

## **China, Free Trade Agreements and WTO Law: A Perspective from Services Trade**

WANG Heng<sup>1</sup>

**Abstract:** China's free trade agreements in services are developing in fast pace. The article examines three questions: the major differences between these agreements and the General Agreement on Trade in Services, whether they are consistent with the law of World Trade Organization, and how to handle the possible inconsistency. It concludes first although modeled after the GATS, these agreements differ in the scope and coverage, origin rules, transparency and good governance, among others. Second, they are generally consistent with the WTO law and are GATS-plus FTAs. Third, there are no complete provisions for solving the inconsistency, and the WTO supremacy shall be stipulated in the FTAs.

### **1. Introduction**

China's first free trade agreement (FTA) is 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>2</sup> China has kept on concluding FTAs within China, or with other developing or developed countries.<sup>3</sup> Except for APTA, these FTAs deal with the trade in services. Given the increasing important role China plays in the international trade, the FTAs signed by China would have significant effect on the multilateral economic governance. Since much study has been devoted to FTA rules involving trade in goods, this paper would like to focus more on China's FTAs in services. It discusses the following three questions: What are the differences between China's services FTAs and the General Agreement on Trade in Services (GATS), and the reasons for them? Are these FTAs consistent with the GATS? How to handle the problem in case of the inconsistency of them with the WTO law?

### **2. China's FTAs in Services: An Overview**

The FTAs in services China signed include:

- (a) Mainland and Hong Kong Closer Economic Partnership Arrangement (Mainland-Hong Kong CEPA);<sup>4</sup>
- (b) Mainland and Macao Closer Economic Partnership Arrangement (Mainland-Macao CEPA);<sup>5</sup>
- (c) Agreement on Trade in Service of the Framework Agreement on Comprehensive

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<sup>1</sup> Associate Professor, International Law School, Southwest University of Political Science and Law (SWUPL), Chongqing, China. For financial support, special thanks are due to the Yokohama National University for awarding him a visiting professorship. His thanks go specially to Professor Ichiro Araki. The views expressed in this article, as well as any errors and omissions, are solely those of the author. Email: stonewh6@gmail.com.

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

<sup>3</sup> FTA is used in broad sense in this article to embrace any agreements seeking to provide for the liberalization of trade and regardless of the official designation given to it by the parties.

<sup>4</sup> It is available at [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> It is available at [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).

- Economic Cooperation between China and ASEAN (China-ASEAN ATS);<sup>6</sup>  
(d) Free Trade Agreement between China and New Zealand (China-NZ FTA);<sup>7</sup>  
(e) Supplementary Agreement on Trade in Services of the Free Trade Agreement between China and Chile (China-Chile ATS);<sup>8</sup>  
(f) Free Trade Agreement between China and Singapore (China-Singapore FTA);<sup>9</sup>  
(g) Agreement on Trade in Services between China and Pakistan (China-Pakistan ATS);<sup>10</sup>  
(h) Free Trade Agreement between China and Peru (China-Peru FTA).<sup>11</sup>

Two CEPAs are special since they are made within China. They are also ‘the first free trade agreement that is fully implemented by Mainland’,<sup>12</sup> and their rules are quite similar. Due to the special feature of these two CEPAs and space constraints, the paper mainly focuses on other China’s services FTAs. It is of significance to study these FTAs in services and their implications for the multilateral economic governance particularly the World Trade Organization (WTO). The article would first analyze the differences between China’s services FTAs and the GATS, and the reasons for them. During the analysis, it would also discuss whether China’s FTAs is consistent with the WTO law. Finally the conclusions would be made. The major challenge of China’s service FTAs and possible solution are to be studied and proposed.

### 3. China’s Services FTAs and the WTO Law

In 2006, the General Council established on a provisional basis a new transparency mechanism for FTAs, providing for early announcement of FTA and notification to the WTO.<sup>13</sup> China has notified ten FTAs to the WTO, and made an early announcement of two FTAs with Australia and Norway. The factual presentations of China-ASEAN ATS, Mainland-Hong Kong CEPA, China-NZ FTA, and China-Singapore FTA are in preparation. They include. The factual abstract of Mainland-Macao CEPA has been distributed including those on services trade. There seems to be no substantial objections raised by other Members of the WTO (Members) in the process. China-Chile ATS, China-Pakistan ATS, and China-Peru FTA have not been notified to the WTO according to its website until June 15, 2009.<sup>14</sup> The following sectors would probe into China’s FTAs in services and the WTO law in four aspects: coverage and scope, origin rules, transparency and good governance, and other aspects.

<sup>6</sup> It is available at <http://gjs2.mofcom.gov.cn/aarticle/policyreleasingcenter/200704/20070404583449.html>.

<sup>7</sup> Free Trade Agreement between China and New Zealand (China-NZ FTA), <http://gjs.mofcom.gov.cn/accessory/200804/1208158780064.pdf> (visited 30 May 2008).

<sup>8</sup> It is available at [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), [http://fta.mofcom.gov.cn/singapore/doc/cs\\_xieyi\\_en.zip](http://fta.mofcom.gov.cn/singapore/doc/cs_xieyi_en.zip) (visited 1 December 2008).

<sup>10</sup> It is available at [http://fta.mofcom.gov.cn/pakistan/xieyi/xiedingwenben\\_en.pdf](http://fta.mofcom.gov.cn/pakistan/xieyi/xiedingwenben_en.pdf) (visited 12 May 2009).

<sup>11</sup> Free Trade Agreement between China and Peru (China-Peru FTA), [http://fta.mofcom.gov.cn/bilu/annex/bilu\\_xdwb\\_en.pdf](http://fta.mofcom.gov.cn/bilu/annex/bilu_xdwb_en.pdf) (visited 13 May 2009).

<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> See WTO Secretariat, ‘Regional trade agreement database’, <http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?enc=BGNDAAo9i1u5NEK0fWo0Yn7u86VXIYA8JFWG+eFcVR+o=> (visited 26 May 2009).

### A. Coverage and Scope

Nearly all China's service FTAs have adopted exactly the same or similar coverage with the GATS, which exclude the traffic rights and services directly related to the exercise of traffic rights, government procurement, subsidies, or measures affecting natural persons seeking access to employment market, measures regarding citizenship, residence or employment on a permanent basis.<sup>15</sup> Services in the exercise of government authorities are also out of the coverage of the services FTAs. The future GATS disciplines on subsidies would be taken in to consideration.<sup>16</sup> The aircraft repair and maintenance services, selling and marketing of air transport services and computer reservation system services are expressly covered in nearly all the services FTAs. Although China-ASEAN ATS has not expressly stipulated these two kinds of services, they are not excluded and should also be covered. Albeit not expressly indicated in the provisions, the GATS coverage and its exclusion are expected to be followed in the Mainland-Hong Kong CEPA and Mainland-Macao CEPA.

There is also exclusion of services in these FTAs which is different from the WTO, including cabotage in maritime transport services,<sup>17</sup> financial services,<sup>18</sup> and air services.<sup>19</sup> The GATS requires that the FTA shall have substantial sectoral coverage, which may be comprehended in terms of number of sectors, volume of trade affected and modes of supply.<sup>20</sup> Such situation exists not only in the FTAs of China but also in those of other countries. The exclusion of financial services could also be found in Korea-Chile FTA and Trans-Pacific CEPA, and there is common practice to exclude the air and maritime transport subsectors.<sup>21</sup> For developed countries, it remains unclear whether such exclusion of financial services is consistent with GATS Article V. However, the parties to the above services FTAs are developing countries. They are entitled to the flexibility on the sectoral coverage requirement in accordance with their development level in overall and individual (sub)sectors.<sup>22</sup> Therefore, these FTAs are more likely to be GATS-consistent.

### B. Origin Rules

Origin rules in China's services FTAs follow the wording of the GATS very closely. For instance, nearly all of them incorporate the exactly same definition of 'owned' or 'controlled' as the GATS.<sup>23</sup> Meanwhile these FTAs differ from the GATS in respect of denial of benefits. Moreover, some of these FTAs do not recognize certain entities as service suppliers of a party to the FTA.

#### 1. Denial of benefits

China-ASEAN ATS and China-Singapore FTA have adopted nearly the same

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<sup>15</sup> China-Singapore FTA, Article 60; China-ASEAN ATS, Article 2.2(b); China-Pakistan ATS, Article 2.2, China-Peru FTA, Article 105, China-Chile ATS, Article 1.2; China-NZ FTA, article 105.2.

<sup>16</sup> China-Singapore FTA, Article 60.3(b).

<sup>17</sup> China-Pakistan ATS, Article 2.2(e).

<sup>18</sup> China-Chile ATS, Articles 1.2 and 4.3; China-Peru FTA, Article 105.7.

<sup>19</sup> China-Peru FTA, Article 105.3(b); China-Chile ATS.

<sup>20</sup> GATS Agreement, Article V:1(a).

<sup>21</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>22</sup> GATS Agreement, Article V:3(a).

<sup>23</sup> *Ibid*, Article XXVIII: (n).

provision on denial of benefits with that of the GATS.<sup>24</sup> Origin rules in China-NZ FTA, China-Chile ATS, China-Pakistan ATS and China-Peru FTA are more lenient than those of the GATS. The denial of benefits can be conducted under stricter requirements. First, unlike the GATS,<sup>25</sup> the party to these FTAs could not deny the benefits to the supply of a service if it is supplied from or in a non-party. Second, different from the GATS, neither does the denial of benefits provision apply to the service supplier as a natural person. Third, the benefits denial article only applies to the service supplier as a juridical person if certain conditions are met. If it is owned or controlled by persons of a non-party or the denying party, and has no substantive business operations in the other party, the service supplier is not entitled to the preferential treatment under these FTAs.<sup>26</sup> Even if the juridical person is owned or controlled by a non-party or the denying party, it could, in most cases,<sup>27</sup> enjoy the benefits once it conducts substantive business activities in the other party. In contrast, a 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>28</sup> For origin rules embodied the denial of benefits clause, these FTAs are much more lenient than the GATS. Such denial of benefits clause is likely to be regarded as WTO-consistent. Some members argued that the list of measures exempted from GATS Article V:1 is not exhaustive.<sup>29</sup> The denial of benefits clause potentially could be exempted from the GATS Article V. Even if it fails to be exempted from the GATS Article V, the GATS provisions on general exceptions and security exceptions may be invoked.<sup>30</sup> Moreover, since the denial of benefits clause also existed in the GATS, the incorporation of this stipulation itself could not be easily regarded as a new discrimination prohibited by GATS.

## 2. Service suppliers

If the companies of a third party are registered in one party of China-Pakistan ATS, their offices, liaison offices, 'shell companies' and 'mailbox companies' are not service suppliers of the other party.<sup>31</sup> The provision should be read in essence to prevent the possible evasion of benefits, and it ensures that the service suppliers have a real economic tie with the parties of the FTAs in services. Such article resembles the counterpart in Mainland-Hong Kong CEPA and Mainland-Macao CEPA. Under Mainland-Hong Kong CEPA, overseas companies, representative office, liaison office, 'mail box company' and company specifically established for providing certain services to its parent company registered in Hong Kong would not be a Hong Kong

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<sup>24</sup> China-ASEAN ATS, Article 31; China-Singapore FTA, Article 75.

<sup>25</sup> GATS Agreement, Article XXVII:(a).

<sup>26</sup> China-NZ FTA, Article 115; China-Chile ATS, Article 10.1; China-Pakistan ATS, Article 24.1; China-Peru FTA, Article 113.1.

<sup>27</sup> Under China-Pakistan ATS Article 24.2, 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.

<sup>28</sup> GATS Agreement, Articles XXVII and XXVIII (m)(ii).

<sup>29</sup> Negotiation Group on Rules, Compendium of Issues Related to Regional Trade Agreements, TN/RL/W/8/Rev. 1, 1 August 2002, paras 91-93.

<sup>30</sup> GATS Agreement, Articles XIV.

<sup>31</sup> China-Pakistan ATS, Article 1, footnote 1.

service supplier.<sup>32</sup> These entities are unable to benefit from the preferences of the FTAs in services. They fall into two categories: non-incorporated (the offices, liaison offices and representative offices), and incorporated entities (shell companies, mailbox companies, overseas companies, and company specifically established for providing certain services to its parent company). Analysis could be conducted separately to determine whether they are consistent with the WTO.

One question is whether the non-incorporated entities could enjoy the preferences of FTAs. There is no explicit answer in the GATS. The service supplier of non-party that is a juridical person may enjoy the preferential treatment if it is established and involved in substantive business operations in the parties.<sup>33</sup> These requirements entail liberal origin rules to extend the preferences under the FTAs to service suppliers of other Members. To enjoy the preferential benefits of the FTAs, the service supplier must first be a juridical person. The following question is whether the non-incorporated entities are juridical persons. Juridical person is any legal entity constituted or otherwise organized under the applicable law, including corporation, among others.<sup>34</sup> The non-incorporated entities have not been listed in the definition of a juridical person, and it is not immediately clear whether the non-incorporated entities are juridical persons. The answers could be found in two provisions of the GATS. One is the definition of 'commercial presence' where the representative office and branches are referred to in parallel to the juridical person.<sup>35</sup> The other is the definition of 'service supplier'. It separates the juridical person from other forms of commercial presence such as a branch or a representative office.<sup>36</sup> Therefore the non-incorporated entities are not regarded as the juridical person under the GATS and could not benefit from the preferences. The exclusion of non-incorporated entities is not WTO-consistent.

The other question is whether the exclusion of some incorporated entities is GATS-consistent. They are juridical persons and could be constituted in a party. The key question remained here is whether they engage in substantive business operations in the parties to such agreements. It is manifest that shell companies and mailbox companies do not engage in real business activities and could not satisfy the requirement. Therefore their exclusion fits the requirement of the GATS. It is difficult to determine whether it is GATS-consistent for the Mainland-Hong Kong CEPA and Mainland-Macao CEPA to exclude overseas companies and companies established for providing services to parent company. One problem is that there is no definition for these two kinds of companies. Neither the substantive business operations in GATS is defined. Members have the discretion to interpret the substantial business operations, and the 'substantive business operations' is defined in the relevant arrangements.<sup>37</sup> However, the term 'business operations' has been considered to cover production,

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<sup>32</sup> Mainland-Hong Kong CEPA, Annex 5, para 3.1.1, footnote 1; Mainland-Macao CEPA, Annex 5, para 3.1.1, footnote 1.

<sup>33</sup> GATS Agreement, Article V:6.

<sup>34</sup> GATS Agreement, Article XVIII: (l).

<sup>35</sup> Ibid, Article XVIII: (d).

<sup>36</sup> Ibid, Article XVIII: (g), footnote 12.

<sup>37</sup> Mainland-Hong Kong CEPA, Annex 5.

distribution, marketing, sale and delivery of a service.<sup>38</sup> For companies established for providing certain services to its parent company, they differ from typical service suppliers since they are also consumed by the parent companies. They often do not need to market services and may fail the substantive business operations test. Such exclusion could be consistent with the GATS. It may be more difficult to analyze the WTO consistency of excluding overseas companies since they are not defined. This exclusion seemingly aims to prevent the evasion of origin rules. It remains unclear whether the exclusion of overseas companies is GATS-consistent. There are no disputes in this regard and the parties need to further clarify and justify them in case of any dispute. Moreover, since these two categories of companies are not expressly excluded in other China's FTAs, it would not be a major problem.

### C. Transparency and Good Governance

Under the WTO, the transparency and good governance is originally stipulated in Article X of General Agreement on Tariffs and Trade (GATT).<sup>39</sup> In some of China's services trade agreements, they are highlighted and higher standards are set.

A number of transparency clauses are introduced into FTAs, which do not apply to all Members. Some of these stipulations are drafted under the shadow of China's WTO-plus obligations. 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>40</sup> GATS only requires Members to establish inquiry points to provide information to other Members,<sup>41</sup> but it sets no obligation towards non-governmental entities. These additional stipulations resemble China's WTO-extra commitments to supply information about trade measures upon request of individuals, enterprises or Members.<sup>42</sup>

Moreover, when adopting final rules on services trade, the parties shall, when possible and including upon request, consider 'substantive comments' received from interested persons with respect to proposed rules.<sup>43</sup> Such obligations only exist in Agreement on Technical Barriers to Trade<sup>44</sup> and Agreement on the Application of Sanitary and Phytosanitary Measures.<sup>45</sup> They apply to proposed technical regulations,<sup>46</sup> proposed conformity assessment procedures,<sup>47</sup> and proposed sanitary or phytosanitary regulations.<sup>48</sup> For international services trade, comment obligations do not apply to all Members and is an additional obligation imposed on China.

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<sup>38</sup> 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, para 112.

<sup>39</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>40</sup> China-Chile ATS, Articles 8(a), and Annex I, para 4 (b); China-Peru FTA, Article 114(a).

<sup>41</sup> GATS Agreement, Article III: 4.

<sup>42</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>43</sup> China-Chile ATS, Article 8.2(b); China-Peru FTA, Article 114 (b).

<sup>44</sup> WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations, the Legal Texts* (Geneva, 2003), 121.

<sup>45</sup> *Ibid.*, 59.

<sup>46</sup> TBT Agreement, Article 2.9.

<sup>47</sup> *Ibid.*, Article 5.6.

<sup>48</sup> SPS Agreement, Annex 5, paras 5(d) and 6(c).

China's extra commitments include provision of a reasonable period for comments before the measure implementation, except for those involving national security, specific measures setting foreign exchange rates or monetary policy and other measures the publication of which would impede law enforcement.<sup>49</sup> Moreover, to the extent possible, each party to these FTAs shall allow a reasonable period of time between publication of final rules and their effective date.<sup>50</sup> There are also some differences between these FTA provisions and China's WTO-extra obligations. Different from China's WTO-extra commitments, the reasonable period of time provided in these FTAs is not expressly allocated for comments. Another difference is the term of 'substantive comments' adopted in the FTAs which does not appear in China's WTO commitments. No guidance has been made on how to judge whether a comment is substantive or not.

Good governance provisions could also be found in FTAs which do not exist in the GATS and which is modeled after China's WTO-extra obligations. In China-ASEAN ATS, China-Singapore FTA and China-NZ FTA, the authorities shall upon request identify the additional information required to complete the application in the case of an incomplete application for authorization.<sup>51</sup> The opportunity to remedy deficiencies within a reasonable timeframe is also provided.<sup>52</sup> If an application is terminated or denied, to the maximum extent possible, the authorities shall inform the applicant in writing and 'without delay' the reasons.<sup>53</sup> The applicant will have the possibility of resubmitting a new application.<sup>54</sup> It is essentially the same with the obligations provided in the Report of the Working Party on the Accession of China.<sup>55</sup> Moreover, the GATS Reference Paper developed in the Negotiation Group on Basic Telecommunications has also been incorporated in the China-Peru FTA.<sup>56</sup> Although not being applied to the general membership, this Reference Paper has been attached to the GATS schedules of commitments of China and Peru.

It is notable that some good governance requirements have not been imposed on China in the WTO. For instance, with regard to the law under which the transfer and payment may be prevented or delayed, the application of these laws is to be 'equitable, non-discriminatory and good faith'.<sup>57</sup> Another example is that the notification and consultation requirement for the denial of benefits. In the China-Chile ATS and China-Peru FTA, the denying party shall 'inform in writing and consult with the other party on the specific case of denial'.<sup>58</sup> Prior notification and consultation obligation is also required in the denial of benefits under the China-NZ FTA.<sup>59</sup> A third example is that the party shall publish explanatory materials on the requirements for temporary

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<sup>49</sup> Accession Protocol, para 2(C) 2.

<sup>50</sup> China-Chile ATS, Article 8.2(c); China-Peru FTA, Article 114 (c).

<sup>51</sup> China-ASEAN ATS, Article 5.3(a); China-Singapore FTA, Article 65.3(a); China-NZ FTA, Article 111.3(a).

<sup>52</sup> China-ASEAN ATS, Article 5.3(a); China-Singapore FTA, Article 65.3(a); China-NZ FTA, Article 111.3(a).

<sup>53</sup> China-ASEAN ATS, Article 5.3(c); China-Singapore FTA, Article 65.3(c); China-NZ FTA, Article 111.3(c).

<sup>54</sup> China-Singapore FTA, Article 65.3(c).

<sup>55</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), 308 (g).

<sup>56</sup> China-Peru FTA, Article 105.8 (b).

<sup>57</sup> *Ibid*, Article 112.3.

<sup>58</sup> China-Chile ATS, Article 10.2; China-Peru FTA, Article 113.2.

<sup>59</sup> China-NZ FTA, Article 115.

entry or make it public available in its territory to enable interested persons of the other party to become acquainted with them.<sup>60</sup>

China has not only extended some of its WTO-plus obligations to the FTAs with developed and developing countries, but also takes new obligations. These higher transparency and good governance provisions would help to promote better economic governance and could potentially lay solid foundation for the multilateralism development in this regard.

#### D. Others

There are some other aspects of China's FTAs in services which deserve attention. China's services FTAs are drafted in the shadow of the GATS. Without express reference, many provisions in China's services FTAs follow the GATS provisions almost *verbatim*, including its interpretative notes. In most China's services FTAs, for instance, they simply reiterated Article I:2 of the GATS which provides for four supply modes. It meets with the GATS requirement that none of the four modes of supply should be *a priori* excluded under the FTAs.<sup>61</sup> Future development of the GATS and the development beyond the GATS commitments are also taken into consideration by China's services FTAs. For emergency safeguard measures, some of China's services FTA have left the room of accommodating and developing the GATS future negotiation outcome in this respect.<sup>62</sup> The parties to the China-ASEAN ATS endeavor to achieve commitments which go beyond their GATS commitments.<sup>63</sup>

However, there are substantial differences in terms to the degree to which the FTAs integrate the GATS. The GATS stipulations on general exceptions and security exceptions are usually incorporated in China's services FTAs,<sup>64</sup> except for the most recent China-Peru FTA. The provisions on business practice, monopolies and exclusive service suppliers are incorporated in the China-ASEAN ATS,<sup>65</sup> but are not included in China-Peru FTA. The review of administrative decisions required by the GATS is not stipulated in the China-Chile ATS and China-Pakistan ATS.<sup>66</sup> But it is not inconsistent with the GATS discipline on the economic integration. Nearly all the parties to China's FTA in services are also Member, except for Laos which is a member country of the ASEAN. The omitted provisions of the GATS would actually apply to the parties as well.

In terms of incorporation of GATS articles in China's FTAs in services, the most-favoured-nation (MFN) treatment is one article that is worthy of attention. The MFN treatment is incorporated in the China-New Zealand FTA with regard to services trade.<sup>67</sup> Such MFN treatment applies to listed services sectors and is subject to the conditions and qualifications set out there.<sup>68</sup> The MFN treatment would not apply to the treatment accorded under other agreements which has entered into force or been

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<sup>60</sup> China-Chile ATS, Annex I, para 4(a).

<sup>61</sup> GATS Agreement, Article V:1(a), footnote 1.

<sup>62</sup> China-Singapore FTA, article 71; China-ASEAN ATS, Article 9.1; China-Pakistan ATS, Article 9.1 .

<sup>63</sup> China-ASEAN ATS, Article 21.1.

<sup>64</sup> China-Chile ATS, Articles 13 and 14; China-ASEAN ATS, Articles 12 and 13.

<sup>65</sup> China-ASEAN ATS, Articles 7 and 8.

<sup>66</sup> GATS Agreement, Article VI: 2.

<sup>67</sup> China-NZ FTA, Article 107.

<sup>68</sup> *Ibid*, Article 107.1.



signed prior to China-NZ FTA.<sup>69</sup> It would help to further liberalize the services trade.

Some of GATS articles have been further developed before they are incorporated into China's services FTAs. One area is the emergency safeguard measures. The safeguard measures could be taken under the China-ASEAN ATS and China-Pakistan ATS before the conclusion of relevant WTO negotiations.<sup>70</sup> If the China-Pakistan ATS causes 'substantial adverse impact on a service sector' of a party, the affected party may request for consultation and sympathetic consideration should be given to the party seeking to take a measure.<sup>71</sup> It is drafted in the shadow of the GATS articles on business practices and subsidies.<sup>72</sup> The measures taken under the safeguard article are to be mutually agreed by the relevant parties.<sup>73</sup> This is the new development which is absent in the GATS provision on safeguard measures. The safeguard measures should not jeopardize the consistency of the FTAs. The safeguard measures have been adopted for the trade in goods,<sup>74</sup> and the GATS is drafted with reference to the GATT. Moreover, the GATS Article X does not preclude the safeguard measures as discrimination, and stipulates for its negotiation. As discussed above, some Members believed the list of measures exempted from GATS Article V:1 to be not exhaustive and that Article X on safeguard measures should be added in that list.<sup>75</sup> The expansion is permissible under the Preamble to the GATS, Members retain the rights to regulate, and to introduce new regulations, on the supply of services within their territories to meet national policy objectives.<sup>76</sup>

Another area is the transfer and payments. In the China-Peru FTA, new developments are made in the transfers and payments. The transfers and payments pertaining to the services supply is permitted to be made in 'a freely usable currency at the market rate of exchange prevailing on the date of transfer.'<sup>77</sup> The payment and transfer could be prevented or delayed under laws on (i) bankruptcy, insolvency or the creditors' rights protection, (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 regulation, (d) criminal offences, or (e) guaranteeing the judgments or orders.<sup>78</sup> This clause is probably drafted in consideration of recent financial crisis. These laws have to be applied in 'equitable, non-discriminatory and good faith'.<sup>79</sup> These developments are due to the deadlock in the WTO negotiation or the current challenges in multilateral economic governance. They are consistent with the GATS requirements. The disciplines on the economic integration do not prohibit these measures if they are not abused. Under the GATS, the

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<sup>69</sup> Ibid, Article 107.2.

<sup>70</sup> China-ASEAN ATS, Article 9.2; China-Pakistan ATS, Article 9.2.

<sup>71</sup> China-ASEAN ATS, Article 9.2; China-Pakistan ATS, Article 9.2.

<sup>72</sup> GATS Agreement, Articles IX:2 and XV:2.

<sup>73</sup> China-ASEAN ATS, Article 9.2; China-NZ FTA, Article 121; China-Singapore FTA, Article 71; China-Pakistan ATS, Article 9.2.

<sup>74</sup> GATT Agreement, Article XIX.

<sup>75</sup> Negotiation Group on Rules, Compendium of Issues Related to Regional Trade Agreements, TN/RL/W/8/Rev. 1, 1 August 2002, paras 91-93.

<sup>76</sup> 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, para 91.

<sup>77</sup> China-Peru FTA, Article 112.2.

<sup>78</sup> Ibid, Article 112.3.

<sup>79</sup> Ibid, Article 112.3.

measures under Articles XI (payment and transfers) and XIV (general exceptions) do not fall within the substantial liberalization requirement on the FTAs.<sup>80</sup> These measures may also be justified under the GATS provision on general exception or the prudential measures provision in the financial services.<sup>81</sup> These measures are the exercise of right to regulate for legitimate regulatory objectives and national policy objectives which are recognized in the GATS.<sup>82</sup>

Moreover, certain clarification of GATS rules is made when they are absorbed in services FTAs. They are mainly due to the embedded defects in the GATS provisions. One example is that the measures inconsistent with the market access and national treatment would be inscribed in both columns.<sup>83</sup> For such circumstances, these measures would only be inscribed in the column of market access under the GATS.<sup>84</sup> However, it is not very clear under the GATS whether the measures inscribed in the column of market access is relevant to market access only, or relevant to both the market access and national treatment. Some of China's services FTAs have helped to clarify it.

Finally, there are some aspects of China's FTAs in services which have not been dealt with in the GATS. One is the relationship between investment and services which are also reflected in some FTAs. In China-Pakistan ATS, the dispute settlement provision on the investment applies to measures affecting services supplied through commercial presence.<sup>85</sup> If a dispute cannot be settled through consultations in six months, it could be submitted to an ad hoc arbitral tribunal.<sup>86</sup> For the disputes affecting other three modes of supply, they seemingly would be subject to the chapter on dispute settlement of the China-Pakistan FTA.<sup>87</sup> These two kinds of dispute settlement provisions are not the same. For instance, the appointment of the third arbitrator is different.<sup>88</sup> Another example is that the China-Chile ATS which stipulates the future negotiation on investments.<sup>89</sup> The other example is the rules on movement of natural persons which turns to be an important issue of China's FTAs. The movement of natural persons is believed to be of great export interests to developing countries. However, there is no substantial development in the WTO. Therefore it is not odd to find the rules making in the FTAs. In China's services FTAs, the provisions on movement of natural persons or business persons are either part of the services trade rules, or apply to both services trade and other areas including trade in goods and investment. The rules on temporary movement of business persons are annexed to the China-Chile ATS.<sup>90</sup> The rules on movement of natural persons are incorporated in the China-NZ FTA and China-Singapore FTA as a separate chapter

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<sup>80</sup> GATS Agreement, Article V:1.

<sup>81</sup> *Ibid*, Annex on Financial Services, para 2(a).

<sup>82</sup> *Ibid*, Preamble.

<sup>83</sup> China-ASEAN ATS, Article 21.3; China-Singapore FTA, Article 64.2; China-Pakistan ATS, Article 17.2.

<sup>84</sup> GATS Agreement, Article XX:2.

<sup>85</sup> China-Pakistan ATS, Article 2.4.

<sup>86</sup> China-Pakistan FTA, Article 53.2.

<sup>87</sup> China-Pakistan ATS, Article 23.

<sup>88</sup> China-Pakistan FTA, Articles 53.4.

<sup>89</sup> China-Chile ATS, Article 18.

<sup>90</sup> *Ibid*, Annex I.

immediately after the chapter on trade in services.<sup>91</sup> They seemingly apply to the trade in services and investments.<sup>92</sup> Similar case exists for the provisions on temporary entry for business persons in the China-Peru FTA.<sup>93</sup> The difference is that these rules apply to trade in goods, services and investment.<sup>94</sup>

#### 4. Conclusion

The FTAs are concluded for economic, geopolitical and other reasons. China's services trade FTAs are substantially modeled after the GATS. Meanwhile, substantial differences also exist between the FTAs under discussion and the GATS. They 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 provision, stricter payment and transfer requirement, clarified schedule writing guidelines, closer links between investment and services, and provisions on movement of natural persons). These developments are due to a number of reasons as well. The underlying considerations may stem from China's WTO-extra obligations extension, trade liberalization, export interests, prevention of rules evasion, the slow multilateral negotiations, public interests protection, the defects of the GATS provisions, lessons from the recent financial crisis, and so on.

One notable aspect is that China's services FTAs are seemingly promulgated with a view to WTO-consistency. Moreover, regionalism is deemed to supplement the WTO system, and the latter would be preferred choice by China.<sup>95</sup> Starting from the CEPA, the WTO rules have been expressly respected in the preamble,<sup>96</sup> articles on WTO disciplines,<sup>97</sup> relation to other (international) agreements,<sup>98</sup> establishment of a free trade area<sup>99</sup>. Future development and amendment of the WTO agreements could be automatically incorporated in FTAs.<sup>100</sup> There is also the will to respect other multilateral, regional and bilateral trade agreements.<sup>101</sup> For domestic regulation disciplines, the FTA may incorporate the relevant negotiation results undertaken in other multilateral fora in which China and Peru participates.<sup>102</sup> In the most recent China-Peru FTA, the consistency with the WTO has been highlighted repeatedly in

<sup>91</sup> China-NZ FTA, Chapter 10; China-Singapore FTA, Chapter 9.

<sup>92</sup> In China-NZ FTA Article 127, Chapters 9 and 11 are referred to. Similar case exists for China-Singapore FTA.

<sup>93</sup> China-Peru FTA, Chapter 9.

<sup>94</sup> Ibid, Article 117.1.

<sup>95</sup> '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 January 30, 2008).

<sup>96</sup> Mainland-Hong Kong CEPA, Article 2.2; Mainland-Macao CEPA, Article 2.2; China-Peru FTA, Preamble and Article 3.1; China-NZ FTA, Preamble.

<sup>97</sup> China-NZ FTA, Article 3.1; China-ASEAN ATS, Article 15.

<sup>98</sup> China-Singapore FTA, Article 112. Free Trade Agreement between China and Pakistan (China-Pakistan FTA), [http://fta.mofcom.gov.cn/pakistan/xieyi/fta\\_xieyi\\_en.pdf](http://fta.mofcom.gov.cn/pakistan/xieyi/fta_xieyi_en.pdf), Article 3. Free Trade Agreement of China and Chile (China-Chile FTA), <http://fta.mofcom.gov.cn/chile/xieyi/freetradexieding2.pdf>, Article 3. China-Peru FTA, Article 3.1.

<sup>99</sup> China-Peru FTA, Article 2.

<sup>100</sup> Ibid, Article 3.3.

<sup>101</sup> China-Singapore FTA, Article 112; China-Pakistan FTA, Article 3; China-Peru FTA, Preamble and Article 3. Framework Agreement on Comprehensive Economic Co-Operation between China and ASEAN, <http://gjs.mofcom.gov.cn/aarticle/Nocategory/200212/20021200056711.html>, Preamble.

<sup>102</sup> China-Peru FTA, Article 110.5.

the preamble and articles on the establishment of a free trade and relation to other international agreements.<sup>103</sup> The relationship between the FTAs and trade agreements other than the WTO agreements is also emphasized.

Generally speaking, China's FTAs in services are consistent with the GATS requirements on economic integration, although they diverge in certain aspects and go beyond WTO law in others. Moreover, China and many of the parties to China's FTAs in services are developing countries. It is notable that flexibility shall be allowed in terms of the GATS economic integration disciplines.<sup>104</sup> China's services FTAs are more likely to be GATS consistent. Perhaps the China's FTAs in services could be deemed as GATS-plus FTAs whose major features are lenient origin rules as well as higher transparency and good governance provisions. They are more likely to be a building block rather than a stumbling stone for multilateral economic governance.

However, the development of China's FTAs in services is not without challenges. One major question is how to solve the problem if a FTA is inconsistent with the WTO agreements, other multilateral, regional or bilateral trade agreements. Some of China's services FTAs do not give the answer on how to solve the possible inconsistency between it and other multilateral, regional and bilateral agreement. In two of these FTAs, the answer is that consultation would be conducted to find a mutually satisfactory solution under 'rules of interpretation of public international law',<sup>105</sup> or 'customary rules of interpretation of public international law'.<sup>106</sup> Under the China-Singapore FTA, the parties would immediately consult with each other to seek a mutually satisfactory solution, and the interpretation rules of public international law are not referred to.<sup>107</sup> These interpretation rules are likely to be the Vienna Convention on the Law of Treaties (VCLT) and in particular its Articles 31 and 32, which have obtained the status and therefore form part of the 'customary rules of interpretation of public international law' provided by Article 3(2) of Understanding on Rules and Procedures Governing the Settlement of Disputes.<sup>108</sup> If the consultation fails, it is not clear about the next step to solve such inconsistency. It could be a serious potential problem. To solve the problem, it is one option that the FTA expressly stipulates that if there is any conflict between the WTO agreements and the FTA, the WTO agreements shall prevail. It may assist in solving the potential inconsistency between the FTAs and the WTO law. In fact, similar approach has been taken in terms of the inconsistency between the FTA and the tax convention, and the tax convention would prevail here in accordance with the China-Chile FTA.<sup>109</sup> Besides the possible provision on the prevalence of the WTO law, the implementation of such provision should be guaranteed.

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<sup>103</sup> Ibid, Articles 2 and 3.1.

<sup>104</sup> GATS Agreement, Article V: 3(a).

<sup>105</sup> China-Peru FTA, Article 3.2.

<sup>106</sup> China-NZ FTA, Article 3.2.

<sup>107</sup> China-Singapore FTA, Article 112.2.

<sup>108</sup> WTO Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, p. 15, WTO Appellate Body Report, *Japan - Taxes on Alcoholic Beverages*, WT/DS10/AB/R, WT/DS11/AB/R, WT/DS8/AB/R, p. 9.

<sup>109</sup> China-Chile ATS, Article 12.2.