nd and 3rd pillars.

Traditionally, these clauses, which are most often recovering from Common Foreign and Security Policy (CFSP), help assert the mixed character of the agreement. In other words, each Partnership and Cooperation Agreement (per country) should be concluded by the EC and its Member States. For the ASEAN countries concerned, the Partnership and Cooperation Agreements, including a commercial cooperation and a political dialogue, could be mixed agreements founded on the article 181 of the EC Treaty (agreements with third countries in the framework of the Development Policy), drawing inspiration from the model of "Political Dialogue and Cooperation" agreement concluded by the EC and its member States with, for instance, the Community of Andean Nations (CAN)[282]. This scenario is nevertheless hardly transposable to China. If China is always integrated to the EU Generalized System of Preferences (GSP) (in a theoretical manner regarding to the exclusion of many Chinese products), and is considered as a developing country in the framework of the new Development Co-operation Instrument (DCI)[283], the legal basis article 181 can appear as maladjusted. On one hand, the main stake of future agreement is commercial (centered on a better access to markets) what implicates that the preponderant legal basis should be the article 133 of the ECT. On the other hand, used in main title or as unique legal basis, the article 181 of the ECT would be undoubtedly a poor political sign given by the EU: as to treat China as developing country in the framework of bilateral relations (and either in an unilateral framework), while China has a considerable commercial surplus in its relations with the Union, is competitive in almost all

[281] The EU wishes to obtain the WMD clause as an essential element of the agreement.
[282] Political dialogue and Cooperation Agreement between the European Community and its Member States, of the one part, and the Andean Community and its Member Countries (Bolivia, Colombia, Ecuador, Peru and Venezuela), of the other part, COM (2003) 698, Brussels, 14 November 2003.
[283] Regulation (EC) n° 1905/2006 of the European Parliament and of the Council establishing a financing instrument for development cooperation, *op. cit.* [170]*, see* article 1 and annexe 1.

commercial domains, and at the same time distorts competition disloyally on its market?

The second scenario concerns the possibility of two separated agreements. This possibility was under consideration in concrete terms for negotiation with Iran in 2002[284] and especially with the Thailand before the coup d'Etat of September 2006 (model that can be extended to all the countries of ASEAN with whom the Union likes to negotiate). On the one hand, each Partnership and Cooperation Agreement, with the domains mentioned above, will be concluded on the article 133 of the ECT (Common Commercial Policy), in the link with the article 300 of the ECT (EC bilateral agreements conclusion scheme). On the other hand, bilateral agreements on non-proliferation, counter-terrorism and serious crimes of international range founded on the article 24 could be envisaged. Actually, if a consensus emerged inside the EU, an agreement inserting the political clauses can be only concluded by the EU on the basis of the article 24 of the European Treaty (EUT)[285]. This possibility can theoretically be transposed in China in case negotiation would not allow inserting the mentioned political clauses[286]. Two agreements would be so possible: a Partnership and Cooperation Agreement focalized on commercial cooperation (with vertical mixity or not) and an agreement in the form of an exchange of letters concerning counter-terrorism, weapon mass destruction and International Criminal Court[287].

We must underline that the Reform Treaty introduces the EU's international legal personality as a unique actor in the international scene[288]. It being, the specificities of Common Foreign and Security

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[284] Bull. UE, 7/8 2002, point 1.6102

[285] See A. Sautenet, « Les relations entre l'Union européenne et l'Asie, 2005 », *Annuaire de droit européen*, Bruxelles, Bruylant, vol. III, to forthcoming.

[286] We must underline that, within the current treaties, the main advantage of two separate agreements with ASEAN is to avoid the mixity of these agreements, contrary to China. This process allows a quickly entry in force of the two agreements: the Community agreement needed a simple Council ratification (article 300 ECT), such as the agreement concluded by the EU (article 24 EUT). A double agreement is also a good way to avoid an internal ratification process by the 27 Member States of the EU. However, this situation seems to be in contradiction with the coherence requirement. This process can imply the disconnection between the two agreements, damaging the objective of standard and essential clauses, i.e. the establishment of a conditionality link between the political content and the commercial content of an agreement.

[287] With the question of the legal and institutional link to preserve the coherence of the external relations of the EU. A joint statement of parties, annexed to each of agreements, could so add in a express manner that the violation of one of the agreements by one of the parties could allow the other party to suspend each of agreement (with the difficulty of the WMD clause, regarding to the EU wishes that this clause being an essential element) In any case, an institutionalized political dialogue should maybe be integrated, with regard to the global challenges of the relation.

[288] With the innovations of the Treaty establishing a Constitution for Europe, see « Journée d'étude 2007 de la CEDECE sur le Traité modificatif », *Annuaire de droit européen*, Bruxelles, Bruylant, forthcoming.

Policy being kept, problems close to mixity – without carrying name – will be raised. But, in any case, it is difficult to imagine an agreement with commercial and political provisions only signed by the European Union.

In any circumstances, the coexistence of two agreements appears not bearable hypothesis politically for the EU which likes to insert in a systematic way a conditionality clause on "human rights" in its agreements with third countries[289]. It would go contrary to the requirement of coherence contained in the article 3 § 2 of the EUT[290]. So, the EU should stay in principle on its position of the single Partnership and Cooperation Agreement, including, including both commercial and political aspects, a position which will not be without political and institutional difficulties. With regard to the formal aspect, the political dimension will besides only accentuating the mixed nature of the future agreement, even if the commercial dimension of the agreement will be in the scope of the exclusive competence of the EU with the Treaty of Lisbon.

The Prospect for a Partnership and Cooperation Agreement

The mandate of negotiation refers to a “project for an agreement of partnership and cooperation”[291]. This terminology theoretically refers to a political and institutional framework, that is to say not only the insertion of a democratic conditionality clause, but equally the affirmation of core common values resting on democracy and respect for human rights as laid down in the preamble, and the institutionalization of political dialogue at various levels (summits, meetings of the permanent Council on partnership, meetings of senior officials, mixed parliamentary commission)[292]. At this level, the contribution of such an agreement would be fundamental to the extent that the 1985 Agreement—as we have seen—does not cover the political part of the relationship[293]. A political dialogue posed—as in the case of the fourth-generation agreements with certain Latin American countries[294]—as a ‘top-of-the-range’ political dialogue with

[289] Commission Communication to the Council and the European Parliament, Role of the European Union in the promotion of human rights and democratization in third countries, *op. cit*. [197], at 10.
[290] I. Bosse Platière, L'article 3 du Traité UE: recherche sur une exigence de cohérence de l'action extérieure de l'Union européenne, thèse pour le doctorat d’État, Université de Rennes I, 2006.
[291] EU Bull 12-2005, *op. cit*. [194].
[292] See, for an analysis of the EU–Russia partnership, see J. Raux et V. Korovkine (dir.), *Le Partenariat entre l'Union européenne et la Fédération de Russie*, Rennes, éditions Apogée, 1998.
[293] See Current Architecture of EU–China Relations, *op. cit*. [41].
[294] For example Article 11 of the Association Agreement, *op. cit*. [253].

shared values as its basis and a deepened institutional framework as its instrument, perhaps seems inadequate given the real sharing of values between the parties.

However, with regard to the Partnership and Cooperation Agreement mandate, we can imagine the implementation of a veritable political cooperation, via a regular political dialogue[295] (which exists in EU–China relations even without an agreement, see *supra*), proceeding solely from domains of the state apparatus, similar to the Partnership and Cooperation Agreement with Russia[296]. It is important to note that, in this case, the use of the assent procedure of the European Parliament could be required by virtue of Article 300 (ex-Article 228), section 3(2) of the TEC aimed at the agreements creating a specific institutional framework or organizing procedures for cooperation[297]. This was the case with the Russian Federation by virtue of Article 228. The European Parliament—as we have seen—underlines the constant human rights violations[298] in its resolutions, which could call into question the whole framework agreement. But this remains only a possibility since, as Delcourt reminds us, with Russia, despite "unsatisfactory Russian political context"[299], it was by "near-unanimity of votes cast that the European Parliament voted to give a positive response to the conclusion of the partnership agreement"[300]. That being so, if the unacceptable—i.e. the constant violation of human rights—is not comparable, we cannot prejudge the behavior of the European Parliament tomorrow. It remains the case that the institutionalization of political dialogue will be equally—with the economic arena—a factor for mixing.

Another acute political problem concerns the insertion of a 'human rights' clause in the future Partnership and Cooperation Agreement. The European Community inserted such a clause for the first time with the Lomé V agreements[301]. That was a simple programmatic clause, which has been progressively developed in practice to become more binding. In its conclusions of 29 May 1995,

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[295] See the nature and levels of dialogue instituted by the PCA with Russia, *op. cit.* [195], article 6.

[296] C. Flaesh Mougin, « Quel partenaire européen pour la Fédération de Russie, Union européenne, Communautés, États membres? », *in* J. Raux et V. Korovkine (dir.), *op. cit*. [293], at 62.

[297] Applying here to agreements that, without forming a legal association, nonetheless organize tight cooperation. cf. V. A. de Walshe, « La procédure de conclusion des accords internationaux », *in* M. Dony, J.-V. Louis (dir.), *op. cit.* [168], point 81.

[298] See notably the Resolution of the European Parliament on Tibet (case of Tenzin Delek Rinpoché) [2005] OJ C247/158, and the Resolution of the European Parliament on the human rights violations in China, notably in the matter of freedom of religion, EU Bulletin 9-2005 Human Rights (3/6) (Doc. P6_TA (2005) 0339).

[299] Ch. Delcourt, « Un partenariat subordonné à l'approbation du Parlement européen: la procédure de l'avis conforme », *in* J. Raux et V. Korovkine (dir.), *op. cit.* [293], at 86. Particular reference is made to 'the escalating violence in Chechnya'.

[300] *Ibidem, at* 88.

[301] Article 5 of the Lomé Convention.

the General Affairs Council, on the basis of a Commission communication[302], established a model 'human rights clause' to be included in future agreements concluded by the EC with third States[303]. The communication of the Commission had the aim of standardizing the wording of the 'human rights clause'. As is stated by De Wilde d'Estmael, "Until then, in fact, the explicit politicization of positive economic measures was made step by step, without any overall coherence, according to whether circumstances were judged to be opportune"[304]. Now, the model is to include in the preambles of agreements a general reference with respect to human rights and democratic values, together with a reference to universal and regional instruments common to the two parties. In the agreement itself, it is anticipated to include, first of all, an Article reiterating the 'essential elements', implying that the respect of human rights constitutes a major element of the agreement in question. Der-Chin Horng underlines in this regard that "the essential element clause stipulates that respect of fundamental rights and democratic principles as laid down in Universal Declaration of Human Rights"[305].

Following on from that, another Article must be inserted: the 'non-execution clause' (declarations interpreting the Article and defining the terms 'case of special urgency' and 'appropriate measures'). This part is also known as the 'Bulgarian clause', and includes the obligation to respect proportionality as a preliminary condition for the application of this clause[306]. This combination has become the typical clause, inserted in international agreements concluded by the Community since 1995[307]. In theory, the insertion of such clauses allows for the possibility of sanctions for breach of human rights, and thus provides for a certain influence over third countries to oblige them to respect human rights, in the framework of agreements which they conclude with the Community. That being so, the execution of these clauses is rare, as the European Parliament notes "there have been consultations on 14 occasions for non-execution of an "essential elements" clause and negative reactions to human rights and democracy clauses, all of which have arisen in the context of the Cotonou Agreement and its predecessor, the Lomé IV

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[302] Commission Communication on taking account of democratic principles and human rights in agreements between the Community and third countries, COM (95) 216 final

[303] EU Bulletin 05/1995, Human Rights (3/12).

[304] T. de Wilde d'Estmael, *La Dimension politique des relations économiques extérieures de la Communauté européenne. Sanctions et incitants économiques comme moyens de politique étrangère*, Bruxelles, Bruylant, at. 380-381.

[305] D. C. Horng, « The Human rights Clause in the European Union's External Trade and in Development Agreements », *European Law Journal*, vol. 9, n° 5, December 2003, at. 677.

[306] *Ibidem*, p. 678

[307] The insertion of such clauses allows, in theory, the possibility of sanctions for non-respect of human rights, and thus allows a certain influence on third countries to oblige them to respect human rights, in the framework of agreements which they conclude with the Community.

Convention"[308]. Beyond the question of its eventual implementation, it is the very insertion of this 'human rights' clause which risks giving rise to fresh debates. The negotiation can be particularly delicate with regard to the a priori desire of the EU to maintain the embargo on selling arms to China in a regional context marked by resurgent tension between China and Taiwan[309], and the problems of human rights violations in China denounced by certain elements of civil society[310], and outlined by the European Parliament (see *supra*). Above all, the Chinese Government seems particularly unenthusiastic about the insertion of such a clause, in that it will encounter "the sensitivity of third states to what may seem an unacceptable interference in their internal affairs"[311]. However, this clause will be integrated in the future agreement, with regard to the public opinion and the symbolic role of this essential clause in the EC external relations.

Concerning the insertion of additional "standard" clauses on migration and readmission topics, the declaration adopted by the European Council of Seville (21-22 June 2002) plans that all the future cooperation or association agreements will have to include a clause on migration control and a readmission mechanism in the case of illegal immigration[312]. However, the negotiation of a separate agreement on the specific topic of readmission is under consideration.

The question of Weapon of mass destruction (WMD) could be the object of a specific clause, even if it seems complicate to give to this clause an essential character[313]. Similarly, a clause concerning the counter-terrorism could be integrated, with regard to the constant insertion of this question in the framework of joint declarations bearing on the strategic partnership (see *supra*). This clause could be inspired by the EC-Chile association agreement, which was the first opportunity to develop a typical formula. The association agreement

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[308] See the European Parliament, General Direction of the External Policies of the Union, Clauses relating to human rights and democracy in the international agreements of the EU (EP 363.284, 29 September 2005), at 7–8.

[309] Even though the EU reaffirmed in 2005 its attachment to the 'one China' policy; see, on the questions of China–Taiwan security and China's adoption of the anti-secession law, the Declaration of the European Union Presidency relative to the adoption of the 'anti-secession law' by the People's National Assembly of the People's Republic of China, Brussels, 18 March 2005 (7297/2/05 REV2 (Press 62)), and the Resolution of the European Parliament on relations between the European Union, China, and Taiwan, and security in the Far East (P6 TA(2005) 0297).

[310] See notably the 2005 Report by Amnesty International, *op. cit.* [131].

[311] C. Flaesh-Mougin, *op. cit*. [297], at 61.

[312] European Council of Sevilla, 21-22 June 2002, point 33 of the declaration.

[313] Since December, 2004 – following conclusions of the Council of November 17th, 2003 consisting in introducing into relations with the EU of elements linked to the non-proliferation of WMD - a clause of non-proliferation was inserted in the review of the agreement of Cotonou between the EU and ACP, such as in the EC-Tadjikistan PCA and the association agreement with Syria. In the framework of the Cotonou agreement, , the Union acquired the recognition of the essential element of this clause such as human rights and the good management of public affairs.

signed with Algeria (April 2002) has integrate exactly this formula[314]. China being *a priori* against the International Criminal Court (see *supra*), a clause on the obligations in the terms of the Statute of Rome on the International Criminal Court will certainly be difficult to implement. If all these clauses are inserted and expressly refer in the appropriate international legal instruments (see *supra*), they could either introduce a horizontal mixity in the future agreement, or, more indeed, assert the mixed nature of the agreement[315]. In any case, It is not nevertheless obvious that, today[316], China is ready to accept not only political requirements, but also requests in terms of market access of the EU in the negotiation…

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If, with regard to Peter Mandelson's desire to construct "a 21st century strategy for China"[317], the People's Republic of China has undeniably become an emerging strategic partner for the EU, the negotiation process has still only just begun and is likely to be complex. Beyond the legal formalizations of the 'strategic partnership', it is the EU's ability to adapt to the commercial and political power of China as a 're-emerging' player on the international scene that is at the heart of these debates—and, consequently, the 'European model'.

[314] The clause on ICC in agreements of Cotonou constitutes this day the only case of obligatory clause in an agreement with a third country. However, it proved to be impossible to make an essential element and therefore to be able to suspend agreement in case of violation of this disposition.

[315] Implicating so at any case (in the present state of treaties or with the treaty of Lisbon) a long process of ratification by the 27 Member States of the Union.

[316] The situation would have been able to differ if they had entered in negotiations in 2003. This year corresponds in effect to a "honeymoon" between the partners (two strategic documents produced by both parties, absence of major strategic conflicts because of the reduced geopolitical force of the EU), China having realized at the time of its accession to WTO that the European Union could count, at least on commercial plan.

[317] Speech by P. Mandelson, 'Europe's Answer to Globalisation: Where Is European Union Trade Policy Going?' ,Wolfsberg, Switzerland, 4 May 2006