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CHINA, FREE TRADE AGREEMENTS AND WTO LAW: A  
PERSPECTIVE ON THE TRADE IN SERVICES

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## **Abstract**

China's free trade agreements in services are developing at a fast pace. This paper examines the major differences between these agreements and the General Agreement on Trade in Services (GATS) and their relationship with the law of the World Trade Organization (WTO). Although they are modeled on the GATS, amongst other things these agreements differ in their scope and coverage, origin rules, transparency and good governance.

## **Keywords**

WTO, China, FTAs, Services

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## Introduction

China's first free trade agreement (FTA) was the result of its accession to the First Agreement on Trade Negotiations among Developing Member Countries of the Economic and Social Commission for Asia and the Pacific (Bangkok Agreement, now renamed Asia Pacific Trade Agreement (APTA) in 2001).<sup>1</sup> China has continued to conclude FTAs both within China and with other developing or developed countries.<sup>2</sup> Apart from the APTA, these FTAs also deal with trade in services and can be classified in three categories: economic integration agreements, standard regional trade agreements with other countries in the Asia-Pacific region, and bilateral free trade agreements with non-Asian countries.<sup>3</sup> Given the increasingly important role China plays in international trade, the FTAs signed by China may have a significant effect on multilateral economic governance. The services trade rules in these FTAs deserve some consideration since China has highlighted the significance of services trade as it seeks to upgrade its trade pattern. Nevertheless, services trade has received less attention in the literature than FTA rules involving trade in goods and so China's FTAs in services will be the focus of this paper. The following three questions are discussed: What are the differences between China's services FTAs and the General Agreement on Trade in Services (GATS), and what are the reasons for them? Are China's services FTAs consistent with the GATS? How should inconsistencies between these FTAs and WTO law be handled?

## China's FTAs in services: an overview

As of June 2009, the FTAs involving services trade signed by China (China's services FTAs) are: (a) the Mainland and Hong Kong Closer Economic Partnership Arrangement (Mainland-Hong Kong CEPA), which was signed on 29 June 2003 and came into force on 1 January 2004;<sup>4</sup> (b) the Mainland and Macao Closer Economic Partnership Arrangement (Mainland-Macao CEPA), which was signed on 17 October 2003 and became effective 1 January 2004;<sup>5</sup> (c) the Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Cooperation between China and ASEAN (China-ASEAN ATS), which was signed on 14 January 2007 and entered into force on 1 July 2007;<sup>6</sup> (d) the Free Trade Agreement between China and New Zealand (China-NZ FTA), which was signed on 7 April 2008 and entered into force on 1 October 2008;<sup>7</sup> (e) the Supplementary Agreement on Trade in Services of the Free Trade Agreement between China and Chile (China-Chile ATS), which

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<sup>1</sup> The Asia-Pacific Trade Agreement (APTA), signed in Beijing, 2 November 2005, [http://www.unescap.org/tid/apta/ta\\_amend.pdf](http://www.unescap.org/tid/apta/ta_amend.pdf).

<sup>2</sup> The term 'free trade agreements (FTAs)' is used in a broad sense in this article so as to embrace any agreements seeking to provide for the liberalization of trade, be they bilateral, regional or plurilateral, and regardless of the official designation given to them by the parties (Free Trade Agreement, Closer Economic Partnership Arrangement, Framework Agreement on Comprehensive Economic Cooperation, Agreement on Trade in Services, *etc.*). A party to an FTAs is not necessarily a country and can be a separate customs territory 'possessing full autonomy in the conduct of its external commercial relations', as stipulated in Article XII:1 of the WTO Agreement. See WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations, the Legal Texts* (Geneva, 2003), 3.

<sup>3</sup> Francis Snyder, 'China, Regional Trade Agreements and WTO Law', 43 (1) *Journal of World Trade* 1 (2009), at 6.

<sup>4</sup> Mainland and Hong Kong Closer Economic Partnership Arrangement (Mainland-Hong Kong CEPA), signed in Hong Kong, 29 June 2003, [http://www.tid.gov.hk/english/cepa/legaltext/cepa\\_legaltext.html](http://www.tid.gov.hk/english/cepa/legaltext/cepa_legaltext.html).

<sup>5</sup> Mainland and Macao Closer Economic Partnership Arrangement (Mainland-Macao CEPA), signed in Macao, 17 October 2003, [http://www.economia.gov.mo/web/DSE/public?\\_nfpb=true&\\_pageLabel=Pg\\_CEPA\\_Index&locale=en\\_US](http://www.economia.gov.mo/web/DSE/public?_nfpb=true&_pageLabel=Pg_CEPA_Index&locale=en_US).

<sup>6</sup> Agreement on Trade in Service of the Framework Agreement on Comprehensive Economic Cooperation between China and ASEAN (China-ASEAN ATS), signed in Cebu, the Philippines, 14 January 2007, <http://gjs2.mofcom.gov.cn/aarticle/policyreleasingcenter/200704/20070404583449.html>.

<sup>7</sup> Free Trade Agreement between China and New Zealand (China-NZ FTA), signed in Beijing, 7 April 2008, <http://gjs.mofcom.gov.cn/accessory/200804/1208158780064.pdf>.

was signed on 13 April 2008 and became effective 1 August 2010;<sup>8</sup> (f) the Free Trade Agreement between China and Singapore (China-Singapore FTA), which was signed on 23 October 2008 and became effective on 1 January 2009;<sup>9</sup> (g) the Agreement on Trade in Services between China and Pakistan (China-Pakistan ATS), which was signed on 21 February 2009 and entered into force on 10 October 2009;<sup>10</sup> (h) the Free Trade Agreement between China and Peru (China-Peru FTA), which was concluded on 28 April 2009 and became effective on 1 March 2010.<sup>11</sup>

The Mainland-Hong Kong CEPA and Mainland-Macao CEPA are special since they are arrangements between different parts of China. They are also ‘the first free trade agreement[s] that [were] fully implemented by the Mainland’,<sup>12</sup> and their rules in services trade are, to a large extent, alike. For both of these Arrangements, supplementary agreements dealing with services trade have been concluded annually since 2004. Due to the special features of these two CEPAs and space constraints, more emphasis will be put on China’s other services FTAs in this paper.

Study of these FTAs in services reveals their implications for multilateral economic governance, particularly for the WTO. This paper will first analyze the differences between China’s services FTAs and the GATS, and the reasons for them. During the analysis, it will also discuss whether China’s FTAs are compliant with WTO law. Conclusions will then be drawn and the major challenges of China’s services FTAs and their possible solutions will be considered and proposed.

### China’s services FTAs and WTO law

On 14 December 2006, the General Council of the WTO established on a provisional basis a new transparency mechanism for all FTAs, which provides for the early announcement of any FTA and notification to the WTO.<sup>13</sup> Several types can be notified.<sup>14</sup> As of July 2009, China had notified the WTO of ten FTAs (with eight different partners), and made early announcements of two more (with Australia and Norway).<sup>15</sup> The factual presentations of China’s relatively earlier services FTAs are now in preparation for the WTO consideration process. These include the China-ASEAN ATS, the Mainland-Hong Kong CEPA, and the China-NZ and China-Singapore FTAs. The factual abstract of the Mainland-Macao CEPA has been distributed, and it includes an abstract on services trade. No substantial objections seem to have been raised by other Members of the WTO in the process.<sup>16</sup>

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<sup>8</sup> Supplementary Agreement on Trade in Services to the Free Trade Agreement between China and Chile (China-Chile ATS), signed in Sanya, Hainan Province, China, 13 April 2008, [http://fta.mofcom.gov.cn/chile/xieyi/xieyizhengwen\\_en.pdf](http://fta.mofcom.gov.cn/chile/xieyi/xieyizhengwen_en.pdf).

<sup>9</sup> Free Trade Agreement between China and Singapore (China-Singapore FTA), signed in Beijing, 23 October 2008, [http://fta.mofcom.gov.cn/singapore/doc/cs\\_xieyi\\_en.zip](http://fta.mofcom.gov.cn/singapore/doc/cs_xieyi_en.zip).

<sup>10</sup> Agreement on Trade in Services between China and Pakistan (China-Pakistan ATS), signed in Wuhan, 21 February 2009, [http://fta.mofcom.gov.cn/pakistan/xieyi/xiedingwenben\\_en.pdf](http://fta.mofcom.gov.cn/pakistan/xieyi/xiedingwenben_en.pdf).

<sup>11</sup> Free Trade Agreement between China and Peru (China-Peru FTA), signed in Beijing, 28 April 2009, [http://fta.mofcom.gov.cn/bilu/annex/bilu\\_xdwb\\_en.pdf](http://fta.mofcom.gov.cn/bilu/annex/bilu_xdwb_en.pdf).

<sup>12</sup> Ministry of Commerce of China, Department of Taiwan, Hong Kong and Macao Affairs, ‘Editors’ Preface’, <http://tga.mofcom.gov.cn/aarticle/Nocategory/200612/20061204086002.html> (visited 18 July 2007).

<sup>13</sup> Transparency Mechanism for Regional Trade Agreements, WT/L/671, Adopted on 18 December 2006.

<sup>14</sup> These types of RTAs are: an FTA as defined in para 8(b) of Article XXIV of the GATT 1994; a customs union (CU) as defined in para 8(a) of Article XXIV of the GATT 1994; an economic integration agreement (EIA) as defined in Article V of the GATS Agreement; and a preferential trade agreement (PTA) as provided for in para 2(c) of the Enabling Clause. WTO Secretariat, ‘Regional Trade Agreements Information System (RTA-IS) User Guide’, [http://rtais.wto.org/UserGuide/RTAIS\\_USER\\_GUIDE\\_EN.html#\\_Toc201649634](http://rtais.wto.org/UserGuide/RTAIS_USER_GUIDE_EN.html#_Toc201649634) (visited 26 May 2009).

<sup>15</sup> WTO Secretariat, ‘Regional Trade Agreement Database’, <http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?enc=BGNDa09i1u5NEK0fWo0Yn7u86VXIYA8JFWG+eFcVR+o=> (visited 26 May 2009). For instance, two RTAs concluded by China and ASEAN on goods and services have been notified.

<sup>16</sup> Questions and answers on the services trade rules of the Mainland-Macao CEPA can be found in two documents: Closer Economic Partnership Arrangement between China and Macao, China-Questions and Replies, WT/REG163/6, Adopted on 20 March 2006, and Closer Economic Partnership Arrangement between China and Macao, China-Questions and Replies, WT/REG163/5, 24 May 2005.



According to the WTO's website, the more recent China-Chile ATS, the China-Pakistan ATS, and the China-Peru FTA are also notified and their factual abstracts are in preparation for the WTO consideration process.<sup>17</sup> The following sections will probe into five aspects of China's FTAs in services and WTO law: coverage and scope, elimination of discrimination, origin rules, transparency and good governance, and other issues.

### ***Coverage and scope***

Apart from the Mainland-Hong Kong and Mainland-Macao CEPAs, China's services FTAs exclude certain services from their coverage. In many cases, the FTAs have adopted exactly the same or similar coverage as the GATS, which excludes traffic rights and services directly related to their exercise, government procurement, subsidies or measures affecting natural persons seeking access to the employment market, and measures regarding citizenship, residence or employment on a permanent basis.<sup>18</sup> Services in the exercise of government authority are also excluded from the coverage of the services FTAs, but future GATS disciplines on subsidies are to be taken into consideration.<sup>19</sup> On the other hand, aircraft repair and maintenance services, the selling and marketing of air transport services and computer reservation system services are expressly covered in nearly all the services FTAs. Although the China-ASEAN ATS does not expressly stipulate these two kinds of services, they are not excluded and so should also be covered. Despite it not being expressly indicated in their provisions, the Mainland-Hong Kong and Mainland-Macao CEPAs are expected to follow the GATS coverage and exclusions.

Unlike the WTO, these FTAs also exclude certain services from their scope, including cabotage in maritime transport services,<sup>20</sup> financial services,<sup>21</sup> and air services.<sup>22</sup> The reason for the exclusion of financial services is probably the sensitivity of the financial sector. If China made additional commitments in financial services in one FTA, it would probably be expected to make similar commitments in other FTAs and may want to avoid this situation. Moreover, China made deep and significant commitments in service sectors, in particular in the financial sector at its WTO accession. These commitments stand in sharp contrast with the standstill commitments undertaken by the original Members. Additional commitments in the financial sector would be difficult for China. The GATS requires FTAs to have substantial sectoral coverage, which may be understood in terms of number of sectors, volume of trade affected and modes of supply.<sup>23</sup> This applies, of course, not only to China's FTAs but also to those of other countries. However, both the Korea-Chile FTA and the Trans-Pacific CEPA exclude financial services and it is common practice to exclude the air and maritime transport

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<sup>17</sup> See note 15 above.

<sup>18</sup> See note 9 above, Article 60 (excluding traffic rights and services directly related to the exercise of traffic rights, government procurement, and subsidies); see note 6 above, Article 2.2(b) (excluding government procurement); see note 10 above, Article 2.2 (excluding government procurement, subsidies, traffic rights or excise of traffic rights, measures affecting natural persons seeking access to the employment market and measures regarding citizenship, residence or employment on a permanent basis); see note 11 above, Article 105 (excluding government procurement, traffic rights, and subsidies. No obligation is imposed on natural persons seeking access to the employment market, to be employed on a permanent basis); see note 10 above, Article 1.2 (excluding government procurement, and subsidies); see note 7 above, Article 105.2 (excluding government procurement, subsidies, air traffic rights and the exercise of air traffic rights, and measures affecting natural persons seeking access to the employment market).

<sup>19</sup> See note 9 above, Article 60.3 (b).

<sup>20</sup> See note 8 above, Article 2.2(e).

<sup>21</sup> See note 10 above, Articles 1.2 and 4.3; see note 11 above, Article 105.7 (the rules on services trade do not apply to measures affecting the supply of financial services except for the list of financial services specific commitments in the Schedule of Specific Commitments under the FTA).

<sup>22</sup> See note 11 above, Article 105.3(b); see note 8 above (speciality air services, airport operation services and ground handling services are covered by the ATS).

<sup>23</sup> Article V: 1(a) of the GATS Agreement.

subsectors.<sup>24</sup> For developed countries, it remains unclear whether such exclusion of financial services is consistent with GATS Article V. However, the parties to China's services FTAs listed above, which are developing countries (China, Chile, Pakistan and Peru), are entitled to flexibility in the sectoral coverage requirement in accordance with their development level in overall and individual (sub)sectors,<sup>25</sup> and therefore China's FTAs in services are most likely to be compliant with the GATS.

A further question requiring clarification is how the flexibility provided for in GATS Art V:3(a) is to be afforded, and whether it allows the exclusion of any service sector. GATS Art V:3(a) refers to the conditions set out in Article V:1, 'particularly with reference to' Article V:1(b). As indicated above, the substantial sectoral coverage of Article V:1(a) is to be treated with flexibility since it is part of Article V:1. However, it remains unclear whether different degrees of flexibility are available to Article V:1(a) and Article V:1(b), especially since Article V:3(a) particularly refers to V:1(b) rather than V:1(a).

### ***Elimination of discrimination***

The test in GATS Article V:1 on economic integration contains two parts. Besides the requirement for substantial sectoral coverage, there is also that for the elimination of discrimination.<sup>26</sup> The GATS requires the absence or elimination of 'substantially all discrimination' in the sense of national treatment through the elimination of current discriminatory measures,<sup>27</sup> and/or the prohibition of new or more discriminatory measures.<sup>28</sup> Measures falling purely within the discipline of market access are not subject to this provision. Similarly, some of China's services FTAs have measures inconsistent with both market access and national treatment inscribed in the market access column. Under certain circumstances, it can be difficult to differentiate between the measures regarding national treatment and those regarding market access.<sup>29</sup> Even some of the market access limitations listed in GATS Article XVI:2 may under certain circumstances theoretically constitute limitations on national treatment if they modify the conditions of competition.<sup>30</sup> This makes the determination of substantially all discrimination under the national treatment discipline more complicated. The following analysis focuses mainly on the elimination of discrimination by China (or the Mainland in the context of the Mainland-Hong Kong and the Mainland-Macao CEPAs).

To determine whether there is an absence or elimination of discrimination under the national treatment discipline in the services FTAs, it is relevant to study the status of limitations on national treatment under the GATS because nearly all the signatories of China's services FTAs are Members. Moreover, commitments under China's services FTAs are actually based on commitments in WTO law. Discrimination under the WTO could therefore constitute the backdrop, or a kind of benchmark, for the discussion of elimination of substantially all discrimination in China's services FTAs.

In China's WTO services commitments, no restriction usually exists on national treatment for modes 1 (cross-border) and 2 (consumption abroad), except for a few sectors, such as distribution, education services, and motor vehicle financing by non-bank financial institutions. There are very limited restrictions on national treatment for mode 3 (commercial presence), such as a residence requirement for representatives in legal services, but no substantial discriminatory measures. Some

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<sup>24</sup> Thomas Cottier and Martin Molinuevo, 'Article V GATS', in Rudiger Wolfrum, Peter-Tobias Stoll, and Clemens Feinaugle (eds), *WTO-Trade in Services* (Leiden: Martinus Nijhoff Publishers, 2008), 125-151, at 131.

<sup>25</sup> Article V:3(a) of the GATS Agreement.

<sup>26</sup> *Ibid*, Article V:1(b).

<sup>27</sup> *Ibid*, Article V:1(b)(i).

<sup>28</sup> *Ibid*, Article V:1(b)(ii).

<sup>29</sup> For examples of frequently scheduled national treatment restrictions, see Council for Trade in Services, Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), adopted on 23 March 2001, S/L/92, Attachment 1.

<sup>30</sup> For an analysis of the relationship between Articles XVI and XVII of the GATS Agreement, see Petros C. Mavroidis, 'Highway XVI Re-visited: The Road from Non-discrimination to Market Access in GATS', 6 *World Trade Review*, 1 (2007).

limitations exist under mode 4 (presence of natural persons). These limitations are either unbound except as indicated in horizontal commitments or qualifications requirements. In the former case, national treatment is not available except in measures concerning the entry and temporary stay of natural persons who fall into the categories referred to in the market access column. In general, with China's accession to the WTO there are 'surprisingly few' limitations on national treatment, and China's commitments in this respect are deeper and wider than those of all other country groups.<sup>31</sup> In other words, a striking aspect of China's WTO services commitments is a willingness to commit to full national treatment for foreign providers across modes and sectors.<sup>32</sup>

The following paragraphs discuss the Mainland-Hong Kong and Mainland-Macao CEPAs and China's other services FTAs, and discuss whether they are compliant with the GATS on the elimination of discrimination.

### The Mainland-Hong Kong CEPA and the Mainland-Macao CEPA

Among China's services FTAs, the Mainland-Hong Kong and Mainland-Macao CEPAs have made the most substantial progress in eliminating discrimination. This is mainly due to the fact that they are arrangements within China and the two CEPAs are, to a large extent, alike. Due to space constraints, the analysis here will focus on the Mainland-Hong Kong CEPA. This CEPA stipulates at the outset that trade in services is to be progressively liberalized through the 'reduction or elimination of substantially all discriminatory measures',<sup>33</sup> closely following the wording of GATS Article V. The schedule of commitments for services trade is not divided into two columns of national treatment and market access as are the GATS commitment schedules. Some discrimination in the sense of national treatment has been eliminated. Examples are as follows: the residency requirement is waived for Hong Kong representatives stationed in the Mainland representative offices of Hong Kong law firms (offices);<sup>34</sup> when Hong Kong accountants apply for a license to practice in the Mainland, the length of auditing experience that they have acquired in Hong Kong is considered equivalent to auditing experience acquired in the Mainland;<sup>35</sup> television dramas co-produced by the Mainland and Hong Kong are subject to the same standards on the number of episodes as those applicable to Mainland (that is, domestically produced) ones;<sup>36</sup> relevant enterprises established by Hong Kong service providers in the Mainland are subject to the same registered capital requirement as that for Mainland enterprises in a number of areas (air transport sales agencies,<sup>37</sup> wholly-owned employment intermediaries in Guangdong Province,<sup>38</sup> printing enterprises providing services regarding packaging materials,<sup>39</sup> and publication distribution enterprises<sup>40</sup>); Hong Kong service suppliers must follow the same conditions as are applicable to Mainland practitioners when opening one-person clinics.<sup>41</sup>

Furthermore, the Mainland-Hong Kong CEPA also contains commitments for service sectors not set out in GNS/W/120<sup>42</sup>, such as for trademark agencies, patent agencies, and individually owned stores.<sup>43</sup> These commitments also help to eliminate discrimination. In recent years, annual

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<sup>31</sup> Aaditya Mattoo, 'China's Accession to the WTO: The Services Dimension', 6 *Journal of International Economic Law*, 299 (2003), at 302, 321.

<sup>32</sup> *Ibid.*, at 304.

<sup>33</sup> See above n 4, Article 1.2.

<sup>34</sup> Annex to Supplement III to the Mainland-Hong Kong CEPA, at 1.

<sup>35</sup> Annex 3 to Supplement to the Mainland-Hong Kong CEPA, at 2.

<sup>36</sup> Annex 2 to Supplement II to the Mainland-Hong Kong CEPA, at 6.

<sup>37</sup> *Ibid.*, at 8; See note 34 above, at 12.

<sup>38</sup> Annex to Supplement V to the Mainland-Hong Kong CEPA, at 5.

<sup>39</sup> *Ibid.*, at 7.

<sup>40</sup> Annex to Supplement VI to the Mainland-Hong Kong CEPA, at 12.

<sup>41</sup> Annex to Supplement IV to the Mainland-Hong Kong CEPA, at 2.

<sup>42</sup> GATT Secretariat, *Services Sectoral Classification List: Note by the Secretariat*, MTN.GNS/W/120, 10 July 1991.

<sup>43</sup> See note 35 above, at 21-24.

supplements to the Mainland-Hong Kong CEPA have been added which highlight the services trade,<sup>44</sup> a process which continues to further the elimination of discrimination. One example is that a waiver of the residence requirement was first applied to Hong Kong representatives stationed in the Mainland offices of Hong Kong law firms in Shenzhen and Guangzhou<sup>45</sup>, and was then expanded to Hong Kong representatives in such offices throughout the Mainland.<sup>46</sup> Similarly, enterprises established by Hong Kong service suppliers to provide air transport sales agency services are subject to an equal registered capital requirement. Such treatment was originally applied only to enterprises in the form of equity joint ventures or contractual joint ventures, but then expanded to wholly-owned ones.<sup>47</sup> In general, new or more discriminatory measures are not to be found under the Hong Kong and Macao CEPAs and are actually prohibited.

### China's other services FTAs

With regard to the other services FTAs, several observations can be made. First, compliance with GATS Article V is highlighted, at least in the wording of the FTAs. Such compliance is either in the form of a direct declaration or in the adoption of similar wording to the GATS. The China-Singapore FTA indicates that the liberalization and promotion of services trade is to be consistent with GATS Article V;<sup>48</sup> the China-Peru FTA confirms consistency with GATS Article V as the underlying principle for the establishment of the free trade area;<sup>49</sup> and the China-ASEAN ATS begins by mentioning the aim to 'eliminate substantially all discrimination and/or prohibition of new or more discriminatory measures with respect to trade in services,'<sup>50</sup> a provision that closely follows GATS Article V:1(b).

Second, the commitments in these services FTAs are built on WTO commitments. For example, the China-Singapore FTA expressly reaffirms the parties' desire to 'build upon their commitments' to the WTO,<sup>51</sup> and in the China-Chile ATS the two parties' schedules of specific commitments under the GATS have been incorporated, except for financial services.<sup>52</sup> Similarly, the China-NZ FTA incorporates WTO commitments in respect of the presence of natural persons mode,<sup>53</sup> and the China-Pakistan ATS is built on the two countries' respective rights and obligations under the WTO Agreement and other multilateral, regional and bilateral instruments of cooperation<sup>54</sup> and affirms their rights and obligations with respect to each other under the WTO<sup>55</sup>.

Third, for some service sectors and subsectors, there is elimination of discrimination in the sense of national treatment. For instance, services incidental to mining are added to China's schedule of commitments under the China-Peru FTA, although they are not found among China's WTO commitments. For this service subsector, limitations on national treatment for modes 2 and 3 are abolished.<sup>56</sup> The commitments of some of China's partners make more substantial progress still. For

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<sup>44</sup> In the supplements to the CEPAs, starting from Supplement III in 2006, there are only annexes on service trade and no annex on trade in goods.

<sup>45</sup> See note 4 above, Table 1, Annex 4, at 4.

<sup>46</sup> See note 34 above, at 1.

<sup>47</sup> *Ibid.*, at 8; see note 36 above, at 12.

<sup>48</sup> See note 9 above, Article 2(b).

<sup>49</sup> See note 11 above, Article 2.

<sup>50</sup> See note 6 above, Preamble, para 3.

<sup>51</sup> See note 9 above, Preamble, para 11.

<sup>52</sup> See note 8 above, Article 4.3.

<sup>53</sup> See note 7 above, Annex 10, Part A, para 2 and Part B, para 3. In the China-NZ FTA, specific commitments under modes 1, 2, 3 are collected in Annex 8. The specific commitments in respect of mode 4 are separated from the other modes and are set out in Annex 10.

<sup>54</sup> See note 10 above, Preamble, para 3.

<sup>55</sup> *Ibid.*, Article 3.

<sup>56</sup> See note 11 above, Annex 6, Section A, at 14.

example, Pakistan has eliminated the limitations on national treatment as well, opening 56 service sectors and subsectors which are not committed under the WTO in the China-Pakistan ATS.<sup>57</sup> For many of the newly-opened sectors and subsectors there is an elimination of discriminatory measures in the sense of national treatment, particularly for modes 1 and 2, and sometimes for 3. These newly-opened sectors include distribution services,<sup>58</sup> educational services,<sup>59</sup> transport services,<sup>60</sup> and recreational, cultural and sporting services.<sup>61</sup> Elimination of discrimination in the discipline of national treatment can also be found in newly-opened subsectors such as computer and related services,<sup>62</sup> courier services,<sup>63</sup> architectural services,<sup>64</sup> veterinary services,<sup>65</sup> printing and publishing,<sup>66</sup> as well as services provided by midwives, nurses, physiotherapists, and para-medical personnel.<sup>67</sup> These commitments are consistent with the observation that the China-Pakistan ATS is the most liberalized and comprehensive services FTA ever signed by either China or Pakistan with other countries.<sup>68</sup>

### China's services FTAs and the elimination of discrimination

Based on a cursory review of the actual level of liberalization provided in these agreements, two features can be found in terms of eliminating discrimination in the national treatment discipline. One is that generally there are not many new commitments by China on national treatment in its services FTAs, except in the CEPAs with Hong Kong and Macao. There are more commitments in terms of market access. The reason is that China's WTO commitments on national treatment are already much deeper and wider in comparison with other Members. Given this, it is not surprising to find that the service commitments in China's services FTAs have not gone very much further. Furthermore, in the current practice of FTAs it is rare to find full national treatment for services. For instance, none of the East Asian preferential trade agreements provide for full national treatment across all sectors and modes.<sup>69</sup> The other feature of China's services FTAs in terms of eliminating discrimination is that China's commitments are based on its WTO commitments, meaning that new or more discriminatory measures are not in any case allowed.

The GATS requires the absence or elimination of 'substantially all discrimination' in the sense of national treatment through the elimination of current discriminatory measures,<sup>70</sup> and/or prohibiting new or more discriminatory measures.<sup>71</sup> China's services FTAs probably satisfy the requirement for the following reasons. First, they have made substantial eliminations of discriminatory rules, particularly for national treatment, as in the Mainland-Hong Kong CEPA and the China-Pakistan ATS. There are also prohibitions against new or more discriminatory rules. The GATS expressly allows the absence or elimination of substantially all discrimination through the prohibition of new or more

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<sup>57</sup> 'Ministry of Commerce Answering Questions on China-Pakistan ATS', [http://www.gov.cn/gzdt/2009-02/23/content\\_1240315.htm](http://www.gov.cn/gzdt/2009-02/23/content_1240315.htm) (visited 4 September 2009).

<sup>58</sup> See above n 10, at 28.

<sup>59</sup> *Ibid.*, at 29.

<sup>60</sup> *Ibid.*, at 46-50.

<sup>61</sup> *Ibid.*, at 45.

<sup>62</sup> *Ibid.*, at 11-13.

<sup>63</sup> *Ibid.*, at 18.

<sup>64</sup> *Ibid.*, at 8.

<sup>65</sup> *Ibid.*, at 10.

<sup>66</sup> *Ibid.*, at 16.

<sup>67</sup> *Ibid.*, at 11.

<sup>68</sup> See note 57 above.

<sup>69</sup> Carsten Fink and Martin Molinuevo, 'East Asian Preferential Trade Agreements in Services: Liberalization Content and WTO Rules', 7 *World Trade Review* (2008) 641, at 662.

<sup>70</sup> See note 27 above.

<sup>71</sup> See note 28 above.

discriminatory measures.<sup>72</sup> Meanwhile, consideration ‘may be’ given to the relationship of the FTAs to a wider process of economic integration or trade liberalization among the parties concerned.<sup>73</sup> This consideration is not compulsory and is rather vague, and in fact the clause is subject to different or even controversial interpretations,<sup>74</sup> meaning that it offers little guidance in evaluating China’s services FTAs. Second, these FTAs probably also satisfy the test of ‘substantially all discrimination’. The reason is that the prohibition of new or future discriminatory measures actually goes across nearly all sectors as the WTO schedules of specific commitments are often incorporated. Third, special treatment is allowed for developing Members. Developing Members are expressly allowed flexibility regarding the elimination of discrimination in consistency with their development level, both overall and of individual (sub)sectors.<sup>75</sup> Taking this provision together with the special treatment allowed to developing members, it may be concluded that China’s services FTAs should be found to be compliant with the GATS since they prohibit the introduction of new or more discriminatory measures and eliminate certain discriminatory measures. Moreover, discrimination may exist under services FTAs if it is justified by GATS Articles XI (payments and transfers), XII (restrictions to safeguard the balance of payments), XIV (general exceptions) or XIV *bis* (security exceptions).<sup>76</sup>

### **Rules of origin**

The origin rules for services in China’s services FTAs follow the wording of the GATS very closely. For instance, nearly all of them incorporate exactly the same definition of ‘owned’ or ‘controlled’ as does the GATS.<sup>77</sup> However, there are also substantial differences from the GATS. Such differences mainly exist in the denial of benefits clause. Moreover, some of the FTAs do not recognize certain entities as service suppliers of a party to the FTA. The denial of benefits and the exclusion of certain service suppliers will be discussed in this section.

### **Denial of benefits**

The China-ASEAN ATS and the China-Singapore FTA adopt nearly the same provision on the denial of benefits as does the GATS,<sup>78</sup> while the origin rules in the China-NZ FTA, China-Chile ATS, China-Pakistan ATS and China-Peru FTA are more lenient, having stricter requirements. First, unlike in the GATS, a party to these FTAs cannot deny benefits to the supply of a service if it is supplied from or in a non-party. In the GATS, on the other hand, such a service would not have access to the benefits.<sup>79</sup> Second, unlike the GATS, the denial of benefits provision does not apply to a service supplier who is a natural person. Third, the benefits denial article only applies to service suppliers which are juridical persons if certain conditions are met: that they are owned or controlled by persons of a non-party or the denying party, and have no substantive business operations in the other party.<sup>80</sup> Even if the juridical person is owned or controlled by a non-party or the denying party, it can, in most cases,<sup>81</sup> enjoy the benefits once it conducts substantive business activities in the other party. In contrast, a

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<sup>72</sup> Ibid. For a different understanding of this article, see note 69 above.

<sup>73</sup> Article V: 2 of the GATS Agreement.

<sup>74</sup> For a detailed analysis of this clause, see note 24 above.

<sup>75</sup> Article V: 3(a) of the GATS Agreement.

<sup>76</sup> Ibid, Article V: 1 (b).

<sup>77</sup> Ibid, Article XXVIII: (n). For an analysis of GATS origin rules, see Heng Wang, ‘WTO Origin Rules for Services and the Defects: Substantial Input Test as One Way Out?’, 44 (5) *Journal of World Trade* 1083 (2010), at 1083–1108.

<sup>78</sup> See note 6 above, Article 31; see note 9 above, Article 75.

<sup>79</sup> Article XXVII:(a) of the GATS Agreement.

<sup>80</sup> See note 7 above, Article 115; See note 8 above, Article 10.1; see note 10 above, Article 24.1; see note 11 above, Article 113.1.

<sup>81</sup> Under Article 24.2 of the China-Pakistan ATS, a party may deny the benefits to a service supplier of the other Party if the service is supplied by a juridical person owned or controlled by persons of a non-party, and that denying party does not maintain diplomatic relations with the non-party.

juridical person under the mode of commercial presence would be denied the benefits of the GATS if it is owned or controlled by persons of a non-Member.<sup>82</sup> In terms of the origin rules embodied in the denial of benefits clause, these FTAs are much more lenient than the GATS and such a denial of benefits clause is likely to be regarded as WTO-consistent. However, some Members have argued that the list of measures exempted from GATS Article V:1 is not exhaustive,<sup>83</sup> and therefore the denial of benefits clause could potentially be exempted from GATS Article V. Even if this is not the case, the GATS provisions on general exceptions and security exceptions may be invoked.<sup>84</sup> Moreover, since the denial of benefits clause also exists in the GATS, the incorporation of this stipulation itself could not easily be regarded as a new discrimination prohibited by GATS Article V:1.

### Exclusion of certain service suppliers

There are origin rules in some of China's services FTAs which exclude certain service suppliers from enjoying their benefits. One example can be found in the China-Pakistan ATS. The offices, liaison offices, 'shell companies' and 'mailbox companies' of companies of a third party that are registered in one of the parties are not service suppliers of the other party.<sup>85</sup> In essence this provision should be read as a measure to prevent the possible evasion of rules, and it ensures that service suppliers have a real economic tie with the parties of the FTAs. This article resembles its counterparts in the Mainland-Hong Kong and Mainland-Macao CEPAs, for instance under the Hong Kong CEPA overseas companies, representative offices, liaison offices, 'mail box companies' and companies specifically established to provide certain services to their parent company registered in Hong Kong are not considered Hong Kong service suppliers and are unable to benefit from the preferences of the FTA.<sup>86</sup> They fall into two categories: non-incorporated (the offices, liaison offices and representative offices) and incorporated entities (shell companies, mailbox companies, overseas companies, and companies specifically established to provide certain services to their parent company). To determine whether these provisions are consistent with the WTO requirements, analysis of the two categories will be conducted separately.

There is no explicit answer in the GATS as to whether non-incorporated entities can enjoy the preferences of FTAs in services. However, a service supplier of a non-party that is a juridical person may enjoy the treatment of economic integration agreements if it is established and involved in substantive business operations in one of the parties to such agreements.<sup>87</sup> Such GATS requirements entail liberal origin rules to extend the preferences under FTAs to service suppliers of other Members, but to be able to enjoy the preferential benefits of FTAs the service supplier must first be a juridical person. The test is therefore whether the non-incorporated entities are juridical persons. Under the GATS, a juridical person is any legal entity constituted or otherwise organized under the applicable law, including among others corporations.<sup>88</sup> However, non-incorporated entities are not listed in the definition of a juridical person, and it is thus not immediately clear whether or not they are to be considered as such. The answer may be found in two provisions of the GATS. One of these is the definition of 'commercial presence', where representative offices and branches are referred to in parallel to juridical persons.<sup>89</sup> The other is the definition of 'service supplier', which separates juridical persons from other forms of commercial presence such as branches or representative

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<sup>82</sup> Articles XXVII (the benefits may be denied to a service supplier that is a juridical person if it is not a service supplier of another Member) and XXVIII (m)(ii) (for a service supplied by commercial presence, a 'juridical person of another Member' should be owned or controlled by persons of that Member) of the GATS Agreement.

<sup>83</sup> WTO Negotiation Group on Rules, Compendium of Issues Related to Regional Trade Agreements, Background Note by the Secretariat, Revision, TN/RL/W/8/Rev. 1, 1 August 2002, paras 91-93.

<sup>84</sup> Articles XIV of the GATS Agreement.

<sup>85</sup> See note 10 above, Article 1, footnote 1.

<sup>86</sup> See note 4 above, Annex 5, para 3.1.1, footnote 1; see note 5 above, Annex 5, para 3.1.1, footnote 1.

<sup>87</sup> Article V:6 of the GATS Agreement.

<sup>88</sup> *Ibid.*, Article XVIII: (l).

<sup>89</sup> *Ibid.*, Article XVIII: (d).

offices.<sup>90</sup> It would therefore seem that non-incorporated entities are not regarded as juridical persons under the GATS and cannot benefit from the treatment of economic integration agreements, and that their exclusion in China's FTAs is not inconsistent with the GATS. Having said this, while the above analysis provides a plausible interpretation, the fact that the definition of juridical person is so broad ('legal entity constituted or otherwise organized') means that different understandings of this issue are potentially possible, and the question deserves further study.

The other issue is whether the exclusion of some incorporated entities is compliant with the GATS. These incorporated entities are juridical persons, and could be constituted in a party to an FTA. The key question here is whether they engage in substantive business operations in the parties to such agreements. It is clear that shell companies and mailbox companies do not engage in real business activities and can hardly satisfy the requirement. Therefore, their exclusion fits the requirement of the GATS. However, it is particularly difficult to determine whether it is GATS-consistent for the Mainland-Hong Kong and Mainland-Macao CEPAs to exclude overseas companies and companies specifically established to provide certain services to their parent company. One problem is that there is no definition of these two kinds of company, and neither are the substantive business operations in GATS Article V:6 clearly defined. Members have the discretion to interpret substantive business operations in their practice, and 'substantive business operations' is defined in the relevant arrangements.<sup>91</sup> However, the text of the GATS may shed some light on this issue. The term 'business operations' is considered to cover production, distribution, marketing, sale and delivery of a service, as stipulated in GATS Article XXVIII:(b) (definition of supply of a service).<sup>92</sup> Companies specifically established to provide certain services to their parent company differ from typical service suppliers since their services are consumed by the parent company. They often do not need to market their services and may fail the substantive business operations test, and such exclusion could be compliant with the GATS.

The exclusion of overseas companies seemingly aims to prevent the evasion of origin rules, but it may be more difficult to analyze its WTO consistency since overseas companies are not defined. Furthermore, there have so far been no disputes in this regard and the parties to an FTA would need to further clarify and justify the exclusion in the case of any dispute. Nevertheless, since the two categories of overseas companies and companies specifically established to provide certain services to their parent company are not expressly excluded in China's other FTAs in services, this would probably not be a major problem.

### ***Transparency and good governance***

Under the WTO, transparency and good governance are originally stipulated in Article X of the General Agreement on Tariffs and Trade (GATT).<sup>93</sup> In some of China's services trade agreements, transparency and good governance is also highlighted, and higher standards are set.

A number of the transparency clauses introduced into China's services FTAs do not apply to all Members. Some of these stipulations are drafted under the shadow of China's WTO-plus obligations. For example, in the China-Chile ATS and China-Peru FTA, the parties are required to respond to inquiries from interested persons regarding services trade rules,<sup>94</sup> while the GATS only requires Members to establish inquiry points to provide information to other Members<sup>95</sup> but sets no obligation

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<sup>90</sup> Ibid, Article XVIII: (g), footnote 12 ('where the service is not supplied directly by a juridical person but through other forms of commercial presence such as a branch or a representative office...').

<sup>91</sup> See note 4 above, Annex 5.

<sup>92</sup> See note 83 above, para 112.

<sup>93</sup> For a discussion on the evolving WTO jurisprudence on transparency and good governance, see Padideh Ala'I, 'From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance', 11 *Journal of International Economic Law* 779 (2008), at 779-802.

<sup>94</sup> See note 8 above, Articles 8(a), and Annex I, para 4 (b) (response to inquiries from interested persons regarding rules relating to the temporary entry of business persons); see note 11 above, Article 114(a).

<sup>95</sup> Article III: 4 of the GATS Agreement.



towards non-governmental entities. These additional stipulations resemble China's WTO-extra commitments to supply information about trade measures on the request of individuals, enterprises or Members<sup>96</sup> and entail more participation of non-state entities in the operation of FTAs.

Moreover, in the process of adopting their final rules on services trade, the parties of these two FTAs are to, when possible and upon request, take into consideration 'substantive comments' received from interested persons with respect to the proposed rules.<sup>97</sup> Under WTO law, such comment obligations are mainly to be found in the Agreement on Technical Barriers to Trade (TBT Agreement)<sup>98</sup> and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)<sup>99</sup> and they apply to proposed technical regulations,<sup>100</sup> proposed conformity assessment procedures,<sup>101</sup> and proposed sanitary or phytosanitary regulations.<sup>102</sup> They do not apply to all Members for international trade in services, and are an additional obligation imposed on China and some recently-acceded Members (RAMs). Upon entry into the WTO, China committed to provide a reasonable period for comments before implementation of a measure, except for those measures involving national security, specific measures setting foreign exchange rates or monetary policy and other measures the publication of which would impede law enforcement.<sup>103</sup> Thus, in these FTAs, to the extent that it is possible, each party is to allow a reasonable period of time between the publication of final rules and their effective date.<sup>104</sup> However, it is notable that there are also some differences between these FTA provisions and China's WTO-extra obligations. One difference is in the term 'substantive comments' adopted in the FTAs, which does not appear in China's WTO commitments. However, as no guidance has been given on how to judge whether a comment is substantive or not it remains to be seen how these provisions work in practice.

Good governance provisions which do not exist in the GATS can also be found in the FTAs and they also seem to be modeled on China's WTO-extra obligations. In the China-ASEAN ATS, China-Singapore FTA, and China-NZ FTA, the authorities are, upon request, to identify the additional information required to complete an application for authorization in the case that it is incomplete,<sup>105</sup> and an opportunity to remedy deficiencies within a reasonable timeframe is also provided for.<sup>106</sup> If an application is terminated or denied, to the maximum extent possible, the authorities are to inform the applicant in writing and 'without delay' of the reasons<sup>107</sup> and the applicant has the possibility of resubmitting a new application.<sup>108</sup> This is essentially the same as the obligations contained in the Report of the Working Party on the Accession of China (Working Party Report).<sup>109</sup> Moreover, the

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<sup>96</sup> Protocol on the Accession of the People's Republic of China (Accession Protocol), WT/L/432, adopted on 10 November 2001, para 2 (C) 3.

<sup>97</sup> See note 8 above, Article 8.2(b); See note 11 above, Article 114 (b).

<sup>98</sup> See note 2 above, 121.

<sup>99</sup> See note 2 above, 59.

<sup>100</sup> Article 2.9 of the TBT Agreement.

<sup>101</sup> *Ibid*, Article 5.6.

<sup>102</sup> Paras 5(d) and 6(c) of Annex 5 of the SPS Agreement.

<sup>103</sup> See note 96 above, para 2(C) 2.

<sup>104</sup> See note 8 above, Article 8.2(c); see note 11 above, Article 114 (c).

<sup>105</sup> See note 6 above, Article 5.3(a); see note 9 above, Article 65.3(a); see note 7 above, Article 111.3(a).

<sup>106</sup> *Ibid*.

<sup>107</sup> See note 6 above, Article 5.3(c); see note 9 above, Article 65.3(c); see note 7 above, Article 111.3(c).

<sup>108</sup> See note 9 above, Article 65.3(c).

<sup>109</sup> Report of the Working Party on the Accession of China (Working Party Report), WT/ACC/CHN/49, Adopted on 10 November 2001, paras 308(e) (the authorities will inform the applicant whether the application is complete and in the case of incomplete applications, identify the additional information that is required to complete the application and provide the opportunity to cure deficiencies), 308 (g) (if an application is terminated or denied, the applicant is to be informed in writing and without delay of the reasons for it. The applicant has the possibility of resubmitting a new application that addresses the reasons for termination or denial).

GATS Reference Paper developed in the Negotiation Group on Basic Telecommunications is also incorporated in the China-Peru FTA.<sup>110</sup> Although not applied to the general membership, this Reference Paper has been attached to the GATS schedules of China and Peru's commitments.

It is notable that some of the good governance requirements in China's services FTAs have not been imposed on it by WTO law. For instance, the application of the law under which transfers and payments may be prevented or delayed is to be 'equitable, non-discriminatory and in good faith'.<sup>111</sup> Another example, in the China-Chile ATS and China-Peru FTA, is that in the notification and consultation requirement for the denial of benefits the denying party shall 'inform in writing and consult with the other party on the specific case of denial'.<sup>112</sup> Prior notification and consultation is also required in the denial of benefits under the China-NZ FTA.<sup>113</sup> A third example is that under the China-Chile ATS and China-NZ FTA, the parties agree to publish explanatory materials on the requirements for temporary entry or make them publicly available in their territories to enable interested persons of the other party to become acquainted with them.<sup>114</sup> Similarly, under the China-NZ FTA parties are to promptly publish and make available modifications or amendments to immigration measures affecting the temporary entry and temporary employment entry of natural persons in such a manner as will enable natural persons of the other Party to become acquainted with them.<sup>115</sup> Similar provision exists in the China-Singapore FTA.<sup>116</sup>

To sum up, China has not only extended some of its WTO-plus obligations in the FTAs with developed and developing countries, but has also taken on new ones and they do not violate the GATS requirements on economic integration arrangements. These higher transparency and good governance provisions help to promote better economic governance and could potentially lay a solid foundation for the development of multilateralism in this regard.

### ***Other Aspects***

There are some other aspects of China's FTAs in services which deserve attention. Given that they have been drafted in the shadow of the GATS, many provisions in them, without express reference, follow the GATS provisions almost *verbatim*, including the interpretative notes. In most of the FTAs, for instance, Article I:2 of the GATS, which provides for four supply modes, is simply reiterated. This meets the GATS requirement that none of the four modes of supply should be *a priori* excluded under FTAs.<sup>117</sup> Future development of the GATS and development beyond the GATS commitments are also taken into consideration. For example, some of China's services FTA leave room to accommodate and develop future GATS negotiation outcomes in respect of emergency safeguard measures,<sup>118</sup> and the parties to the China-ASEAN ATS endeavor to achieve commitments which go beyond their GATS commitments.<sup>119</sup>

However, there are substantial differences in terms of the degree to which the FTAs integrate the GATS. The GATS stipulations on general exceptions and security exceptions are usually incorporated,<sup>120</sup> except for the most recent China-Peru FTA. The provisions on business practice,

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<sup>110</sup> See note 11 above, Article 105.8 (b).

<sup>111</sup> *Ibid*, Article 112.3.

<sup>112</sup> See note 8 above, Article 10.2; see note 11 above, Article 113.2.

<sup>113</sup> See note 7 above, Article 115.

<sup>114</sup> See note 8 above, Annex I, para 4(a); see note 7 above, Article 131 (b).

<sup>115</sup> See note 7 above, Article 131 (c).

<sup>116</sup> See note 9 above, Article 82.

<sup>117</sup> Footnote 1, Article V:1(a) of the GATS Agreement.

<sup>118</sup> See note 9 above, Article 71; see note 6 above, Article 9.1; see note 10 above, Article 9.1.

<sup>119</sup> See note 6 above, Article 21.1.

<sup>120</sup> See note 8 above, Articles 13 (general exceptions) and 14 (security exceptions); see note 12 above, Articles 12 (general exceptions) and 13 (security exceptions).

monopolies and exclusive service suppliers are incorporated in the China-ASEAN ATS,<sup>121</sup> but not in the China-Peru FTA. The review of administrative decisions required by the GATS is not stipulated in the China-Chile ATS or China-Pakistan ATS.<sup>122</sup> But this is not inconsistent with the GATS discipline on economic integration because nearly all the parties to China's FTAs in services are also WTO Members, the exception being Laos, which is a member country of the ASEAN. The omitted GATS provisions would actually apply to these parties as well.

In terms of the incorporation of GATS articles in China's FTAs in services, most-favored-nation (MFN) treatment is one article that is worthy of attention. This is incorporated in the China-New Zealand FTA with regard to services trade.<sup>123</sup> Such MFN treatment applies to seven listed services sectors and is subject to the conditions and qualifications set out there.<sup>124</sup> The sectors listed include environmental, engineering, computer and travel services.<sup>125</sup> This helps further liberalize the services trade. MFN treatment does not apply to the treatment accorded under other agreements which entered into force or were signed prior to the China-NZ FTA.<sup>126</sup>

Some GATS articles have been further developed since they were incorporated into China's services FTAs. One area is that of emergency safeguard measures. The safeguard measures can be taken up under the China-ASEAN ATS and China-Pakistan ATS before the conclusion of relevant WTO negotiations.<sup>127</sup> If the implementation of these FTAs causes a 'substantial adverse impact on a service sector' of a party, the affected party may request consultation, and sympathetic consideration should be given to the party seeking to make a measure.<sup>128</sup> This is drafted in the shadow of the GATS articles on business practices and subsidies.<sup>129</sup> The measures taken under the safeguard article are to be mutually agreed upon by the relevant parties.<sup>130</sup> This new development is absent in the GATS provision on safeguard measures but the safeguard measures should not jeopardize the consistency of the FTAs with the GATS because they have been adopted for the trade in goods,<sup>131</sup> and the GATS is drafted with reference to the GATT. Moreover, GATS Article X does not preclude safeguard measures as discrimination, and provides for their negotiation. As discussed above, some Members believe the list of measures exempted from GATS Article V:1 is not exhaustive and that Article X on safeguard measures could be added to that list.<sup>132</sup> This expansion is also permissible under the Preamble to the GATS, according to which Members retain the right to regulate and to introduce new regulations on the supply of services within their territories in order to meet national policy objectives.<sup>133</sup>

Another area is transfers and payments. The China-Peru FTA makes new developments in this area. Transfers and payments pertaining to the supply of services are permitted to be made in 'a freely usable currency at the market rate of exchange prevailing on the date of transfer.'<sup>134</sup> Payments and transfers may be prevented or delayed under laws on (a) bankruptcy, insolvency or the protection of creditors' rights, (b) issuing, trading or transactions in securities, futures, options or derivatives, (c) financial reporting or record keeping of transfers necessary to assist law enforcement or financial

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<sup>121</sup> See note 6 above, Articles 7 (monopolies and exclusive service suppliers) and 8 (business practices).

<sup>122</sup> Article VI:2 of the GATS Agreement.

<sup>123</sup> See note 7 above, Article 107.

<sup>124</sup> *Ibid*, Article 107.1.

<sup>125</sup> *Ibid*, Annex 9.

<sup>126</sup> *Ibid*, Article 107.2.

<sup>127</sup> See note 6 above, Article 9.2; see note 10 above, Article 9.2.

<sup>128</sup> *Ibid*.

<sup>129</sup> Articles IX:2 and XV:2 of the GATS Agreement.

<sup>130</sup> See note 6 above, Article 9.2; See note 7 above, Article 121; See note 9 above, Article 71; See note 10 above, Article 9.2.

<sup>131</sup> Article XIX of the GATT 1994.

<sup>132</sup> See note 83 above.

<sup>133</sup> *Ibid*, para 91.

<sup>134</sup> See note 11 above, Article 112.2.

regulation, (d) criminal offences, or (e) guaranteeing judgments or orders,<sup>135</sup> a clause which was probably drafted in light of the recent financial crisis. These laws have to be applied in an ‘equitable, non-discriminatory and good faith’ manner.<sup>136</sup> These developments are probably largely due to deadlock in WTO negotiations and the current challenges in multilateral economic governance and they are compliant with the GATS requirements. The disciplines on economic integration do not prohibit such measures if they are not abused. Under the GATS, the measures under Articles XI (payments and transfers) and XIV (general exceptions) do not fall within the substantial liberalization requirement of FTAs.<sup>137</sup> The measures may also be justified under the GATS provision on general exceptions or the prudential measures provision in financial services.<sup>138</sup> They fall within the exercise of the right to regulate for legitimate regulatory objectives and national policy objectives, both of which are recognized in the GATS.<sup>139</sup>

Moreover, some GATS rules are clarified when they are absorbed in the services FTAs. This is mainly due to embedded defects in the GATS provisions. One example is the concept of ‘service consumer’ in the supply mode of consumption abroad. ‘Service consumer’<sup>140</sup> is replaced by ‘a person’.<sup>141</sup> The latter may be clearer, since service consumer refers to any person receiving or using a service.<sup>142</sup> It may also help to dispel the potential confusion as to consumers who in domestic law are subject to special consumer protection rules. Another example is that measures inconsistent with market access and national treatment are inscribed in both columns,<sup>143</sup> whereas under the GATS these measures are only inscribed in the column of market access.<sup>144</sup> Although the GATS scheduling approach avoids the need to repeat an inscription,<sup>145</sup> sometimes it is not very clear whether the measures inscribed in the market access column are relevant to market access only, or to both market access and national treatment – a problem which some of China’s services FTAs help to clarify.

Finally, there are other aspects of China’s FTAs in services which are not dealt with in the GATS. One is the relationship between investment and services, which is also reflected in some FTAs. In the China-Pakistan ATS, the dispute settlement provision on investment applies to measures affecting services supplied through commercial presence.<sup>146</sup> If a dispute cannot be settled through consultation in six months, it can be submitted to an ad hoc arbitral tribunal;<sup>147</sup> disputes affecting the other three modes of supply would seem to be subject to the chapter on dispute settlement.<sup>148</sup> These two kinds of dispute settlement provision are not the same, for instance the appointment of the third arbitrator is

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<sup>135</sup> Ibid, Article 112.3.

<sup>136</sup> Ibid.

<sup>137</sup> Article V:1 of the GATS Agreement.

<sup>138</sup> Para 2(a) of Annex on Financial Services of the GATS Agreement.

<sup>139</sup> Para 4 of Preamble of the GATS Agreement.

<sup>140</sup> Article I:2 (b) of the GATS Agreement.

<sup>141</sup> See note 11 above, Article 104.

<sup>142</sup> Article XXVIII:(i) of the GATS Agreement.

<sup>143</sup> See note 6 above, Article 21.3; see note 9 above, Article 64.2; see note 10 above, Article 17.2.

<sup>144</sup> Article XX:2 of the GATS Agreement.

<sup>145</sup> WTO Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Publications and Audiovisual Products)*, WT/DS363/R, circulated on 12 August 2009, para 7.921.

<sup>146</sup> See note 10 above, Article 2.4.

<sup>147</sup> Ibid, Article 53.2.

<sup>148</sup> Ibid, Article 23.

dissimilar.<sup>149</sup> Another example is how the China-Chile ATS addresses future negotiations on investments.<sup>150</sup>

A further area not covered by the GATS is the movement of natural persons, which is an important issue in China's FTAs. Although this is considered of great export interest by developing countries, there have been no substantial developments in the WTO. It is therefore not surprising to find rules being made in FTAs. The provisions on the movement of natural persons or business persons in China's services FTAs are either part of the services trade rules, or apply to both services trade and other areas, including trade in goods and investment. Rules on the temporary movement of business persons are annexed to the China-Chile ATS.<sup>151</sup> The China-NZ and China-Singapore FTAs incorporate rules on the movement of natural persons as a separate chapter immediately after the chapter on trade in services,<sup>152</sup> and the China-Peru FTA does likewise for the provisions on the temporary entry of business persons.<sup>153</sup> These rules in the FTAs with New Zealand, Singapore and Peru pertain not only to trade in services, but also to trade in goods and investment.<sup>154</sup> Moreover, commitments are made in respect of the entry and temporary employment entry of natural persons, the latter of which are not required by the GATS.<sup>155</sup> Annex 10 to the China-NZ FTA provides that, unless otherwise provided therein, neither Party may require labor certification tests or other similar procedures, impose or maintain numerical restrictions relating to temporary entry, nor require labor market testing, economic needs testing or other procedures of similar effect as a condition for temporary entry.<sup>156</sup> Similar provisions are found in Annex 6 of the China-Singapore FTA (Commitments on Temporary Entry of Natural Persons).<sup>157</sup> Annex 11 to the China-NZ FTA also stipulates the prohibition of labor market testing, economic needs testing and other procedures of similar effect in respect of grants of temporary employment entry.<sup>158</sup> These commitments facilitate the development of services trade in real economic life.

## **Conclusion**

FTAs are concluded for economic, geopolitical and other reasons. China's services trade FTAs are substantially modeled after the GATS and it is notable that they have seemingly been promulgated with a view to WTO-consistency. Moreover, it seems to be the view of the Chinese government that regionalism supplements the WTO system, although the latter would be its preferred choice.<sup>159</sup> The Mainland-Hong Kong and Mainland-Macao CEPAs, for example, expressly state respect for the WTO

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<sup>149</sup> Ibid, Articles 53.4 (third arbitrator appointed by President of the International Court of Justice), 63.5 (third arbitrator appointed by the WTO Director-General).

<sup>150</sup> See note 8 above, Article 18.

<sup>151</sup> Ibid, Annex I.

<sup>152</sup> See note 7 above, Chapter 10 (movement of natural persons); see note 9 above, Chapter 9 (movement of natural persons).

<sup>153</sup> See note 11 above, Chapter 9 (temporary entry for business persons).

<sup>154</sup> Article 117.1 of the China-Peru FTA indicates that the parties should '...avoid unduly impairing or delaying trade in goods or services or conduct of investment activities under this Agreement'. Similar expressions can be found in the China-NZ FTA, Article 128 and China-Singapore FTA, Article 80.

In the definition of 'installer or servicer' in Chapter 10 on the movement of natural persons in the China-NZ FTA, the requirement is set that such installation and/or servicing by the supplying company should be a condition of purchase of the said machinery or equipment.

<sup>155</sup> See GATS Annex on Movement of Natural Persons Supplying Services under the Agreement, para 2 ('the Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member...').

<sup>156</sup> See note 7 above, Article 129.4.

<sup>157</sup> See note 9 above, Article 81.4.

<sup>158</sup> See note 7 above, Article 130.4.

<sup>159</sup> Ministry of Commerce of the People's Republic of China, 'Minister Interview: Vice Minister Yi Xiaozhun's Analysis on China's Choice and Efforts under the Trend of Regional Economic Integration', <http://yixiaozhun.mofcom.gov.cn/aarticle/speeches/200705/20070504725234.html> (visited 30 January 2008).

rules in their preambles<sup>160</sup> and their articles on WTO disciplines,<sup>161</sup> the relation to other (international) agreements,<sup>162</sup> and the establishment of a free trade area.<sup>163</sup> They also provide for the automatic incorporation of future developments and amendments of the WTO agreements<sup>164</sup> and state a will to respect other multilateral, regional and bilateral trade agreements.<sup>165</sup> The most recent FTA, between China and Peru repeatedly highlights consistency with the WTO in its preamble and articles on the establishment of a free trade area and the relation to other international agreements.<sup>166</sup> The relationship between the FTA and trade agreements other than the WTO agreements is also emphasized and for the discipline of domestic regulation, the FTA may incorporate the relevant negotiation results undertaken in other multilateral fora in which China and Peru participate.<sup>167</sup>

Meanwhile, China's FTAs diverge in certain aspects and go beyond WTO law in others. Substantial differences also exist between the FTAs under discussion and the GATS. These include scope and coverage, rules of origin (lenient denial of benefits provision, exclusion of non-incorporated entities and certain incorporated entities), higher transparency and good governance requirements, and others aspects (MFN treatment, improved safeguard provisions, stricter payment and transfer requirements, clarified schedule writing guidelines, closer links between investment and services, and provisions on the movement of natural persons). There are a number of reasons for these divergences. The underlying considerations may be promoting trade and export interests, the slow pace of multilateral negotiations, the prevention of rule evasion or 'free riding', public interest protection, China's WTO-extra obligation extensions, defects in the GATS provisions, lessons from the recent financial crisis, and so on.

These FTAs in services are more likely to be building blocks rather than stumbling stones for multilateral economic governance. From some perspectives, China's FTAs intend to set a level playing field and are pro-liberalization. The FTAs involving only developing countries have not provided for more favorable treatment to juridical persons owned or controlled by natural persons of the parties. Such preferential treatment is expressly allowed by the GATS, but China and its other developing-country partners have not taken advantage of it.<sup>168</sup> From this perspective, China's FTAs intend to set a level playing field and are pro-liberalization. Moreover, China and many of the parties to China's FTAs in services are developing countries. It is notable that flexibility is allowed in terms of the GATS economic integration disciplines.<sup>169</sup> China's services FTAs are therefore likely to be GATS consistent. Perhaps they can be deemed GATS-plus FTAs whose major features are lenient origin rules, higher transparency and good governance provisions.

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<sup>160</sup> See note 4 above, Article 2.2 ('to be consistent with the rules of the World Trade Organization'); See note 5 above, Article 2.2; See note 10 above, Preamble ('to strengthen and enhance the multilateral trading system as reflected by the World Trade Organization') and Article 3.1 ('affirm their existing rights and obligations with respect to each other under the WTO Agreement'); See note 7 above, Preamble ('Building on their rights, obligations and undertakings under the WTO Agreement and other multilateral, regional and bilateral agreements and arrangements').

<sup>161</sup> See note 7 above, Article 3.1 ('nothing in this Agreement shall derogate from the existing rights and obligations of a party under the WTO Agreement or other multilateral or bilateral agreement to which it is a party'); see note 6 above, Article 15.

<sup>162</sup> See note 9 above, Article 112; see note 10 above, Article 3; see note 11 above, Article 3.1.

<sup>163</sup> See note 10 above, Article 2.

<sup>164</sup> *Ibid*, Article 3.3.

<sup>165</sup> See note 9 above, Article 112; see note 10 above, Article 3; see note 11 above, Preamble and Article 3; see note 6 above, Preamble.

<sup>166</sup> *Ibid*, Articles 2 and 3.1.

<sup>167</sup> See note 11 above, Article 110.5.

<sup>168</sup> Article V: 3(b) of the GATS Agreement,

<sup>169</sup> *Ibid*, Article V: 3(a).

