

# BRING THE PARTNERSHIP AND COOPERATION AGREEMENT TO NEW HEIGHTS? — IMPLICATIONS FOR THE PROSPECTIVE EU-CHINA PCA\*

Zhang Jiao

*Master in Law, Faculty of Law University of Macau*

## I Introduction

Since its birth in the 1950s, the European Union (EU)<sup>1</sup> has been developing its relations with the rest of the world through a set of common policies. Experiencing more than fifty years development, the EU is now playing an important role in global affairs and its weight is growing as EU Member States

---

\* This article is the highly condensed version of my master degree thesis. I'm grateful to the Master and Postgraduate Programme in European Union Law, International Law and Comparative Law (Faculty of Law, University of Macau) which brought me to the palace of European Union Law. I especially owe my thanks to my supervisors: Prof. Zeng Lingliang and Prof. Paulo Canelas de Castro for their constant encouragement, constructive advices and comments during the whole process of the thesis writing. I would also like to express my sincere thanks to Prof. Francis Snyder and Prof. Liu Gaolong for their constructive comments provided during the thesis defense. Thanks to Prof. Zeng Lingliang's recommendation and Prof. Manuel Marcelino Escovar Trigo provision for the forthcoming publication. However, I am solely responsible for all views and any mistakes in this article.

1 Here is a problem of terminology. The confusing is that although the "European Union" (in the legal term) has been created by the Treaty on the European Union (the so-called "Maastricht Treaty") in 1992, most of the international agreements were still concluded in the name of the "European Community", not to say the practice before 1992. However, politically, relations with the third countries are always presented as being with the "European Union". Fortunately, the Lisbon Treaty formally offers the "European Union" with the legal personality, which makes the problem clearer. To make it simple, I will use 'EU' more generally to express the European identity as a whole while use 'EC' when it is strictly necessary to do so.

increasingly make foreign policy decisions as a bloc<sup>2</sup>. Achievements of EU external policies have been partly recorded by various agreements concluded by the EU. On one hand, different agreements reflect different level of bilateral relations between EU and the contracting country; on the other hand, different agreements are used to achieve different goals of the bilateral relations. It can be said that differences between various types of agreements are not simply the titles but their distinct features and functions.

The PCA has appeared at the end of the 1990s when the EU concluded nine similar PCAs with Russia and the new independent states of Eastern Europe, the Southern Caucuses and Central Asia<sup>3</sup>. In 2004, another EC-Tajikistan PCA was signed. After that, a set of negotiations of the PCAs has been carrying out between the EU and the ASEAN countries including Indonesia<sup>4</sup>, Malaysia, Singapore, Thailand, Philippines, Brunei and Vietnam. Besides, negotiations of the EU-China PCA and the EU-Iraq PCA are also in process<sup>5</sup>. Generally speaking, the PCA is a kind of comprehensive bilateral agreement which is used in EU's external relations to strengthen democracies and develop economies of the contracting party, to accompany the contracting party's transition to a market economy and to provide a basis for cooperation between the EU and the contracting party in the legislative, economic, social, financial, scientific, civil, technological and cultural fields<sup>6</sup>. Thus, comparing with other legal instruments used in EU external relations, the PCA with special features and functions may signal a different level of relationship between the EU and the contracting country and plays a distinct role in EU external relations.

After analysing several issues on the PCA in EU external relations, this article will then focus on the ongoing EU-China PCA. At the time when both China and the EU were seeking ways to further develop their ties and to reflect the full

2 See 'Overview of External Relations', available at [http://europa.eu/pol/ext/index\\_en.htm](http://europa.eu/pol/ext/index_en.htm), latest achieved on 2 May 2010.

3 These countries including: Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Ukraine and Uzbekistan.

4 The EU-Indonesia PCA has been signed on 9 November 2009, see 'Joint Press Statement', available at [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/er/111114.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/er/111114.pdf), latest achieved on 2 May 2010.

5 Actually, negotiation for the EU-Iraq PCA is now entering final stage. See "EU-Iraq: Negotiations for Partnership and Cooperation Agreement enter final stage" on the EU website: [http://www.europa-eu-un.org/articles/en/article\\_9213\\_en.htm](http://www.europa-eu-un.org/articles/en/article_9213_en.htm), latest achieved on 2 May 2010.

6 See 'Partnership and Cooperation Agreements Concluded between EU and countries of Eastern Europe and Central Asia', available at [http://europa.eu/legislation\\_summaries/external\\_relations/relations\\_with\\_third\\_countries/eastern\\_europe\\_and\\_central\\_asia/r17002\\_en.htm](http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/eastern_europe_and_central_asia/r17002_en.htm), latest achieved on 2 May 2010.

breadth and depth of today's comprehensive strategic partnership, negotiations for a new comprehensive framework agreement – EU-China PCA – was thus opened on the Ninth EU-China Summit and is in progress currently. The article is expected to find out the nature and features of the PCA and further to make some comments, even predictions, on the ongoing EU-China PCA.

## **II Overview of the Partnership and Cooperation Agreement in EU External Relations**

### **2.1 Evolution of Bilateral Agreements in the Context of EU External Relations**

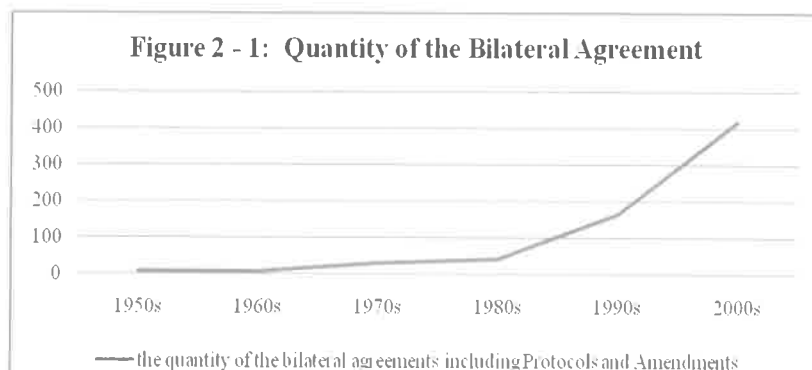
Overview of the bilateral agreements EU/EC concluded with the third countries shows a clear tendency that not only type of the agreements but also quantity of the agreements have been increasing yearly.

In terms of the type, except agreement on peaceful uses of atomic energy, trade agreement and association agreement which are signed throughout the development of the EU since its birth, other types of bilateral agreements came out later with the integration of the EU. Generally speaking, these bilateral agreements can be broadly divided into two categories, (1) bilateral agreement concerning on specific subjects and, (2) bilateral agreement covering broad areas. Besides, according to whether the EU enjoys exclusive competence or shared competence over subject matters of the agreement, agreements can be divided into ordinary agreement (pure EU-type agreement) concluded by the EU only and mixed agreement concluded by both the EU and the Member States.

As regards to the quantity, the quantity of the agreements in 2009 was twenty-five while the quantity of the agreements in 1956 and 1958 was only one respectively<sup>7</sup>. The increasing trend of the bilateral agreements can be clearly seen from the following chart<sup>8</sup>:

7 The quotas are from the "Treaties Office Database" on the website of the European Commission: <http://ec.europa.eu/world/agreements/searchByType.do?id=1>, latest achieved on 13 January 2010.

8 The number of the 1950s is counted from 1956 because the first bilateral agreement was signed in 1956. The resource on the number is from the "Treaties Office Database", *Ibid*, latest achieved on 13 January 2010.



\* The quotas are from the “Treaties Office Database” on the website of the European Commission (latest achieved on 18 March 2010)

In order to explore the reason of this tendency, it is necessary to look into the development of EU/EC’s competence in terms of its external relations briefly<sup>9</sup>. The issue of competence is important because the principle of conferral of powers<sup>10</sup> is one of the cornerstones of the EU legal order.<sup>11</sup> According to that principle, the EU may only act when it enjoys conferral competences transferred by the Member States. Thus, with the increasing of the external competences conferred

9 “Competence” is a complex question, for the purpose of this thesis, the author will only explain the competence issue to the extent that is necessary for exploring the reason how the types and quantities of the bilateral agreements increase year by year. For more statements on “external competence of the EC/EU”, see Panos Koutrakos, ‘Part I: The Regulation of EC International Relations’ in *EU International Relations Law*, Hart Publishing, 2006, pp.7-134. Also see Rass Holdgaard, ‘Chapter 3: The Community’s Express External Relations Authority’, ‘Chapter 4: The Community’s Implied External Relations Authority’, ‘Chapter 5: Restraints on the Community’s Exercise of External Competence’, ‘Chapter 6: Exclusion of Member States’ External Competence’, and ‘Chapter 7: Restraints on member States’ Exercise of External Competence’ in *External Relations Law of the European Community – Legal Reasoning and Legal Discourses*, Kluwer Law International, 2008, pp. 21-146; Marise Cremona, ‘Defining competence in EU external relations: lessons from the Treaty reform process’, in Alan Dashwood and Marc Maresceau (eds.), *Law and Practice of EU External Relations – Salient Features of a Changing Landscape*, Cambridge University Press, 2008, pp. 34-69.

10 Article 7 of the TFEU provides that ‘The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers’.

11 Regarding comprehensive discussion on the principle of conferral of powers, including analysis on EU’s external competence especially implied external competence, see Geert De Baere, ‘Chapter I: Conferral’, in *Constitutional Principles of EU External Relations*, Oxford University Press, 2008, pp. 9-32.

by the Member States, the EU may enter into more types of bilateral agreements with third countries. The competence can be increased mainly through two ways – directly by treaty amendments (see Table 2 - 1) and indirectly by development of case law<sup>12</sup>. Once the EU gains a new external competence, type and quantity of the bilateral agreement will be increased. To think deeply, incentives behind the increasing of the EU's external competence are due to demands of the EU which arose from both the internal and the external dimensions. Internally, EU has experienced very fast and intensive integration, from an identity which aimed at preventing wars among Member States and generating prosperity on the Europe continent to an identity which is a unique economic and political partnership among 27 democratic European countries with ambitious to create peace, prosperity and freedom for its 498 million citizens in a fairer and safer world<sup>13</sup>. In order to achieve the objectives of certain internal competence, increasing of the external competence is considered to be necessary because external policy is a kind of extension of internal policy. Externally, EU is now playing a more and more important role on the world stage (to some extent, with its collective power of 27 Member States currently). It is of great significance for the EU to create a good external environment for the healthy and safety internal development as well as its international ambitious. This is why, apart from developing its internal policy, the EU always keeps an eye on its relations with third countries and international organisations.

Table 2 – 1: Evolution of External Competences of the EC/EU in Treaties					
Treaty of Rome (1957)	Single European Act (1986)	Treaty of Maastricht (1992)	Treaty of Amsterdam (1997)	Treaty of Nice (2001)	Treaty of Lisbon (2007)
common commercial policy	research and technological development	monetary policy	trade in services and the commercial aspects of intellectual property	development cooperation	humanitarian aid;

12 More comprehensive statement and discussion on external implied powers can be found in Panos Koutrakos, *supra* note 9, pp. 77-134; and also Paul Craig and Gráinne de Búrca, *EU Law – Text, Cases and Materials (fourth edition)*, Oxford University Press, 2008, pp. 97-100.

13 See 'Panorama of the European Union', on the website of EUROPA, available at: [http://europa.eu/abc/panorama/index\\_en.htm](http://europa.eu/abc/panorama/index_en.htm), latest achieved on 12 April 2010.

association agreement	environment	education and vocational training	visas, asylum, immigration and other policies related to free movement of persons	economic, financial and technical cooperation	neighbouring policy
		culture		common foreign and security policy	
		public health		police and judicial cooperation in criminal matters	
		trans-European network			
		development cooperation			

\* External competences list here are the ones for specific policies. The general ones, such as Article 300 or Article 308, are not included.

\*\* These articles provide the EU with developing relations with third countries and international organisation, but salience on whether the EU may enter into international agreement concerning these subject matters.

## 2.2 Practice of the Partnership and Cooperation Agreement in EU External Relations

### 2.2.1 Partnership and Cooperation Agreement in 1990s

The PCA has emerged at the end of the 1990s when the EU concluded nine similar PCAs with the countries of Eastern Europe, the Southern Caucuses and Central Asia. The first PCA was concluded with Russia<sup>14</sup>, to be followed by the

14 [1997] OJ L 327/3, entered into force on 1 December 1997.

ones with Ukraine<sup>15</sup>, Moldova<sup>16</sup>, Kazakhstan<sup>17</sup>, Kyrgyz<sup>18</sup>, Georgia<sup>19</sup>, Uzbekistan<sup>20</sup>, Armenia<sup>21</sup>, and Azerbaijan<sup>22</sup>. The aims of these PCAs are “to provide a suitable framework for political dialogue, to support the efforts made by the countries to strengthen their democracies and develop their economies, to accompany their transition to a market economy and to encourage trade and investment”<sup>23</sup>. The PCAs also aim to “provide a basis for cooperation in the legislative, economic, social, financial, scientific, civil, technological and cultural fields”<sup>24</sup>. The appearance of these PCAs was under the background of the dissolution of the Union of Soviet Socialist Republics (USSR). Considering that the regional peace is the priority of EU’s external policy, it is of great importance to support the transformation of these countries in terms of both economic and political. These agreements were not concluded in a legal vacuum as the Community and its Member States had signed a Trade and Cooperation Agreement with the Soviet Union in 1989<sup>25</sup>. In this context, the new agreements aimed at replacing the 1989 agreement by establishing separate frameworks of bilateral cooperation<sup>26</sup>.

### 2.2.2 Partnership and Cooperation Agreement in 2000s

However, almost no new PCA was concluded after 1990s (see Table 2 - 2), except the EU-Tajikistan PCA and the EU-Indonesia PCA. The EU-Tajikistan PCA was signed in October 2004 and an Interim Agreement on trade and trade-related matters has implemented since May 2005. It takes five years for the Member

15 [1998] OJ L 49/3, entered into force on 1 March 1998.

16 [1998] OJ L 181/3, entered into force on 1 July 1998.

17 [1999] OJ L 196/3, entered into force on 1 July 1999.

18 [1999] OJ L 196/48, entered into force on 1 July 1999.

19 [1999] OJ L 205/3, entered into force on 1 July 1999.

20 [1999] OJ L 229/3, entered into force on 1 July 1999.

21 [1999] OJ L 239/3, entered into force on 1 July 1999.

22 [1999] OJ L 246/3, entered into force on 1 July 1999.

23 See Summary of EU legislation – Partnership and Cooperation Agreement”, available at [http://europa.eu/legislation\\_summaries/external\\_relations/relations\\_with\\_third\\_countries/eastern\\_europe\\_and\\_central\\_asia/r17002\\_en.htm](http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/eastern_europe_and_central_asia/r17002_en.htm), latest achieved on 18 March 2010.

24 *Ibid.*

25 Agreement between the European Economic Community and the European Atomic Energy Community and the Union of Soviet Socialist Republics on trade and commercial and economic cooperation [1990] OJ L 68/3.

26 See Christophe Hillion, ‘Partnership and Cooperation Agreements between the European Union and the New Independent States of the Ex-Soviet Union’, 3 *EFA Rev.* 1998, p. 399, cited from Panos Koutrakos, *supra* note 9, p. 363.

States to ratify the Agreement and finally the European Parliament delivered the Resolution on the conclusion of the EC-Tajikistan PCA on 17 September 2009<sup>27</sup>. The EU-Indonesia PCA was recently signed on a Ministerial Troika meeting between the two sides on 9 November 2009.

Table 2 - 2: Bilateral Agreements (covering broad area) of the European Union					
Type Year	Partnership and Cooperation Agreement	Euro- Mediterranean Agreement	Economic Partnership, Political Coordination and Cooperation Agreement	Trade, Development and Cooperation Agreement	Stabilisation and Association Agreement
1994	Ukraine, Russia, Moldova				
1995	Kazakhstan, Kyrgyz	Tunisia, Israel			
1996	Azerbaijan, Armenia, Uzbekistan	Morocco			
1997		Palestinian Authority, Jordan	United Mexican States		
1998					
1999				South Africa	
2000					
2001		Egypt			Macedonia, Croatia
2002		Algeria, Lebanon			
2003					
2004	Tajikistan				
2005					
2006					Albania
2007					Montenegro*
2008					Bosnia and Herzegovina*
2009	Indonesia*				

\* These agreements have not yet entered into force.

27 The full text of the resolution is available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2009-0017+0+DOC+XML+V0//EN>, latest achieved on 6 February 2010.



\*\* The dates listed in this table refer to the date of signature.

Actually, the use of the PCA does not enter into its final stage. On the contrary, a series of negotiations for the new PCAs has already been carrying out and is ongoing between the EU and ASEAN countries including Malaysia, Singapore, Thailand, Philippines, Brunei and Vietnam. Besides, the other two ongoing PCAs are the EU-China PCA, and the EU-Iraq PCA<sup>28</sup>. It may be predicted that 15 or 20 years after the first group of PCAs, there will emerge another group of PCAs most of which are signed between the EU and Asia countries. Although they belong to the same type of agreement, the 2000s PCAs may differ a lot from the 1990s PCAs not only because of the different national conditions of the contracting parties but also because of the entry into effect of the Lisbon Treaty by which the objectives of the EU's external action have been defined and the procedure for the conclusion of international agreements has been reformed<sup>29</sup>.

### **2.3 The Role of the Partnership and Cooperation Agreement in EU External Relations**

#### **2.3.1 Common characteristics of the contracting parties**

An interesting aspect of the EU's approach to international relations is its emerging focus on cooperation with regional groups. Usually, there are corresponding types of legal instruments for countries of different regions. For instance, Framework Cooperation Agreement is for Latin American countries; Euro-Mediterranean Agreement is for Mediterranean partner countries; Cotonou Agreement is for African, Caribbean and Pacific (ACP) countries; and PCA is for East Europe and Central Asia (and now extend its application to other Asia countries). Thus, the first common characteristic of the contracting parties is that they are from two regions of the world: East Europe and Asia, the continents of which are adjacent. What's more, parties concerned in the 1990s PCAs are former USSR members, and importantly, EU's neighbour countries. Broadly speaking, the EU lives together with these countries on the so-called "Eurasian Continent".

#### **2.3.2 Comparison among different types of bilateral agreements**

Up to the late 1980s, the EC has engaged principally in trade and development agreements with third countries partly due to the limitation of its competence. With

28 Negotiation for the EU-Iraq PCA is now entering final stage. See "EU-Iraq: Negotiations for Partnership and Cooperation Agreement enter final stage" on the EU website: [http://www.europa-eu-un.org/articles/en/article\\_9213\\_en.htm](http://www.europa-eu-un.org/articles/en/article_9213_en.htm), latest achieved on 9 May 2010.

29 Further discussions on legal basis and features of the PCAs in 2000s can be found in section 3.

the development of competence, and thanks to the creation of mixed agreement, the EU begins to cooperate with the third countries on broad areas. This contributes to the creation of different types of agreements (See Table 2 - 2).

Compared with the Trade, Development and Cooperation Agreement (TDCA), the PCA has a concern on peace and security of the Europe continent while the TDCA mainly focus on trade issues. Although, the TDCA introduced a FTA which is not contained in most of the PCAs, the PCA has more political concerns and immigration issues than the TDCA. Unlike the Stabilisation and Association Agreement (SAA) which aims at integrating these countries to the EU, values and standards of the EU are not so strongly inputted in the PCA as in the SAA. The PCA emphasises more on the cooperation although values and standards of the EU are promoted as well. The Euro-Mediterranean Association Agreements (EMA) shares a lot of common ideas with the PCA since the EMA deals EU's relations with South Europe countries while the PCA deals with EU's relations with East and Central Europe countries.

The PCA, in sum, plays its special role to the peace, security and development of the East and Central Europe as well as Asia, with a view that although these countries have a lot of areas development of which are far away from the EU standards, they are of great significance to be cooperated with so as to further develop EU internally and assert EU's international role in the world stage.

### 2.3.3 Remarks on the role of the Partnership and Cooperation Agreement in EU External Relations

Generally speaking, the PCA is a kind of comprehensive bilateral agreement which is used by the EU in its external relations to strengthen democracies and develop economics with countries of East and Central Europe and Asia. In addition, the PCA also aims to provide a basis for cooperation in the legislative, economic, social, financial, scientific, civil, technological and cultural fields<sup>30</sup>. Thus, comparing with other bilateral agreements used in EU external relations, the PCA with special features and functions signals a different level of relationship between EU and these third countries and plays a distinct role in EU external relations.

However, it is hard to say that the PCA is indeed suitable for all these contracting parties although it may be sure that the 1990s' PCAs are successfully contribute to EU's relations with the former USSR members and the relatively peace

30 See *Partnership and Cooperation Agreements Concluded between EU and countries of Eastern Europe and Central Asia*, available at [http://europa.eu/legislation\\_summaries/external\\_relations/relations\\_with\\_third\\_countries/eastern\\_europe\\_and\\_central\\_asia/r17002\\_en.htm](http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/eastern_europe_and_central_asia/r17002_en.htm), latest achieved on 20 April 2010.

in this region. The composition of the parties concerned in 2000s' PCAs is more complex. To conclude the PCAs with the parties concerned in 2000s' PCAs, from the point of view of this article, is not really because the PCA is the most suitable legal framework for the EU to deal with the relations with all these contracting parties, but because of the fact that the EU has already concluded PCAs with part of the Asia countries, and the PCA has been considered by the EU as the general legal framework for its relations with Asia countries as a whole. Nevertheless, it is also hard to say that the PCA is not suitable for all these contracting parties because the PCA covers broad areas which seem to be enough for the relations and the degree of cooperation can be different when the specific PCA is negotiated. To be honest, the question of which type of agreements to be chose as the legal framework governing their relations is not a vital issue considered by the contracting parties. What the contracting parties really concern is the substantive contents of the agreement. Thus, even if the PCA is not the most appropriate legal framework for the relations between the EU and some of the contracting parties, it would not arise too many arguments on the chosen of the type, not to say to create a new type of agreement.

Nevertheless, as we discussed before, the PCAs do reflect certain strategy of the EU towards contracting parties. The type of the agreement, as a consequence, does contain information which shall be paid attention by the contracting parties. Although the contents may be different in order to satisfy various demands of the contracting parties, the PCAs share a lot of common features (which will be discussed in the next section). The contracting parties, as the recipient to the EU's initiative, shall consider carefully whether these common features are really appropriate to be accepted and whether there is any other provision which is crucial to be concluded in the specific PCA although it may not appear in other PCAs. For the EU, there is still a need to reconsider the common provisions in the existing PCAs when negotiating new PCAs with other countries. Although the EU is experienced in negotiating and concluding PCAs, speaking of the current ongoing PCAs and considering the disparities not only among 1990s' PCA parties and 2000s' PCA parties but also among 2000s' PCA parties themselves, whether these PCAs can successfully meet the demands of the contracting parties, the Member States and the EU itself is still a challenge to the EU's external capacity.

### **III Legal Basis and Features of the Partnership and Cooperation Agreement**

#### **3.1 Legal Basis for the Partnership and Cooperation Agreement**

The EU is created by law and operated based on the rule of law. The primary EU law *i.e.* EU Treaties, determines the areas of, delimitation of, and arrangements

for exercising EU's competence<sup>31</sup>. That is to say, everything that the EU does is derived from Treaties, which are agreed on voluntarily and democratically by all Member States<sup>32</sup>.

When carefully examining the PCA, it is interesting to find that all the PCAs are mixed agreements and have a considerable number of legal bases<sup>33</sup>. The PCA belongs to the condition that the agreement pursues more than one objective and covers a wide range of contents, and the objectives and contents are not incidental. Thus, provisions of the PCA are based on various corresponding legal basis. The PCAs, except the one with Tajikistan, are all based on the same legal bases, although the number of the Articles is different due to the Treaty amendments. Two treaty amendments shall be mentioned here: one is the Treaty of Amsterdam which was entered into force on 1 May 1999, and the other is the Treaty of Nice which was entered into force on 1 February 2003. Accordingly, legal bases in existing PCAs can be divided into three stages: (1) PCAs concluded before the entry into force of the Treaty of Amsterdam (*i.e.* PCAs with Russia, Ukraine, Moldova, Kazakhstan, and Kyrgyz), (2) PCAs concluded after the entry into force of the Treaty of Amsterdam (*i.e.* PCAs with Armenia, Azerbaijan, Georgia, and Uzbekistan), (3) PCAs concluded after the entry into force of the Treaty of Nice (*i.e.* PCA with Tajikistan).

As to the first group<sup>34</sup>, common legal basis for them in the EC Treaty<sup>35</sup> are Article 54, 57, 66, 73c, 75, 84, 99, 100, 113, 228, 235. As to the second group<sup>36</sup>, common legal basis for them are Article 44 (ex 54), 47 (ex 57), 55 (ex 66), 57 (ex 73c), 71 (ex 75), 80 (ex 84), 93 (ex 99), 94 (ex 100), 133 (ex 113), 300 (ex 228), 308 (ex 235). Clearly, no matter before or after the Treaty of Amsterdam, the legal bases for these nine PCAs are the same in nature. The policies they support for are 'right of establishment', 'services', 'capital and payments', 'transport', 'tax provision', 'approximation of laws', 'common commercial policy', and 'general and final provisions'. Other two common legal bases which cannot be neglected are Article 101 of the Treaty Establishing the European Atomic Energy Community

31 See Article 1, Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 115/47 of 9.5.2008.

32 See "Treaties and Law", the website of EUROPA, available at: [http://europa.eu/abc/treaties/index\\_en.htm](http://europa.eu/abc/treaties/index_en.htm), latest achieved on 18 April 2010.

33 These included Art 44(2), 47(2), 55, 57, 71, 80(2), 93, 94, 133, 300 and 308 EC.

34 The number of the article (first group) refers to the number in the Treaty of Maastricht.

35 There are also two legal basis laid in Eurotom Treaty and ECSC Treaty which will be dealt later.

36 The number of the article (second group) refers to the number in consolidated version of the Treaty of Amsterdam, and the ex-Article number refers to the number in consolidated version of the Treaty of Maastricht.

(Euratom)<sup>37</sup> which concerns the policy of ‘nuclear energy’ and Article 95 of the Treaty establishing the European Coal and Steel Community (ECSC)<sup>38</sup>, namely ‘general provisions’. However, it shall also be noted that, except to the difference on numbers, the contents of part of the articles were also amended by the Treaty of Amsterdam. For example, Article 133 extended the application to international negotiations and agreements on services and intellectual property. Besides, Article 300(2) laid down procedures for a decision to suspend the application of an agreement, and for the purpose of establishing the positions to be adopted on behalf of the Community in a body set up by an agreement based on Article 310 when that body is called upon to adopt decisions having legal effects, with the exception of decisions supplementing or amending the institutional framework of the agreement.

As to the third group, currently means the PCA with Tajikistan, the legal bases are little bit different owing to the entry into force of the Nice Treaty. The new legal bases – Article 181a and Article 63 – have been inserted in the PCA. Article 181a, introduced in the EC Treaty by the Treaty of Nice, provides a specific legal basis for the PCAs in the field of economic, financial and technical cooperation with third countries. Besides procedural matters, this Article especially states that “Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to the objective of respecting human rights and fundamental freedoms”, which are in accordance with the objectives and principles of the PCAs. Article 63 is under the title of “visas, asylum, immigration and other policies related to free movement of persons”. It authorises the Council, within a period of five years after the entry into force of the Treaty of Amsterdam, to adopt measures on asylum, measures on refugees and displaced person, measures on immigration policy and measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States. Due to the insert of these two articles, Article 308 (ex Article 235) which is a common clause in the first and second group PCAs is no longer contained in EU-Tajikistan PCA. This is because the Article 308 may be used as the legal basis for a measure only

37 Article 101 of the Euratom expressly provides that “The Community may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with a third State, an international organization or a national of a third State”.

38 Paragraph 1 of Article 95 provides that “In all cases not provided for in this Treaty where it becomes apparent that a decision or recommendation of the Commission is necessary to attain, within the common market in coal and steel and in accordance with Article 5, one of the objectives of the Community set out in Articles 2, 3 and 4, the decision may be taken or the recommendation made with the unanimous assent of the Council and after the Consultative Committee has been consulted”.

if the Treaties have not provided the necessary powers elsewhere, as ECJ said in a lot of cases<sup>39</sup>. Besides, Article 133 was further amended as it treats different fields of commercial policy differently in terms of the decision-making procedure and it makes the competence allocation between the EU and Member States more clearly. There are three kinds of procedure applying to negotiate and conclude a relevant international agreement, *i.e.* the Council acts by qualified majority, the Council acts unanimously, and the action requires the common accord of the Member States if the agreement includes provisions which go beyond the Community's internal powers. In addition, because of the fact that the ECSC Treaty was expired in 2002, there is no such a legal basis as Article 95 ECSC Treaty in the EU-Tajikistan PCA.

### 3.2 A Comparative Study on EU's Partnership and Cooperation Agreement

#### 3.2.1 General comparison

A comprehensive comparative study on contents of EU's PCAs may help to find both common features and disparities among those PCAs. Titles of articles contained in the PCAs are almost the same: 'objectives', 'general principles', 'political dialogue', 'trade in goods', 'labour conditions', 'establishment and operation of companies', 'cross-border supply of service', 'general provisions', 'current payments and capital', 'competition, intellectual, industrial and commercial property protection', 'legislative cooperation' (separated from the previous title since the PCA with Armenia), 'economic cooperation', 'democracy and human rights' (exists in the PCAs with Armenia, Georgia, Uzbekistan and Tajikistan), 'prevention of illegal activities' (exists in the PCAs with Russia, Armenia, Georgia, Uzbekistan and Tajikistan), 'cultural cooperation', 'financial cooperation' and 'institutional, general, and final provisions'.

As to the contents of the PCAs, apart from the differences resulted from the evolution of the PCA, *i.e.* three different groups of the PCAs<sup>40</sup>, the variations may also be raised due to specific situation of contracting parties. These differences lie

39 See for example: Case 45/86 *Commission v. Council [Re General Tariff Preferences]* [1987] ECR 1493, Case C-350/92 *Spain v Council* [1995] ECR I-1985, Case C-271/94, *European Parliament v. Council* [1996] ECR I-1689, Case 436/03 *Parliament v. Council* [2006] ECR I-3733.

40 Due to the Treaty amendments, existing PCAs can be divided into three stages: (1) PCAs concluded before the entry into force of the Treaty of Amsterdam (*i.e.* PCAs with Russia, Ukraine, Moldova, Kazakhstan, and Kyrgyz), (2) PCAs concluded after the entry into force of the Treaty of Amsterdam (*i.e.* PCAs with Armenia, Azerbaijan, Georgia, and Uzbekistan), (3) PCAs concluded after the entry into force of the Treaty of Nice (*i.e.* PCA with Tajikistan).

especially in the areas of legislative cooperation and economic cooperation with regards to which none of the PCAs are totally identical. However, speaking of the 'objective', 'general principles', 'political dialogue', 'democracy and human rights' (if has), 'cultural cooperation', 'financial cooperation' and 'institutions, general and final provisions', the contents even expressions are almost the same.

### 3.2.2 Provisions in Partnership and Cooperation Agreements

Objectives of the PCAs are, briefly speaking, to provide an appropriate framework for the political dialogue, to promote trade and investment and harmonious economic relations, to provide a basis for cooperation and to support the contracting party<sup>41-42</sup>. These objectives indicate that the PCAs are agreements concerning issues not only economic but also political. The wording of "to support (the other contract party) (note by the author) efforts to consolidate its democracy and to develop its economy and to complete the transition into a market economy" reflects EU's development policy. Notably, the European Union and its Member States together is the world's biggest aid donor.<sup>43</sup> Besides, it also reflects EU's neighbouring policy (ENP)<sup>44</sup>. Although the ENP has been established only since 2004, the strategy towards neighbouring countries enshrined in the ENP can be traced back to at least ten years before when the EC negotiated PCAs with its neighbouring countries. To some extent, the PCAs are aiming at promoting these contracting parties with European or International standards which may facilitate the cooperation between the EU and these countries. Additionally, it has to be pointed out that the objectives in the PCA with Russia is little bit different, not only because this PCA is the first one the EU concluded but also because the special status of the Russia vis-à-vis the EU<sup>45</sup>. The most important and substantive unique

41 For the purpose of this article, the contracting party means the party which the EU concluded the PCA with.

42 Article 1 of the PCAs. Take the PCA with Ukraine as an example, "The objectives of this partnership are to provide an appropriate framework for the political dialogue between the Parties allowing the development of close political relations, to promote trade and investment and harmonious economic relations between the Parties and so to foster their sustainable development, to provide a basis for mutually advantageous economic, social, financial, civil scientific technological and cultural cooperation, to support Ukrainian efforts to consolidate its democracy and to develop its economy and to complete the transition into a market economy".

43 The European Union is the world's largest donor of international assistance. More than half the money spent to help poor countries comes from the European Union and its member states. See [http://europa.eu/pol/dev/index\\_en.htm](http://europa.eu/pol/dev/index_en.htm), latest achieved on 9 May 2010.

44 The PCAs is now an integrated part of the ENP. See Section 3.3.3 on "regional strategy".

45 Although the EU does not satisfy with the national conditions of the Russia, the EU understands that Russia is partner which the EU cannot lose in order to successful deal with Europe affairs.

objective is to “create the necessary conditions for the future establishment of a free trade area ... as well as conditions for bringing about freedom of establishment of companies, of cross-border trade in service and of capital movements”<sup>46</sup>.

General principles of the PCAs include democracy, principle of international law and human rights, and principle of market economy. Besides, the relations with ‘Independent States’ should be maintained and strengthened among newly independent states which have emerged from dissolution of the USSR. Actually, democracy, human rights and rule of law are the core values of the EU, which the EU consistently and persistently pursues in internal as well as external activities. They are cultural achievements of which, according to the proclamations of their statesmen, the Europeans of today are proud<sup>47</sup>. The EU considered these values as the secret of its own success, and that’s why it seeks to offer to its international partners<sup>48</sup>.

A regular political dialogue with respective procedures and mechanisms has been established by every PCA so as to strength the links of the parties, to bring about an increasing convergence of positions on international issues of mutual concerns, and to cooperate on matters pertaining to the strengthening of stability and security in Europe. Besides, since the PCA with Armenia, *i.e.* plus Azerbaijan, Georgia, Uzbekistan and Tajikistan, a clause on “cooperation on matters relating to democracy and human rights” has been inserted, providing that “the parties shall cooperate on all questions relevant to the establishment or reinforcement of democratic institutions, including those required in order to strengthen the rule of law, and the protection of human rights and fundamental freedoms according to international law and OSCE principles”<sup>49</sup>.

All these existing PCAs contain clauses on cultural cooperation and financial cooperation as well. The EU offers temporary financial assistance to the contracting parties, which aims at achieving the economic transformation of the parties concerned. The EU has developed a unique set of skills in assisting countries in transition. The fields of the assistance may range from economic, environment,

---

Thus, the strategy of the EU towards Russia is a combination of criticism and cooperation. See China Institute of International Studies, *Blue Paper on International Situation and Chinese Foreign Affairs (2005, 2006)* (*Guo Ji Xing Shi He Zhong Guo Wai Jiao Lan Pi Shu*), Contemporary World Publishing, 2005, p.75 (Chinese version).

46 Article 1 of the EC-Russia PCA, OJ L 327/3 of 28.11.1997.

47 Ludger Kühnhardt, ‘Culture, Values and European Integration’, in Woosik Moon and Bernadette Andreosso-O’Callaghan (eds.), *Regional Integration – Europe and Asia Compared*, Great Britain: Ashgate, 2005, p.157.

48 See ‘50 years of European Union’, *EU-News*, Office of the European Commission in Hong Kong and Macao, spring 2007.

49 Title 7 of the PCAs in relevant PCAs.



technology to social, politic, etc. The EU will assist the contracting parties in transferring to the market economic, economically; and transferring to a country with well conditions of democracy, human rights and rule of law, politically.

With regards to the title of 'institutions, general and final provisions', the clauses contained in all the PCAs, again, are identical even speaking of the wording. Importantly, a Cooperation Council, a Cooperation Committee and a Parliamentary Cooperation Committee and the corresponding procedures have been established by each of the PCAs. Those bodies are designed to ensure the implementation of the agreements.

Special clauses in the PCAs are mostly lying in the areas of cooperation, such as legislative cooperation and economic cooperation. Different countries may have different national conditions, thus their demands or concerns may differ to certain extent. Besides, more detail, variations also lies in the area of cooperation in the context of the cooperation sectors.

### 3.2.3 Living Partnership and Cooperation Agreements

Before entering into force of the PCAs, relations of the EU and the contracting parties usually were regulated by an Interim Trade Agreement. This is because of the ratification process of the PCA is very complicated<sup>50</sup>. It needs to be ratified by all the contracting parties including the EU according to its decision-making procedure and Member States separately according to the national procedure. Thus, it may take more than five years for the parties to ratify the PCA. The ratification process of the PCA with Russia was even temporarily suspended by the EU due to Russian forces' military hostilities in Chechnya<sup>51</sup>. Besides, the ratification process of the PCA with Belarus was halted in 1997 due to the deterioration of Belarus' internal political situation, and the ratification of the PCA with Turkmenistan is delayed by some Member States and European Parliament.

Additionally, once the EU enlarges with the coming of the new Member State, a Protocol to the PCA would be signed. This is not simply extending the PCA to the new Member State as the appearance may show, but is a new round of interests' negotiation. As a consequence, for example, the threshold for the contracting party to enter into the market of the new Member State would be raised. The contracting party, thus, may ask for more reciprocal treatment.

50 See the relevant part of the next Chapter on "Negotiation, Conclusion and Implementation of the PCA".

51 See on the website of the delegation of the EU to Russia – Partnership and Cooperation Agreement, available at [http://www.delrus.ec.europa.eu/en/p\\_243.htm](http://www.delrus.ec.europa.eu/en/p_243.htm), latest achieved on 18 April 2010.

Actually, the lives of the existing PCAs are going to the end (except the PCA with Tajikistan) because the duration of these PCAs are ten years and they were entered into force during 1997 – 1999. Although the Agreements do not express clearly on how to deal with the situation after the duration of application, these PCAs probably would not be renewed because of the new neighbouring policy. The ENP was developed in 2004, with the objective of avoiding the emergence of new dividing lines between the enlarged EU and its neighbours and instead strengthening the prosperity, stability and security of all concerned<sup>52</sup>. However, the ideas enshrined in the ENP have already been reflected in early policies and existing agreements such as the PCAs with Eastern neighbours and the Association Agreements with Euro-Mediterranean neighbours. Thus, in order to deepen the relations with its neighbours, it is more possible for the EU to integrate these neighbours into its neighbouring agreements than to renew the old PCAs. However, to create or ratify a new agreement is also not a good choice since the ratification process is so difficult and time-consuming. Thus, it is more appropriate to amend the PCAs to reflect the new changes occurred during these years, such as internal evolution of the party concerned, developments of the EU and the newly launched ENP. Implementing of the PCAs is on the list of priorities of the ENP Action Plan. The mechanisms established by the PCAs will continue to contribute to the ENP. To create or ratify a new agreement would only be a possibility if amendment of the PCA cannot satisfy the developing relationship.

To some extent, the 1990s PCAs successfully accomplished their tasks to transfer the national conditions (such as democracy, human rights, rule of law, market economy, etc.) of the parties concerned to a certain level which is more approximate to EU standards and which will further facilitate the cooperation between the EU and the parties concerned. The amending agreements will upgrade the cooperation between the parties of the agreements and make the partners more closely. Take Ukraine and Russia as examples. The EU and Ukraine have been negotiating a new framework agreement to replace the old one since 2007. Generally, the new Agreement would associate Ukraine to the EU CFSP and European Security and Defence Policy (ESDP) as well as enhance Ukraine's domestic political and judicial reform; Economically, Ukraine should ultimately be covered, at least to a certain extent, by the four freedoms underpinning the internal market, and the situation that Ukraine has acceded to the WTO would also be taken into account<sup>53</sup>. The EU and Russia launched the negotiation for a

52 See on the website of the European Commission – European Neighbourhood Policy, available at [http://ec.europa.eu/world/enp/policy\\_en.htm](http://ec.europa.eu/world/enp/policy_en.htm), latest achieved on 18 April 2010.

53 See Christophe Hillion, 'The New Enhanced Agreement', *SIPU report for the Swedish International Development Agency*, 5 July 2008.

new Agreement on the EU-Russia Summit which was held on 27 June 2008<sup>54</sup>. Actually, the process has been suspended because of the status of rule of law in Russia, the conflict in Georgia, and the pressure from Poland and Lithuania<sup>55</sup>. Since both of the sides understand that the EU-Russia relation is complex but necessary, the negotiation on the new EU-Russia Agreement is still on its way.

Although the 1990s PCAs would partly terminate their service, a new generation of PCAs would be born<sup>56</sup>. The parties concerned in this generation of the PCAs including Indonesia, Malaysia, Singapore, Thailand, Philippines, Brunei, Vietnam, Iraq and China. The EU-Indonesia PCA was recently signed on a Ministerial Troika meeting between the two sides on 9 November 2009. The negotiation for the EU-Iraq PCA is now entering into final stage. Although most of this generation PCAs are now under negotiation, it can be predicted that these PCAs would be very different from the 1990s PCAs due to the various national conditions, evolution of the EU and the entry into force of the Treaty of Lisbon. However, as indicated by the PCA with Tajikistan which was signed on 11 October 2004, the basic structure of the 1990s PCAs would be remained.

### 3.3 Features of the Partnership and Cooperation Agreement

#### 3.3.1 Covering Broad areas

It is clear that all the PCAs cover broad policy areas of the EU, ranging from trade in goods, establishment and operation of companies, cross-border supply of services, payments and capital, competition, intellectual property protection, financial cooperation, economic cooperation to political dialogue, cultural cooperation and legislative cooperation. If not considering the depth of cooperation but only considering the range of cooperation, it may be said that the areas covered by the EU Treaties are almost covered by the PCA.

54 See Council of the European Union, 'Joint statement of the EU-Russia summit on the launch of negotiations for a new EU-Russia agreement', 11214/08 (Presse 192), 27 June 2008.

55 Alliance of Liberals and Democrats for Europe, 'No New Partnership and Cooperation Agreement with Russia until the rule of law is respected', Press release on 25 October 2006, available at <http://www.alde.eu/en/details/news/no-new-partnership-and-cooperation-agreement-with-russia-until-the-rule-of-law-is-respected-3/>; Also see Slovenian Presidency of the EU 2008, 'Agreement on start of negotiations for new Partnership and Cooperation Agreement with Russian Federation', Press release on 11 May 2008, available at [http://www.eu2008.si/en/News\\_and\\_Documents/Press\\_Releases/May/0511MZZrusija.html](http://www.eu2008.si/en/News_and_Documents/Press_Releases/May/0511MZZrusija.html), latest achieved on 18 April 2010; Xin Hua News, 'Poland agreed on start of negotiations for new Partnership and Cooperation Agreement with Russian Federation' ('Bo Lan Wai Zhang Cheng Zhi Chi Chong Qi E Ou He Zuo Xie Ding Tan Pan'), Press Release on 11 November 2008, (in Chinese), available at <http://www.docin.com/p-2713139.html>, latest achieved on 18 April 2010.

56 More discussion on 2000 PCAs may be found in section 2.2.2.

Actually, both the PCA and the EU Treaty are international agreements in nature. The difference is that the EU Treaty is concluded by the States which were already form an Union with high integrate standard, while the PCA is concluded by the States which are aiming at cooperating in a wide range of areas but without the intention to integrate as an Union. Thus, the largest difference lies in the degree of cooperation or, more appropriate for the EU, the degree of integration. However, it doesn't mean the areas covered by the PCA are the same as in EU Treaties, and indeed, the cooperation between the PCA parties is far away from the integration among EU Member States.

### 3.3.2 *Mixed agreements*<sup>57</sup>

If the subject matter of an agreement is fall in the category of shared competence<sup>58</sup>, the agreement is considered as 'mixed agreement'<sup>59</sup>. This is because, under such circumstance, neither the EU nor Member State may conclude the agreement by itself. However, it doesn't mean that all the provisions contained in the agreement are fall in the shared competence. The question of whether it is fall in the exclusive competence or the shared competence shall be put into the context of certain subject matter vis-à-vis certain provision.

Generally speaking, bilateral agreements can be divided into agreements covering broad areas and agreements covering specific subjects. Mixed agreements

57 Although mixed agreement has its positive impacts as will be discussed, in practice, the use of mixed agreements may raise a lot of problems both in negotiation, conclusion and implementation as well. Detail discussion on "mixed agreement" can be found in David O'Keeffe and Henry G. Schermers (eds.), *Mixed Agreements*, Kluwer Law and Taxation Publishers, 1983; Maurits J. F. M. Dolmans, *Problems of Mixed Agreements*, Asser Institute, 1985; Allan Rosas, "The European Union and Mixed Agreements", in Alan Dashwood and Christophe Hillion (eds.), *The General Law of the EC External Relations*, Sweet and Maxwell, 2000; and Panos Koutrakos, *supra* note 9.

58 Article 2 TFEU reads that "[w]hen the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts". "When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence".

59 Actually, this is not the only case of "mixed agreement". Dominic McGoldrick divided the mixed agreements into three categories: 1) if the EC and one or more of the member states are parties to it; 2) if the EC and the member states share competence in relation to it; 3) because of requirements relating to its financing or relating to its provisions on voting. See Dominic McGoldrick, *International Relations Law of the European Union*, Longman, 1997, p. 79. Besides, some scholars also define the "mixed agreement" as agreement concluded by not only the EC but also the ECSC and/or Euratom.

may exist in both kinds of agreements. Nevertheless, agreements covering broad areas may have more opportunity to become mixed agreements. As to the current article, all the PCAs we discuss here are mixed agreements, which is a common feature of the PCAs. Within the areas covered by the PCAs, areas of agriculture and fisheries, environment, consumer protection, transport, energy, etc. are applied shared competence even in today's Treaty of Lisbon<sup>60</sup>. A typical provision in PCAs represents its nature as mixed agreement is that "[a] partnership is hereby established between the Community and its Member States, of the one part, and (the other contracting party) (note by the author), of the other part"<sup>61</sup>.

### 3.3.3 Reflecting Regional strategy

Another feature of the PCA is that contracting parties may be simply divided into two groups: (1) for the 1990s PCA, the contracting parties are composed of EU neighbouring countries, (2) for the 2000s PCA which are under negotiation now, the contracting parties are composed of Asian countries. This phenomenon clearly reflects EU's regional strategy in international relations.

The EU manages its external relations by using different strategy towards different regions of the world. After the dissolution of the USSR, the EC successfully handled its relations with its eastern neighbours and negotiated nine PCAs with these countries. On the one hand, these PCAs contribute to deepen the relations between the EU and the countries concerned and further ensure the peace and stability of the EU. On the other hand, they also contribute to the development and transformation of these newly independent states. Besides, a more important aim of the PCA is to promote common values and interests between the EU and the country concerned and to promote European standards in the country concerned.

The emergence of Asia makes EU-Asia relationship one of the major issues in EU external relations. With the experiences on negotiating and concluding PCAs with four central Asia countries<sup>62</sup>, the EU is currently negotiating PCAs with China, India, Indonesia, Iraq, Philippine, Singapore and Vietnam. However, the situation of central Asia is different from the other part of the Asia which will result in different strategy towards two parts of the Asia. The EU has developed

60 Article 4(2), TFEU. It shall be noted that agriculture was applied exclusive competence before the Treaty of Lisbon.

61 Article 1 of the PCAs. See Dominic McGoldrick, *supra* note 59, pp.80-81, "From a strictly legal perspective, in relation to an agreement over which competence is shared, neither the EC nor the member state should become a party without the other. Neither of them in isolation is capable of fulfilling all of the obligations under the agreement".

62 *i.e.* Kazakhstan, Kyrgyz, Uzbekistan, Tajikistan. Another one with Turkmenistan has already been negotiated but is not entered into force until now because of the democratic problem of the Turkmenistan.

different development policies towards different parts of the Asia, whereas, as to the general framework for the relations with most of its Asia partners, PCA becomes the common legal framework for Asia. These PCAs are all based on the previous Trade and Cooperation Agreements and reflect the parties' intention to upgrade their relations<sup>63</sup>.

#### IV Negotiation and Conclusion of the Partnership and Cooperation Agreement

##### 4.1 Competence Allocation between the EU and Member States<sup>64</sup>

Considering that to assert its role in the world stage is one of the objective of the EU<sup>65</sup>, the Laeken Declaration offers three parameters which can be used to judge the success of the reform process regarding EU's international role, the first of which is the need for a better division and definition of competence within the EU<sup>66</sup>.

The definition and delimitation of competence is an issue at the heart of the EU's external relations policy, especially in the case of mixed agreement (as the case of the PCA). Amendments of the Treaties reflect EU's effort on this aspect. The latest amended Treaty - the Treaty of Lisbon has made a significant attempt to rationalize and codify existing law, including case law. Article 3(5) and Article 21 of the TEU describe the objectives of the EU's external action including democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, etc. These provide the legal bases for inserting clauses concerning EU values in international agreements. Besides, Title I of the TFEU states clearly on the categories and areas of the Union's competence. Article 3 sets

63 However, it needs to be noted that the title of the agreement is subject to change if the parties consider that the PCA cannot satisfy their developing relations.

64 Competence division between the EU and Member States continues to be an attraction to scholars, and it has been dealt with in almost all the books which draw panorama of the EU External Relations. Contributions in this area are: Albert Bleckmann (ed.), *Division of Powers between the European Communities and their Member States in the Field of External Relations*, Kluwer Law International, 1981; I. MacLeod, I. D. Hendry, Stephen Hyett, *The External Relations of the European Communities: A Manual of Law and Practice*, Oxford University Press, 1996; Dominic McGoldrick, *supra* note 59; and also Piet Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations*, Oxford University Press, 2004. Paul Craig and Gráinne De Búrca, *supra* note 12, Oxford University Press, 2008, p. 59.

65 Article 2, TEU.

66 Marise Cremona, 'Defining competence in EU external relations: lessons from the Treaty reform process', in Alan Dashwood and Marc Maresceau (eds.), *supra* note 9, p. 34.

out the areas which the exclusive competence applied. Except the specific ones<sup>67</sup> clearly set out by the Treaty, the second paragraph needs special attention, which reads that “[t]he Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope”<sup>68</sup>. Article 6 of the Treaty sets out the areas in which the complementary competence shall be applied. While “the Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Article 3 and 6”, as expressed in Article 4.

However, the issue of competence allocation between the EU and Member States has been continuously considered as mysterious and unclear to the outsiders. One of the reasons is the idea that this is an internal issue of the EU, thus the EU doesn’t under a duty to explain clearly to the outsiders. This was illustrated by the Ruling 1/78<sup>69</sup> which ruled that “it is not necessary to set out and determine, as regards other parties to the Convention, the division of powers ... between the Community and the Member States, particularly as it may change in the course of time. It is sufficient to state to the other contracting parties that the matter gives rise to a division of powers within the Community, it being understood that the exact nature of that division is a domestic question in which third parties have no need to intervene”. On the one hand, it is true that third parties have no need to have a very clear mind on the competence division within the EU. This argument is based on the 1986 Vienna Convention on the Law of Treaties between States and International Organisations which provides that “an international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance”<sup>70</sup>. However, it shall also be noted that the agreement remains an envisaged agreement at any time before the Community’s consent to be bound by the agreement is finally expressed<sup>71</sup>. Thus, it remains the

67 These are: customs union, the establishing of competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is euro, the conservation of marine biological resources under the common fisheries policy, and the common commercial policy.

68 Article 3(2), TFEU.

69 Ruling 1/78, [1978] ECR 2151, para 35.

70 Article 46(2), [1986] ILM 543.

71 See *Opinion 1/94, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, [1994] ECR I-5267.

possibility that the Agreement may not take effect if the “violation was manifest and concerned a rule of fundamental importance”, or if the Community’s finally consent to be bound by the agreement has not finally expressed. From another perspective, it would be more convenient in the process of negotiation if the third country knows whether the EU or Member States it shall deal with. The uncertain definition of “a rule of fundamental importance” adds the uncertainty to the legal effect of the Agreement. To some extent, clear allocation of competence is also the requirement of the principle of transparency and legitimacy, and the requirement of asserting EU’s role in the world stage. The unclear on this issue is due to both the complexity of the problem and the EU and Member States’ unwillingness. For the former reason, the allocation of competence can evolve over the lifetime of an agreement or series of agreements<sup>72</sup>. So, even there is a clear list of competence allocation, there may be some changes to it at any time. For the latter reason, both the EU and Member States do not expect to loose their interests because of the internal problem being taken advantage by the third countries. The unclear allocation of competence offers flexibility for them in the negotiation process.

Actually, the issue is also unclear and uncertain to the insiders of the EU, especially to the EU citizens. From the EU perspective, it is hard to lay down clear rules on the allocation of the competence because the competence is not a static issue, instead, it is changeable. However, as the integration process develops further, the unclear and uncertainty on the competence division may undermine the legitimacy of the EU action within the Member States to a greater and greater extent<sup>73</sup>. Nevertheless, it can be said that the fundamental criteria for considering what is the nature of a competence is to check whether such kind of allocation is sufficient for the EU’s tasks defined in the primary EU treaties and whether it can satisfy the proper balance between the dangers of ‘creeping competence’<sup>74</sup>.

When the Treaties confer on the Union a competence shared with the Member States in a specific area, both the EU and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competences to the extent that the Union has not exercised its competence or the Union has decided to cease exercising its competence<sup>75</sup>. This is laid down

72 Dominic McGoldrick, *supra* note 59, p. 79.

73 See Christiaan W. A. Timmermans, ‘The General Principle’, in Paul J. G. Kapteyn, A. M. McDonnell, Kamiel J. M. Mortelmans, Christiaan W. A. Timmermans (eds.), *The Law of the European Union and the European Communities* (fourth revised edition), Kluwer Law International, 2008, p. 166.

74 See Marise Cremona, ‘Defining competence in EU external relations: lessons from the Treaty reform process’, in Alan Dashwood and Marc Maresecau (eds.), *supra* note 9, p. 34.

75 See Article 2(2), TFEU.



by the Treaty regarding how the EU and Member States shall exercise their competences in case of shared competence applied. However, in practice, the application is more complex than that. "It is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperation flows from the requirement of unity in the international presentation of the Community", as indicated by the ECJ in Opinion 1/94<sup>76</sup>, namely "the duty of cooperation"<sup>77</sup>.

Besides, another important principle - the principle of subsidiarity - shall also be observed in case of shared competence. By virtue of the Treaty and the Protocol on the application of the principles of subsidiarity and proportionality added to the Treaty of Amsterdam, in areas which fall within shared competence, the proposed action need to meet the requirements that it complies with the principle of subsidiarity and the objectives of the proposed action can be better achieved by the Community. More complex than it has been said in the Treaty, this principle raise a lot of questions in practice, such as the scope for the application, the standard for "necessary to achieve the objectives" as well as the standard for "cannot be sufficiently achieved by the Member States" and "can be better achieved by the Community". Certainly, it is the ECJ who is responsible for interpreting these questions<sup>78</sup>.

#### 4.2 Competence and Responsibility of Major EU Institutions

In addition to the issue of competence allocation between the EU and the Member States, another relevant but different issue is competence division among different EU institutions. The principle of Community institutional balance,

76 See *Opinion 1/94*, *supra* note 71 at para. 108. Also see *Ruling 1/78*, *supra* note 69 at paras. 34-36, and *Opinion 2/91*, *Re the ILO Convention 170 on Chemicals at Work*, [1993] ECR I-1061.

77 Analyse on "the duty of cooperation" governing the participation of the EC and its Member States in international organizations can be found in Stephen Hyett, "The duty of Co-operation: A Flexible Concept", in Alan Dashwood and Christophe Hillion (eds.), *supra* note 57, pp. 248-253.

78 See Case 84/94 *United Kingdom v. Council* [1996] ECR I-5755; Case C-233/94 *Germany v. European Parliament and Council* [1977] ECR I-2405; Case C-377/98 *Netherlands v. Parliament and Council* [2001] ECR I-7079; Case C-103/01 *Commission v. Germany* [2003] ECR I-5369. More discussion on "the principle of subsidiarity" can be found in Antonio Estella de Noriega, *The EU Principle of Subsidiarity and its Critique*, Oxford University Press, 2002; J. Steiner, "Subsidiarity under the Maastricht Treaty", in David O'Keeffe and Patrick M. Twomey (eds.), *Legal Issues of the Maastricht Treaty*, Chancery, 1994; and European Parliament Fact Sheets on "Subsidiarity", available at: [http://www.europarl.europa.eu/factsheets/1\\_2\\_2\\_en.htm](http://www.europarl.europa.eu/factsheets/1_2_2_en.htm), latest achieved on 30 April 2010.

derived from the *Meroni* judgment<sup>79</sup>, implies that each institution has to act in accordance with the powers conferred on it by the Treaties, in accordance with the division of powers<sup>80</sup>. However, the unclear and uncertainty of the competence division among different EU institutions, consequently, results in constant conflict among these institutions<sup>81</sup>.

The Council of the EU is of great significance in terms of external actions of the EU, especially regarding the CFSP. The Commission plays very important role in negotiating international agreements with third countries or international organisations. However, The Commission only plays a limited role on CFSP/ESDP. The European Parliament has emerged in accordance with the Treaty amendments as a more and more powerful actor. Major affairs the Parliament has impacts on are budgetary affairs, CFSP/ESDP, and agreements approving. The Court of Justice of the EU, generally speaking, is not actively involved in the negotiation and conclusion process of international agreements. However, the Treaties empowered it to ensure that in the interpretation and application of the Treaties the law is observed. Accordingly, the Court of Justice of the EU has the power to review the legality of acts of EU institutions, bodies or agencies. The Treaties provide the Member States, the European Parliament, the Council or the Commission with the opportunity to obtain the opinion from the Court of Justice before concluding the agreement as to whether an agreement envisaged is compatible with the Treaties.

With the entry into force of the Treaty of Lisbon<sup>82</sup>, the European Council

79 Case 9/56 *Meroni & Co., Industrie Metallurgiche, SpA v. High Authority of the European Coal and Steel Community* [1958] ECR English special edition Page 00133.

80 See *Europa Glossary* on “institutional balance”, available at [http://europa.eu/scadplus/glossary/institutional\\_balance\\_en.htm](http://europa.eu/scadplus/glossary/institutional_balance_en.htm), latest achieved on 30 April 2010; Also see Jean-Paul Jacqué, “The Principle of Institutional Balance”, *Common Market Law Review* (41), 2004, pp.383-391; Xenophon A. Yataganas, “The Treaty of Nice: the sharing of power and the institutional balance in the European Union – A continental perspective”, *European Law Journal*, Vol. 7, No. 3, September 2001, pp.242-291; Michael Nentwich and Gerda Falkner, “The Treaty of Amsterdam: Towards a New Institutional Balance”, *European Integration online Papers (EIoP)*, Vol. 1 (1997) n.º 15, available at <http://eiop.or.at/eiop/texte/1997-015.htm>, latest achieved on 30 April 2010.

81 As Fraser Cameron said that these conflicts may be arose not only among the institutions but also within one institution. For example, within the Commission there are struggles over who should control which directorate-generals (DGs), while within the Council there are struggles for the ear of Solana. See Fraser Cameron, *An Introduction to European Foreign Policy*, Routledge, 2007, pp.40-41.

82 Article 15 and 16 TEU. More information on the European Council, see ‘European Council – an official institution of the EU’, available at: <http://www.european-council.europa.eu/the-institution.aspx?lang=en>, latest achieved on 10 June 2010.

became one of the official institutions of the EU. According to Article 16 of the Lisbon Treaty, The Foreign Affairs Council shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent. The role of the European Council has been extended by the Lisbon Treaty to all aspects of the external action of the Union.

The Treaty of Lisbon also contains other two important institutional innovations with a significant impact on the Union's external action<sup>83</sup>: the "permanent" President of the European Council appointed for a renewable term of two and a half years, and the somewhat new High Representative for Foreign Affairs and Security Policy and Vice-President of the Commission. These innovations aim to ensure the consistency and coherence of the EU's action.<sup>84</sup> As designed by the Lisbon Treaty, the High Representative assisted by the European External Action Service should serve to bridge the institutional tension between the Commission and the Council and to settle the unreasonable separation between Community external policies and the CFSP.

#### **4.3 Negotiation and Conclusion of the Partnership and Cooperation Agreement**

Based on the previous introduction and analysis on the competence allocation between the EU and Member States, and competence division among EU institutions, we may turn to the specific question of negotiation and conclusion of the PCA.

According to Article 300 of TEC, which is the procedural legal basis for the PCA, first step for negotiating the agreement is that the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Council, after examining the necessary and appropriateness of the negotiation, will issue directives of negotiating (or negotiation mandate) to the Commission, in which objective, principle, contents, competence division may be defined. There is no single formula regarding the content of the negotiation mandate because it is decided on a case by case basis to meet the various demands of negotiation so as to better safeguard the interests of not only the EU but also its Member States. Such a document is adopted by the Council by a qualified majority, except in the case when the agreement covers a field for which unanimity is required for the adoption of internal rules and for the agreements establishing an association, for which the Council shall act

<sup>83</sup> Article 15(6) and Article 18 TEU.

<sup>84</sup> 'Treaty of Lisbon – the EU in the World', available at: [http://europa.eu/lisbon\\_treaty/glance/external\\_relations/index\\_en.htm](http://europa.eu/lisbon_treaty/glance/external_relations/index_en.htm), latest achieved on 9 July 2010.

unanimously. Speaking of the PCA, the negotiation mandate shall be adopted by qualified majority in some cases such as sea and air transport and by unanimous in the other cases such as approximation of laws, because of the PCA covers wide range of policy areas.

The next step is to negotiate. As mentioned in the previous sections, competence allocation between the EU and the Member States in the process of negotiation is far from clear. Moreover, under the circumstance when the shared competence or the implied competence doctrine applied, the negotiation role of the EU and Member States may be reconsidered and re-allocated in issuing the negotiation mandate. That is to say, the determination of the dividing line between Community and national competence is dissociated from the process of the actual negotiation of a given agreement<sup>85</sup>. As to the economic aspects of the PCA, the Commission may act as the sole negotiator for the EU and its Member States with the conferred power given by the Member States before negotiation. In this regard, it shall be noted that the role of the Commission may be influenced by the remove of the three-pillar structure by the Lisbon Treaty. As to fields where shared competence applied, a joint position may already be obtained between the EU and Member States for the Commission to negotiate with the contracting party. As to the political aspects or in the field of industry and cultural, the main negotiation role will be played by Member States themselves, although joint position may also be obtained under these circumstances. The procedure to obtain such a joint position is different to a large extent from the one to obtain joint position in other fields which fall in the Community competence. The difference lies especially in the occasion when the joint position is hard to obtain. The principle of subsidiarity and the duty of cooperation as discussed before need to be always born in mind during the process of negotiation.

Since the negotiation mandate is a confidential document, as it cannot be accessed by the public, we can only discuss the allocation of competence in negotiating PCA from a theoretical perspective. Firstly, what is clear is that "Political dialogue" part of the PCA is mainly dealt by the Member States since it falls in the national competence; clauses concerning common commercial policy falls within EU's explicit exclusive competence while "right of establishment", "cross-border supply of services", "capital and payments" falls within EU's implicit exclusive competence because the conclusion of clauses concerning these areas may affect common rules or alter their scope. Besides, in the areas of "immigration and asylum", "transport", "approximation of laws", "economic, financial, and technical cooperation", shared competence is applied.

After the finalisation of the negotiation, the procedure turns to the signing

---

85 Panos Koutrakos, *supra* note 9, pp.160-161.

and conclusion. Subject to the powers vested in the Commission, the signing and the conclusion of the PCA shall be decided on by the Council, acting by a qualified majority or acting by unanimous for the fields in which unanimity is required for the adoption of internal rules, on a proposal from the Commission. The Lisbon Treaty modified the procedure in some respects, importantly, the reinforced role of the European Parliament<sup>86</sup>. An Interim Agreement for application trade parts of the PCA, which falls into the Community's competence, is always signed and took effect before the ratification of the PCA because the ratification of the PCA through the ratification procedure of each Member States may take a long time.

## **V Analysis on the Ongoing EU-China Partnership and Cooperation Agreement**

### **5.1 An Overview of EU-China Relationship**

The history of relations between Europeans and Chinese can be traced back at least as far as the beginning of the Christian era. Establishment of the People's Republic of China ("China" in the following text) marks the beginning of a new era of China-Europe relations. However, people were not paying attention to the China-Europe relations in the social background of cold war. At that time, the relationship between China and Europe was in the shadow of the relationship between the Soviet Union and the United States respectively. The end of the cold war brought to an end the bipolar structure of international structure. As to the EU-China relationship, direct interaction and dependent relations between China and the EU has been, generally speaking, successfully carried out. Both China and the EU sought to strength the relations with the other because of the awareness of the importance of each other to the respective external relations.

Three years after the establishment of diplomatic relations between China and the EEC, Trade Agreement between the People's Republic of China and the European Community has been signed<sup>87</sup>. The agreement was aimed at promoting development of trade between China and the EC on the basis of equality and the mutual advantage. Considering new demands of both China and the EU, the two sides concluded the Trade and Economic Cooperation Agreement (TECA)<sup>88</sup>

<sup>86</sup> Article 218, TFEU.

<sup>87</sup> The official signing ceremony took place on 3 April 1978 when the Minister of Trade, Mr Li Xiang was visiting Brussels. The Agreement was signed on the Community's behalf by Mr K.B. Andersen, President of the Council, and Mr Wilhelm Haferkamp, Vice-President of the Commission. It came into force on 1 June 1978. See *Ibid*, p. 3.

<sup>88</sup> Article 10, TECA.

in 1985 which replaced the 1978 Trade Agreement and aimed to form the legal framework of the EU-China relationship. The relationship has experienced a trouble time in 1989 when the Tiananmen Event happened. Nevertheless, end of the twentieth century and new twentieth-first century witnessed gradually stronger and closer relationship between China and the EU. Most notably, a series of policy papers have been delivered by the two sides during these years: "A Long-Term Policy for China-Europe Relations" published by the European Commission in 1995<sup>89</sup>; "Building a Comprehensive Partnership with China" published in 1998<sup>90</sup>; "EU Strategy towards China: Implementation of the 1998 Communication and Future Steps for a more Effective EU Policy" published in 2001<sup>91</sup>; "A Maturing Partnership: Shared Interests and Challenges in EU-China Relations" published in 2003<sup>92</sup>; China's first-ever EU policy paper "A Maturing Partnership: Shared Interests and Challenges in EU-China Relations" published in 2003<sup>93</sup>; "EU-China: Closer Partners, Growing Responsibilities" published by the European Commission in 2006<sup>94</sup>; and "EU-China trade and investment: Competition and Partnership"<sup>95</sup> adopted accompanying the 2006 Communication. Currently, negotiation on the EU-China PCA has still been undertaking since 2006. The new PCA aims to upgrade the 1985 agreement and to reflect the depth and breadth of today's strategic partnership.

## 5.2 Impetus for Negotiating the EU-China PCA

Apart from the general legal framework laid down in the 1985 TECA, the legal framework of EU-China relationship is shaped by other legal instruments with multilevel mechanisms in various areas, both in hard law and soft law forms. However, the comprehensive legal framework of EU-China relationship is absent which may no longer meet the demands of the rapid-developing relationship not only in economic dimension but also in political and social dimension.

Negotiation directives were adopted by the Council on 12 December 2005 for the preparation on the EU side to open the negotiation of EU-China PCA<sup>96</sup>.

89 COM (1995) 279 final.

90 COM (1998) 181 final.

91 COM (2001) 265 final.

92 COM (2003) 533 final.

93 *China's EU Policy Paper*, October 2003, available at: <http://www.fmprc.gov.cn/eng/topics/ceupp/t27708.htm>.

94 COM (2006) 631 final.

95 COM (2006) 632 final.

96 See European Commission, Bulletin of the European Union 12-2005, available at <http://europa.eu/bulletin/en/200512/p106071.htm#anch0295>, latest achieved on 1 May 2010.

Later, in the 9<sup>th</sup> EU-China Summit, the two sides agreed on opening negotiations for a new comprehensive framework agreement. When the Commissioner for External Relations visited Beijing during 16-18 Jan 2007, negotiations on a new PCA were launched. On 12 June 2007, the EU-China Mixed Committee on Economic and Trade announced the official commencement of negotiating the revision of TECA 1985.

It may be said that the impetus for negotiating the new EU-China PCA is, generally speaking, stimulated by the following factors: good timing and favourable geographical location (in Chinese: *Tian Shi Di Li*).

On one hand, it is time for a general legal framework to be adopted to govern the comprehensive EU-China relationship. This is convinced by the fact that the EU-China relations are now managed by fragmentary and multi-level mechanisms. Although they are operating well from the perspective of sectoral cooperation, "strategic partnership" which is the goal of the current EU-China relationship needs a comprehensive framework which can govern this huge cooperation system. Besides, the EU and China have achieved a lot of good results in various fields. However, most of them are achieved without touching the sensitive issues which may disturb the good relationship of the two sides. Nevertheless, in order to promote the relationship to a higher level, it is time for the two sides to seriously and gradually negotiate these sensitive issues and further strength the mutual understanding. Both common and disparity values exist between the EU and China. The degree to which they manage these disparities decides the degree of their relationship. Thus, except the result of current negotiation means a lot to EU-China relationship, the process of negotiation is also of great importance.

On the other hand, China is one of the Asia countries, the fact of which is suitable for the intending 2000s PCA group. As discussed in Chapter 2 that the PCA can be divided into two groups – the 1990s PCA and the 2000s PCA. While the contracting parties of the 1990s PCAs are countries of East Europe and Central Asia, the intending contracting parties of the 2000s PCAs would be Asia countries. Thus, it is natural that the EU-China PCA becomes one member of the 2000s PCAs.

### **5.3 Specific Issues in Negotiating the EU-China Partnership and Cooperation Agreement**

It is certain that the new PCA will reflect a comprehensive partnership and cooperation relationship between the two parties in wide-ranging fields. However, it is not easy to include both economic-related clauses and political-related clauses in one agreement because the different nature of these two areas. Thus, two agreements may be produced to meet the different demands of different areas – one political and the other economic. This possibility is shown in the

Joint Statement of the 9<sup>th</sup> EU-China Summit<sup>97</sup>. Currently, trade and investment negotiating track 5<sup>th</sup> formal round took place in Brussels on 13 November 2009. In addition, a number of technical meetings took place on through the second half of 2009<sup>98</sup>. Although negotiations continue to be slow in major areas, 1/4 of the economic and trade chapters are now finalised with another 1/4 close to finalisation<sup>99</sup>. The next round is foreseen in the early months of 2010<sup>100</sup>. Whether the two agreements – an agreement aimed at replacing the 1985 EC-China TECA and a framework agreement on political cooperation will be incorporated into one complete agreement or not can not be predicted now. However, it is easier to conclude and implement the two relatively separate agreements than a single agreement although the possibility of combining the two together after several years of operation does exist. Since both the EU-China TECA and PCA, especially the PCA, have to be in the form of mixed agreements, their negotiation and conclusion is likely to be time-consuming, because the two new envisaged agreements will have to be ratified not only at the EU level, but also at the national level of each of the 27 Member States<sup>101</sup>.

The fact that no fundamental conflict of interest between China and the EU is often mentioned by both sides and is considered as one important reason for which the EU-China relationship has been developing fast and healthy. However, as the relationship gradually becomes comprehensive towards a new legal framework, not only common interest shall be concerned, but also diversities shall be carefully handled. Common interests of China and EU include but not limited to the followings: both stand for democracy in international relations and support multilateral organization, such as the UN; both are committed to combating international terrorism and promoting sustainable development through poverty elimination and environmental protection endeavours; both are highly complementary economically thanks to their respective advantages; both China and the EU member states have a long history and splendid culture each and stand

97 Joint Statement of the 9<sup>th</sup> EU-China Summit, Helsinki 9 September 2006, available at [http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc\\_130360.pdf](http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_130360.pdf), latest achieved on 9 May 2010.

98 European Commission, Overview of FTA and Other Trade Negotiations, updated 21 April 2010, available at [http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc\\_118238.pdf](http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf), latest achieved on 1 May 2010.

99 *Ibid.*

100 *Ibid.*

101 Zeng Lingliang, 'A Preliminary Perspective of Negotiations of EU-China PCA: A New Bottle Carrying Old Wine or New Wine or Both?', *European Law Journal*, Vol. 15, No. 1, January 2009, p. 129.



for more cultural exchanges and mutual emulation. The political, economic and cultural common understanding and interaction between China and EU offer a solid foundation and provide fertile soil for the continued growth of EU-China relationship<sup>102</sup>.

As bilateral ties have intensified, so has the room for friction, tensions and disappointments which are given by their differences in historical background, cultural heritage, political system and economic development level. The new framework agreement will bring all the contentious issues onto the negotiating table<sup>103</sup>. The toughest negotiations including issues concerning state sovereignty, China's status of "full market economy", arms embargo, values of democracy, human rights and rule of law, commitments of China in the WTO framework, and protection of EU's interests especially trade interests in China. How to deal with these diversities in the spirit of seeking commonality, mutual respect and trust and equal consultation is a big challenge faced by China and the EU. The degree to which they manage these disparities would decide the degree of their relationship. The capacity to settle these differences will determine the future of EU-China relationship.

A special issue in EU-China PCA is that, amendment of the EU Treaties may lead to disparities of PCAs in different Treaty era. The fact that the Lisbon Treaty entered into force on 1 December 2009 indicates that the legal basis and competence allocation would be different from the 1990s PCAs.

Furthermore, policy areas which are strengthened by the Lisbon Treaty and may have impacts on the legal basis and competence allocation include fighting international cross-border crime, illegal immigration, trafficking of women and children, drugs and arms; development policy; climate change and energy. Other amendments made by the Lisbon Treaty which relevant to the EU-China PCA are: it pledges that the EU will uphold and promote the EU's values in the wider world and contribute to peace, security, the sustainable development of the earth, solidarity and respect among peoples, free and fair trade, and the eradication of poverty, which indicates that the EU's values – democracy, rule of law, human rights, freedom and equality would be further strengthened in the future international activities and international agreements<sup>104</sup>; it helps the EU to speak with a single voice in the world, which indicates that more joint or common position would be adopted during the negotiation<sup>105</sup>. New innovations – High

102 See the 2003 China's EU Policy Paper, *supra* note 93.

103 Katinka Barysch, Charles Grant and Mark Leonard, 'Embracing the Dragon: Can the EU and China Be Friends?', *CESifo Forum*, March 2005, p. 10.

104 Article 2 of the *Consolidated Version of the Lisbon Treaty (TEU Part)*, OJ C 83 of 30.03.2010.

105 For the major amendments made by the Lisbon Treaty, see European Commission, *Your Guide to the Lisbon Treaty*, Publications Office of the European Union, 2009.

Representative for Foreign and Security Policy who is also the Vice-President of the Commission and a President of the European Council have been implemented in order to promote the EU action on the international scene and to be better able to defend its interests and values abroad.

## VI Conclusion

The EU manages its external relations by using different strategies towards different regions of the world – Africa, Asia, Caribbean, Central Asia, Latin America, Mediterranean, Middle East and the Gulf, North America, Pacific, Eastern neighbours, etc. Usually, there are corresponding legal framework and/or instruments for countries of different regions. For instance, Framework Cooperation Agreement is for Latin American countries; Euro-Mediterranean Agreement is for Mediterranean partner countries; Cotonou Agreement is for ACP countries; and PCA is for East Europe and Central Asia (and now EU is extending the application of the PCA to other Asia countries).

As we discussed, differences among various types of agreements are not simply the titles but their distinct features and functions. Moreover, even within the same type of agreement, the contents may differ to a large extent. It is the demand of both the EU and the other contracting party decides the title and contents of the agreement. However, this does not mean that the research on one specific group of agreements is meaningless. On the contrary, as the case of PCA, the objectives and the subject matters of the PCAs are almost the same which also results in the fact that the legal bases for these PCAs are almost the same (except the variations due to the Treaty amendments).

Based on the analysis in previous sections, it can be concluded that the PCA is a kind of mixed agreement the EU uses to manage its relations with countries of East Europe and Asia, aiming at providing a comprehensive legal framework for the politic and economic relations with the other contracting party and promoting the contracting party with European and/or international standards.

Negotiation and conclusion of the PCA, as regards to the EU side, involves two types of competence division: competence allocation between the EU and its Member States and competence division among EU institutions. The principle of conferred powers applies to the first type of competence allocation, which means that the EU may act only when the Member States conferred powers to it explicitly or impliedly. When mixed agreement is discussed, coordination among EU institutions and EU Member States becomes extremely important. The Commission would be authorised to open the negotiation by a negotiation mandate issued by the Council, in which general principles, subject matters of the agreement and competence division would be laid down. However, the competence division is not always clear. It may be reconsidered even during the negotiation

process especially when shared competence applied. Generally, a Committee would be designated by the Council to assist the negotiation. The EU institutions and representatives of the Member States conduct their negotiation responsibilities according to their respective competences, although the Commission may be entrusted to conduct the negotiation solely in pursuance of the common position adopted before its negotiation with the other contracting party. The European Parliament has to give its consent to some Council decisions or has to be informed and consulted under other circumstances. The ECJ may be consulted during the process considering the principle of institutional balance and legality of the envisaged agreement under the EU Treaty.

The PCA can be further divided into two groups: the 1990s PCAs and the 2000s PCAs. The 2000s PCAs are now under negotiation except the one with Tajikistan which has already entered into force on 1 January 2010. The lives of the 1990s PCAs are going to the end because the duration of these PCAs are ten years and they entered into force in 1997 – 1999. It is more appropriate to amend the PCAs than to renew them in order to reflect the new changes occurred during these years, such as internal evolution of the party concerned, developments of the EU and the newly launched ENP. To some extent, the 1990 PCAs successfully accomplished their tasks to transfer the national conditions (such as democracy, human rights, rule of law, market economy, etc.) of the parties concerned to a certain level which is more approximate to EU standards and which will further facilitate the cooperation between the EU and the parties concerned.

Although the 1990s PCAs would partly terminate their service, a new generation of PCAs would be born. Although most of this generation PCAs are now under negotiation, it can be predicted that these PCAs would be very different from the 1990s PCAs due to the various national conditions, evolution of the EU and the entry into force of the Treaty of Lisbon. As we said before, even if the title remains the same, the contents of the agreements and the degree of cooperation can differ to a large extent. Moreover, the title of the agreement is subject to change according to the need of the parties. Thus, the title of “PCA” for these new agreements is just provisional. However, the structure and main subject matters of the 1990s PCAs may remain in the 2000s PCAs, as indicated by the PCA with Tajikistan which was signed on 11 October 2004. Since they are entitled “PCA” in negotiation mandates, the orientation of the negotiation of these agreements is to conclude a PCA. As to whether the PCA is brought to new height, the opinion of this article is that the PCA is entering into a new era. On one hand, the 1990s PCA will be amended to adapt new changes such as internal evolution of the contracting parties, developments of the EU and the newly launched EU’s neighbouring policy; and on the other hand, the application of the PCA is extending to other Asia countries whose national conditions are

extremely different from the 1990s contracting parties.

Speaking of the EU-China PCA, it would be divided into two parts: one is for trade and economic cooperation which aims at replacing the current 1985 TECA; and the other is for providing a framework for political cooperation. Because the current legal framework of the EU-China relationship is still the 1985 TECA, to conclude a new EU-China PCA is enjoying the good timing and favourable geographical location. Negotiating and upgrading the EU-China relationship is based on a foundation of common interests between the EU and China. Nevertheless, the EU and China also have difficulty in deepening mutual understanding due to the different history they experienced and different political systems they have.

The degree to which the EU and China manage their disparities especially on sensitive issues decides the degree of the success of the PCA. If the two sides develop their relations setting aside their disparities, they might maintain their relationship in a certain good atmosphere; nevertheless, they could never meet the nature of "strategic partner" as each side has designated the other one. It is time for the two sides to patiently deal with these tough issues in order to upgrade the relationship. Politically, values such as democracy, human rights and rule of law are understood differently by China and the EU although both of the two sides agree that these values shall be promoted. Besides, the EU is assisting China's development on one hand, and is afraid of China's fast development on the other hand. The reflections are EU's hesitating in lifting arms embargo on China and its reluctant in recognising China's fully market economy status. Economically, the EU makes use of measures such as anti-dumping and environmental requirements to raise the market access so as to reduce the import from China<sup>106</sup>.

The most difficult matter in negotiating the EU-China PCA, from the point of view of this article, is that the EU and China have different demands and expectations on this PCA. The EU calls for China's more active attitude in affording international responsibility and expects that China could develop with the European or international standard; however, China wants the EU to assist China's domestic development and expects that the EU could respect China's mode of development. The EU is now asserting more and more important role in world affairs. It prefers to settle the international disputes by negotiating and it supports multi-literalism which is welcomed by China. However, the EU consistently and insistently promotes its values and systems to other countries especially to developing countries. Sometimes, it even intervenes in the state sovereignty of other countries which cannot be accepted by China. As this article concerned, on one hand, the EU should try to think from the stand of China, understand the

106 See China Institute of International Studies, *supra* note 45, p.165.

real need of China, and correctly evaluate the role of China; and on the other hand, China should also understand the policy and integration of the EU and try to accept the ideas or values which are good for its development. The policy and measures of the EU cannot simply be understood as they are adopted by the EU solely, because the EU consists of 27 sovereign States and each Member State has to consider the interests of EU as a whole as well as consider its own national interests during the decision-making process. Policies made by EU are influenced more or less by the Member States.

It is fair to say that the current EU-China relationship has not met the degree of strategic partnership since there still a large distance to mutual understanding and mutual trust. The PCA negotiated now is a framework agreement, thus it cannot be expected as it may solve all the remaining problems. However, what can be expected is that the PCA may open the window and provide good foundation and condition for settling tough issues gradually. As we said before, the negotiation process is as important as or maybe more important than the result of the PCA, because the negotiation process may offer great opportunities for equal, friend and frank dialogues which may contribute to promote mutual understanding. The extent of compromises in the negotiation is crucial – more compromise, the new PCA would hardly be well implemented; less compromise, the Agreement might be just a formalised statement without substantive significance. In any case, in order to reach a satisfactory result, the common interests and common goals shall be made good use of, while the divergences shall be carefully dealt with, and the new challenges shall be handled together by mutual respect, mutual understanding and joint efforts as strategic partners. Although the negotiation of the new PCA is still in process, one thing we may be sure of is that this PCA will be a milestone of EU-China relationship, especially in terms of legal framework of the relationship.

