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Tianqi Yu

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List of Abbreviations

ASEAN	Association of Southeast Asian Nations
AVHE products	audiovisual home entertainment products
BIT	bilateral investment treaty
CAI	comprehensive agreement on investment
CETA	Comprehensive Economic and Trade Agreement
CFIUS	Committee on Foreign Investment in the United States
CIE	Chinese investment enterprise
China Protocol	Protocol on the Accession of the People's Republic of China
China WPR	Report of the Working Party on the Accession of China
CJV	contractual joint venture
CPC	Communist Party of China
CPC	Central Product Classification
CRTA	Committee on Regional Trade Agreements
CU	customs unions
CUP	China UnionPay Co. Ltd.
DCFTA	Deep and Comprehensive Free Trade Agreement
DSB	dispute settlement body
DSM	dispute settlement mechanism
EJV	equity joint venture
EU	European Union
EITL	Enterprise Income Tax Law
EPA	Economic Partnership Agreement
EPS	electronic payment service
FCN Treaty	Friendship, Commerce, and Negotiation Treaty
FDI	foreign direct investment
FIE	foreign invested enterprises
FTA	free trade agreements
FTL	Foreign Trade Law
GAC	General Administration of Customs
GDP	gross domestic product
GATS	General Agreement on Trade in Services

GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIA	international investment agreement
IP	intellectual property
IPR	intellectual property right
ISDS	investor-state dispute settlement
JV	joint venture
M&A	mergers and acquisitions
MFN	most favoured nation
MOFCOM	Ministry of Commerce of the People's Republic of China
MOFTEC	Ministry of Foreign Trade and Economic Co-operation
MOU	memorandum of understanding
NAFTA	North American Free Trade Agreement
NDRC	National Development and Reform Commission of the People's Republic of China
NME	non-market economy
NPC	National People's Congress
OECD	Organization for Economic Co-operation and Development
PBOC	People's Bank of China
PRC	People's Republic of China
PTA	preferential trade agreement
RCEP	Regional Comprehensive Economic Partnership
RTA	regional trade agreement
SAA	Stabilisation and Association Agreement
SAT	State Administration of Taxation
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SCIO	State Council Information Office
S&ED	Strategic and Economic Dialogue
SOEs	state-owned enterprises
SPFTZ	China (Shanghai) Pilot Free Trade Zone
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures

SSC	Schedules of Specific Commitments
TBT	Technical Barriers to Trade
TFEU	Treaty on the Functioning of the European Union
TiSA	Trade in Service Agreement
TRIMs	Agreement on Trade-Related Investment Measures
Agreement	
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property
Agreement	Rights
UK	United Kingdom
UN	United Nations
UNCITRAL	Arbitration Rules of the United Nation Commission on the International Trade Law
UNCTAD	United National Conference on Trade and Development
USA	United States of America
USTR	United States Trade Representative
VAT	value-added tax
WFE	Wholly foreign-owned enterprise
WTO	World Trade Organization

Introduction

Following an economic miracle lasting three decades, China's current economic slowdown is an inevitable result of the economic cycle. In order to recover from the downturn and develop a more significant role in the global economy, China intends to conduct an economic reform which will upgrade its domestic industries and, more importantly, expand the export of goods and capital.

Correspondingly, China is conducting legal reforms which will satisfy the demands of economic development. These ongoing legal reforms cover a wide range of topics, including the reduction of interventions by the Communist Party, the enhancement of judicial transparency, the protection of human rights, and the integration of legal regulations, as well as the simplification of judicial procedures.

In light of the current wave of legal reform, scholars are discussing the possibility that China may be moving toward increased liberty within the rule of law as it moves towards a market economy. With its Communist ideology, one-party-state and status as a non-market economy (NME),¹ China has long been regarded as an anomaly by the democratic and capitalist world. China has decided to reform its legal system not only under the influence of external pressure, but in order to promote economic development, enhance the welfare of its citizens and integrate into the prevailing wave of globalisation.

For example: internal vested interest groups are reluctant to make concessions with regard to the measures currently being implemented to bring about economic reform, but competition from foreign business will play a significant role in these reforms, because the external competition will force the Chinese enterprises to either innovate, or suffer a loss of market share. As a corollary, the treatment of foreign businesses is an overarching and unavoidable topic in this legal reform.

¹ There is ongoing debate with regard to whether China enjoys the status of a market economy. As China has not automatically enjoyed market economy status for the first 15 years after its accession to the WTO, it needs recognition from the importing country. Most Chinese scholars and officials consider the Chinese economy to be a socialist market economy with Chinese characteristics, whereas scholars from the European Union (EU) and the United States think the opposite. For example, EU lawmakers refused to grant China market economy status, preempting a proposal being prepared by the European Commission on 12 May 2016. In order to emphasise the peculiarity of China in this regards, this research holds the opinion that at this point the country remains a non-market economy.

China's struggle with regard to the treatment accorded to foreign businesses is, however, evident: on the one hand, for a number of obvious or unknown reasons, the Chinese government is reluctant to share the huge Chinese market with foreign businesses; on the other hand, Chinese enterprises, particularly state-owned enterprises (SOEs), need to compete with foreign businesses if they are to transform into better market participants and solve their inefficiency problems.

The treatment accorded to foreign business in China is, therefore, a topic under intensive discussion. It is also one of the most interesting topics for the rest of the world as it seeks to conquer the Chinese market. In a nutshell, this topic is akin to the national treatment standard in international law. As it is impossible to cover the whole legal reform in a single piece of research, this dissertation has chosen to focus on the valuable topic of the national treatment standard in order to conduct an intensive research.

In sum, the rest of the world is wondering to what extent China's reforms will change its previous legal approach. This research will therefore put the economy, political and other aspects in abeyance to fully concentrate on the national treatment standard within a legal perspective in order to reveal whether China is adopting a more liberal approach to international economic law.

Within this framework, this dissertation is divided into four chapters.

Chapter 1 provides the conceptual and normative framework within which this dissertation is developed. To review the national treatment standard in Chinese trade and investment regimes, the principal task is to define the national treatment principle, which is the pivotal issue concerning the treatment accorded to foreign businesses. To understand the broader concept, the chapter begins by returning to the origin of the national treatment principle and the non-discrimination principle. Given the broad spectrum of subject matter covered by the national treatment principle, the next section in Chapter 1 is dedicated to defining a narrow national treatment principle in international trade and investment regimes, which will describe the scope of the national treatment concept discussed in this dissertation. Chapter 1 then presents an analysis of the substantive contents of the national treatment principles in international trade and investment regimes, which will deepen the understanding of the national treatment principle and provide the foundation for the remainder of the analysis.

After identifying the conceptual and normative framework of this dissertation, Chapter 2 deals with China's national treatment standard in the trade regime. This is the first core issue of this dissertation. More specifically, Chapter 2 discusses the national treatment standard adopted by China in the World Trade Organization (WTO) legal system and the Free Trade Agreement (FTA) strategy. In this chapter, in addition to the *textual analysis* of WTO legal documents and China's commitments concerning the national treatment principle and the national treatment clauses in the 14 FTAs² concluded by China, a *case study* is also conducted in order to better interpret the legal provisions of disputes occurring in complicated circumstances. In order to research China's attitude to national treatment in the trade regime, cases in which China is the respondent before the WTO Dispute Settlement Body (DSB) and the national treatment clause are cited by complainant and analysed. With the exception of cases in which an agreement was reached during the consultation, and those currently in consultation, there are four cases³ in the WTO which will be included in the further analysis. In addition to the general circumstance of the national treatment provision in each case, the famous *China—Electronic Payment Services*⁴ case will be emphasised, as it revealed China's attitude with regard to the national treatment principle in the General Agreement on Trade in Services (GATS) where the inherent defect of the blurred demarcation between market access and national treatment provisions is the subject of heated debate.

Chapter 3 turns to a legal assessment of China's national treatment standard in investment regimes. The discussion in this chapter concerns China's foreign investment regulation with regard to the national treatment principle and China's international practice concerning national treatment clauses in international investment agreements (IIAs). In both sections, a combination of *chronological analysis* and *textual analysis* has been applied, with the aim of presenting the development of China's national treatment principle in recent decades from both municipal and international law perspectives. From the

² See the website of the Ministry of Commerce of the People's Republic of China, FTAs Service Department, at <http://fta.mofcom.gov.cn>. [10.07.2017]

³ The four cases are:

China—Certain Measures Affecting Electronic Payment Services, Panel Report, 16 July 2012, WT/DS413/R, 12-3729; *China—Measures Affecting Imports of Automobile Parts*, Appellate Body Report, 15 December 2008, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS339/AB/R, 08-6121;

China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights, Panel Report, 26 January 2009, WT/DS362/R, 09-0240;

China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, Appellate Body Report, 21 December 2009, WT/DS363/AB/R, 09-6642.

⁴ *China—Certain Measures Affecting Electronic Payment Services* Panel Report, WT/DS413/R, adopted August 31, 2012.

municipal law perspective, the basic framework of China's foreign investment laws has been built gradually since the reform and opening-up policy of 1978,⁵ and the drafting of the proposed *Foreign Investment Law* in 2015 was a breakthrough for the entire foreign investment regime. From an international law perspective, the 104 bilateral investment treaties (BITs)⁶ concluded by China in the last three decades are reviewed, with a particular focus on the national treatment clauses. Thus, the evolution of China's international treaty practice as regards the national treatment principle, and the interaction between international law and municipal law in China will become clear. In addition to this *chronological and textual analysis*, a *case study* is also included in the second section of Chapter 3. Two decades after it admitted the jurisdiction of the ICSID, China is still reluctant to be involved in the International Centre for Settlement of Investment Disputes (ICSID) tribunal.⁷ What makes China's national treatment case before the ICSID unavailable is the fact that, when signing the Washington Convention, China notified the ICSID that it would only consider submitting to the jurisdiction of the centre those disputes over compensation resulting from expropriation or nationalisation.⁸ There is, therefore, currently no Chinese case in the ICSID available for research with regard to the topic of this dissertation.

Chapter 4 addresses the comparison between the Chinese approach and the approaches of the United States and the EU with regard to the national treatment principle in trade and investment regimes. In this chapter, a *comparative analysis* is adopted to review how far China remains from a liberalised national treatment approach. A *comparative analysis* concerning the national treatment standard in trade and investment regimes is conducted between China and the United States, with emphasis on the comparison of investment

⁵ Xiang Gao and Huiqin Jiang, 'Foreign Investment Laws and Policies in China: Historical views and current issues', in Liang Song, Ross Garnaut and Cai Fang (eds), *Deepening Reform for China's Long-Term Growth and Development* (Canberra: ANU Press, 2014), pp.531-552, at 532.

⁶ See the website of Ministry of Commerce of the People's Republic of China, Department of Treaty and Law, at <http://tfs.mofcom.gov.cn/article/Nocategory/201111/20111107819474.shtml>. [10.07.2017]

⁷ China signed the ICSID Convention on February 9, 1990, ratified it on July 1, 1992 and deposited its instruments of ratification on January 7, 1993. The ICSID Convention entered into force for China on February 6, 1993. See the ICSID website, List of Contracting States and Other Signatories of the Convention, as of March 30, 2016, available at: <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.bak.aspx?ViewMembership=All>. [10.07.2017]

⁸ Text of Notification by China, January 7, 1993, which reads '*Pursuant to Article 25(4) of the Convention, the Chinese Government would only consider submitting to the jurisdiction of the International Centre for Settlement of Investment Disputes disputes over compensation resulting from expropriation and nationalization.*' ICSID, Notifications Concerning Classes of Disputes Considered Suitable or Unsuitable for Submission to the Centre, at 1, ICSID 8-D (December 2015), available at: <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/ICSID%208-Contracting%20States%20and%20Measures%20Taken%20by%20Them%20for%20the%20Purpose%20of%20the%20Convention.pdf>. [10.07.2017]

regimes. A *comparative analysis* between China and the EU as a whole and between China and individual EU Member States is also conducted, as the national treatment standards adopted by the EU and by individual EU Member States are not identical. Moreover, the China-US BIT and the China-EU Comprehensive Agreement on Investment (CAI) negotiations are included in order to review the current progress being made by China, and what still needs to be done to smooth the negotiation.

Finally, the conclusion is drawn together with concluding remarks from every chapter, and, following an analysis of the previous four chapters, a final observation on the Chinese national treatment standard is provided.

Chapter One The National Treatment Principle in The International Economic Law

The national treatment principle is one of the most significant principles in international economic law, in both trade and investment regimes. This chapter examines the national treatment principle in international trade and investment law, which will provide a foundation for the further research into China's national treatment standard.

I. The national treatment principle and the non-discrimination principle

The national treatment principle is the main standard underpinning the principle of non-discrimination in both international trade and investment law. Furthermore, non-discrimination represents the core value of the national treatment principle, namely: treating aliens and nationals alike. Therefore, before defining and delineating the national treatment principle, it is crucial to touch upon the non-discrimination principle, which is the essence of the national treatment principle.

The principle of non-discrimination, which has a long history in international trade relations, constitutes a cornerstone in various fields of international economic law, notably that of international trade in goods and services, as well as intellectual property and investment protection. The non-discrimination principle provides that contracting parties to an international economic treaty shall not treat domestic market actors more favourably than foreign market actors (national treatment) or differentiate between foreign market actors from different origins (most-favoured-nation, MFN).⁹

Non-discrimination is a fundamental principle in the international trade regime, it underpins the WTO, and many WTO agreements have specific non-discrimination rules. These non-discrimination rules lie at the very heart of the basic WTO agreements.¹⁰ The significance of the non-discrimination principle within the WTO framework is highlighted by the fact that it is embodied in the Preamble to the Marrakesh Agreement Establishing the World Trade Organization, which names the 'elimination of discriminatory treatment in

⁹ Nicolas F. Diebold, 'Standard of Non-discrimination in International Economic Law', *International and Comparative Law Quarterly*, Vol. 60, October 2011, pp. 831-865, at 831.

¹⁰ William J. Davey, *Non-discrimination in the World Trade Organization: The Rules and Exceptions* (Brill | Nijhoff, July 2012), at 55.

international trade relations’ as one of the principal means to achieve the objective of trade liberalisation.¹¹

The whole of international investment law in international investment regimes can be reduced to the principles of equality and non-discrimination. Non-discrimination involves the obligation to refrain from conduct intended to accord differential treatment on the basis of nationality.¹² This principle prohibits a host from treating a particular firm or a group of firms more favourably than others on the basis of nationality.¹³

In both international trade and investment regimes, the most pervasive non-discrimination rule is the MFN rule,¹⁴ however, the national treatment principle is the form of non-discriminatory rule with the deepest impact on national regulatory autonomy, requiring sovereign states to adopt regulation in such a way as to not treat its own citizens more favourably than foreigners.¹⁵ The national treatment obligation is also one of the oldest obligations in international economic law, extending back at least as far as the Greek city-states.¹⁶ Today, national treatment obligations are found in treaties throughout the international trade and investment law system.

A. The definition of ‘non-discrimination’

When used in a legal sense, discrimination can, at its simplest, be said to be the different treatment of similar situations (and, it is sometimes added, the treatment of different situations in the same way). A non-discrimination obligation, then, is typically thought of as a requirement not to distinguish two things inappropriately.¹⁷

According to *Black’s Law Dictionary*, discrimination is either ‘the effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or disability’ or ‘differential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be

¹¹ Nicolas F. Diebold, *Non-Discrimination in International Trade in Services: ‘Likeness’ in WTO/GATS* (Cambridge University Press, 2010), at 15.

¹² Krista Nadakavukaren Schefer, *International Investment Law: Text, Cases and Materials* (Edward Elgar Publishing, 2013), at 12.

¹³ *Ibid.*, at 290.

¹⁴ Davey, *Non-discrimination in the World Trade Organization*, at 55.

¹⁵ Diebold, *Non-Discrimination in International Trade in Services*, at 17.

¹⁶ Schefer, *International Investment Law*, at 303.

¹⁷ Davey, *Non-discrimination in the World Trade Organization*, at 56.

found between those favoured and those not favoured'.¹⁸

In other words, it could be said that a non-discrimination rule requires that two situations should not be distinguished – should not be treated differently – if they are essentially the same.¹⁹

Discrimination may arise from explicitly different treatment; this is sometimes called '*de jure* discrimination'. But it may also arise from ostensibly identical treatment which, due to differences in circumstances, produces differentially disadvantageous effects; sometimes called '*de facto* discrimination'.²⁰ The distinction between these two types of discrimination will contribute to the analysis of China's national treatment regulation in Chapter 2.

The above-mentioned definition of non-discrimination is, however, a general principle which is observed more in spirit than in practical application. Therefore, sub-principles which manifest the essential spirit of the non-discrimination principle are enlarged by legal practices in international economic law.

B. National treatment—a sub-principle of non-discrimination

Although the national treatment principle shares its basic legal elements with the other non-discrimination principle of MFN, national treatment clauses are theoretically and practically more complex, as states do – after all – have a primary duty to their citizens.²¹

As a sub-principle of the non-discrimination principle, the national treatment clause stipulates formal equality between foreign and national factors. It is a contingent standard based on the treatment given to other foreigners. Thus, while the MFN principle seeks to grant foreign actors treatment comparable to other foreign actors operating in the host country, the national treatment principle seeks to grant treatment comparable to that accorded to national actors operating in the host country.²²

The national treatment principle therefore pertains more to the accessibility of the host

¹⁸ Garner, Bryan A. (ed.), *Black's Law Dictionary* (Thomson Reuters, 2009, the ninth edition), at 534.

¹⁹ Davey, *Non-discrimination in the World Trade Organization*, at 57.

²⁰ *Ibid*, at 58.

²¹ Schefer, *International Investment Law*, at 303.

²² United Nations Conference on Trade and Development (UNCTAD), *International Investment Agreements: Key Issues*, Volume 1, UNCTAD/ITE/IIT/2004/10, New York and Geneva, 2004, available at: http://unctad.org/en/Docs/iteit200410_en.pdf, at 161. [10.07.2017]

market for foreign actors in general. It will be easier for hosts to treat foreign actors from different countries equally than to treat foreign and national actors equally. By the same token, the national treatment standard is more relevant to China's legal practice when it comes to the treatment of foreign businesses. This partly explains why this dissertation has chosen to concentrate on the national treatment standard in China, as this principle requires a higher level of openness to foreign actors, which is a significant part of the current Chinese reform process.

From a historical perspective, from early times Assyrians, Phoenicians and Greeks concluded treaties with foreign states to guarantee the mutual protection of foreigners, especially foreign merchants.²³ In treaty practice, the national treatment principle has its origins in trade agreements, arguably dating back to ancient Hebrew Law²⁴ and subsequently appearing in agreements between Italian city-states in the 11th Century,²⁵ and in commercial treaties concluded during the 12th Century between England and continental powers and cities.²⁶ The first treaties to apply a concept of non-differentiation between foreign and local traders can be traced back to the practices of the Hanseatic League in the 12th and 13th centuries.²⁷ Later, the national treatment principle was also adopted in various shipping treaties entered into between European powers in the 17th and 18th centuries,²⁸ and became commonplace in the trade treaties drawn up in large numbers in the latter part of the 19th century,²⁹ as well as appearing in the *Paris Convention for the Protection of Industrial Property* and *Berne Conventions for the Protection of Literary and Artistic Works* entered into late in the 19th century.³⁰

Even before the formation of the WTO, however, the national treatment principle had an important influence on international trade. Although the principle was heavily undermined in the protectionist policies that characterised international trade relations between the two

²³ Stephan Verosta, 'International Law in Europe and Western Asia Between 100 and 650 AD', *Recueil Des Cours*, 1964-III, Vol. 113, pp. 485-651, at 503.

²⁴ William Smith Culbertson, *International Economic Policies: A Survey of the Economics of Diplomacy* (New York, D. Appleton and Company, 1925), at 24.

²⁵ Michael M. Hart, 'The Mercantilist's Lament: National Treatment and Modern Trade Negotiations', *Journal of World Trade Law*, Vol. 21, No. 6, Dec. 1987, pp. 37-61, at 38.

²⁶ Georg Schwarzenberger, 'The Most-Favoured-Nation Treatment in British State Practice', *The British Yearbook of International Law*, XXII, 1945, at 7.

²⁷ Pieter VerLoren van Themaat, *The Changing Structure of International Economic Law* (Martinus Nijhoff, The Hague 1981), at 16.

²⁸ Georg Schwarzenberger, 'The Principles and Standards of International Economic Law', *Recueil Des Cours*, Vol. I, 1966, Academie De Droit International, Hague, pp. 27-65, at 60.

²⁹ Gerard Curzon, *Multilateral Commercial Diplomacy: The General agreement on tariffs and trade, and its impact on national commercial policies and techniques* (London: Michael Joseph, 1965), at 15.

³⁰ See Article 2 of the Paris Convention for the Protection of Industrial Property of 20 March 1883; and Article 5 of the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886.

World Wars,³¹ bilateral trade agreements negotiated by the United States with various trading partners pursuant to the *Reciprocal Trade Agreements Act* of 1934 typically included some form of the national treatment principle.³²

After the Second World War, the United States Friendship, Commerce, and Negotiation (FCN) treaties included a clause offering national treatment,³³ and the United States insisted on its incorporation in the General Agreement on Tariffs and Trade (GATT) as one of its fundamental principles.³⁴

With the formation of the WTO and the development of the foreign direct investment (FDI), the discrepancy between international trade and investment law becomes increasingly obvious, and it is therefore necessary to describe the national treatment principle in these two regimes respectively. Although the national treatment principle is one of the most important principles in various branches of international law – from public international law to private international law – this research will only focus on the national treatment principle in international economic law, including both international trade and investment law.

II. The national treatment principle in international trade and investment regimes

A. The national treatment in the international trade regime

1. The national treatment principle in the WTO

In the international trade regime, the two most fundamental principles constraining and guiding the policies of WTO members with regard to the trade in goods are the two pillars of the non-discrimination principle: the MFN treatment obligation and the national treatment obligation. In simple terms, the MFN treatment obligation prohibits a country

³¹ Clair Wilcox, *A Charter for World Trade* (Macmillan Company, 1949), at 3.

³² Henry Joseph Tasca, *The Reciprocal Trade Policy of the United States: A Study in Trade Philosophy* (Philadelphia: University of Pennsylvania Press, 1938), at 18.

³³ Gerald D. Silver, 'Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The Right of Branches of Foreign Companies to Hire Executives "Of Their Choice"', *Fordham Law Review* (1989), Vol. 57, pp. 765-784, at 768, available at: <http://ir.lawnet.fordham.edu/flr/vol57/iss5/4>. [10.07.2017]

³⁴ John H. Jackson, *World Trade and the Law of GATT* (Indianapolis: Bobbs-Merrill Co., Inc., 1969), at 276-278.

from discriminating *between* countries, while the national treatment obligation prohibits a country from discriminating against other countries.³⁵

During the negotiation phase of the GATT, the United States insisted on the incorporation of the national treatment principle in the GATT as one of its fundamental principles.³⁶ The primary initial rationale for the national treatment principle was to protect concessions reflected in tariff bindings from being undermined by internal taxes or other regulatory measures that replicated the protectionist effect of the previous tariffs.³⁷ However, on the insistence of the United States, the principle of national treatment was applied not only to cases of imports subject to tariff bindings, but was extended to internal taxes and other regulatory measures that had a protectionist or discriminatory impact on imports.³⁸ Therefore, historically, the United States has been a solid promoter of a stricter national treatment standard. This is in sharp contrast to China's attitude towards the national treatment standard.

During the early years of the GATT, high tariffs were the principal impediment to imports, and the preoccupation of GATT members was negotiating reductions in these tariffs on an MFN basis,³⁹ leaving a relatively minor role for the national treatment principle in disciplining protectionism or discrimination in international trade. However, with the success of the GATT in reducing tariffs to very low levels by the 1980s,⁴⁰ the national treatment principle began to emerge as an important source of discipline on residual forms of protectionism or discrimination that lay beyond or within the borders of each member country.⁴¹

As a recurring theme in all WTO agreements, national treatment means that a foreign person, product, or right – such as, for example, a good, a service, a service provider, an investor, an intellectual property right, or a (juridical or physical) person owning an (intellectual or other) property right – must be treated in the same way by a regulating state as the domestic equivalent. Such an obligation is imaginable in a general and

³⁵ Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press, 2005), at 369.

³⁶ Jackson, *World Trade and the Law of GATT*, at 276-278.

³⁷ Kenneth D. Dam, *The GATT Law and International Economic Organization* (University of Chicago Press, 1970), at 6-12.

³⁸ Michael J. Trebilcock and Shiva K. Giri, 'The National Treatment Principle in International Trade Law', *Handbook of International Trade: Economic and Legal Analyses of Trade Policy and Institutions*, Volume II, 2005, at 1-2.

³⁹ Hart, 'The Mercantilist's Lament', at 44-46.

⁴⁰ Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* (New York: Routledge, 1999, 2nd edition), at 112-134.

⁴¹ *Ibid*, at 2.

comprehensive fashion: all state measures which affect foreign persons, goods, services or rights differently to domestic enterprises and their counterparts would be outlawed, including tariffs. Such a non-specific national treatment obligation does not exist in general international law; even in modern, treaty-based, international economic law the right to national treatment is generally only triggered once the foreign goods, services, rights or persons have legally entered the market or territory of the host state.⁴²

More specifically, the national treatment obligation is a recurring provision in almost every WTO agreement, such as the GATT, the GATS, the Agreement on Technical Barriers to Trade (TBT Agreement),⁴³ the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement),⁴⁴ the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement),⁴⁵ and the Agreement on Trade-Related Investment Measures (TRIMs Agreement).

Alongside the GATT and the GATS, the WTO adjudicating bodies based their further interpretation of specific concepts⁴⁶ in the national treatment provision in the TBT Agreement on the text in the TBT Agreement and Article III:4 of the GATT, and applied precedents in a fashion analogous to the GATT Article III (National Treatment on Internal Taxation and Regulation).

Unlike Article III:4 of the GATT, which contains a national treatment obligation applicable

⁴² Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis, *The World Trade Organization: Law, Practice, and Policy* (The Oxford University Press, 2015, third edition), at 179-180.

⁴³ See Article 2.1 of the TBT Agreement:

"Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country."

⁴⁴ See Article 2.1 of the SPS Agreement:

"Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade."

⁴⁵ See Article 3 of the TRIPS:

"1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS. 2. Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade."

⁴⁶ According to the following sections, the specific concepts mentioned here referred to as 'likeness' and 'treatment no less favourable than'.

only to internal regulation, Article 2.3 of the SPS Agreement embodies a general non-discrimination rule applicable to SPS measures. It combines obligations similar to those of both the MFN and the national treatment obligations of Articles I and III:4 of the GATT, thus bringing together the two GATT non-discrimination rules of relevance to regulatory measures.⁴⁷

The national treatment provision of TRIPS is also fortified by the national treatment provision of the *Paris Convention for the Protection of Industrial Property*, which is incorporated into the TRIPS Agreement by TRIPS Article 2.1. The national treatment articles in both the *Paris Convention for the Protection of Industrial Property* and TRIPS are closely related to Article III:4 of the GATT.⁴⁸

Finally, the national treatment clause of TRIMs identifies two specific types of measure as inconsistent with the national treatment obligation under Article III:4 of the GATT: (a) laws and regulations that require an enterprise to purchase or use domestic products (local content requirements), and (b) laws and regulations that limit an enterprise's purchase or use of imported products to an amount related to the volume or value of local products that it exports (trade balancing requirements). Those measures, together with the national treatment regarding investment measures will be analysed in Chapter 3.

The national treatment provisions in TBT Agreement and TRIPS are therefore strongly related to Article III of the GATT. The SPS Agreement adopts a novel approach regarding the national treatment principle, and there is no case with China as respondent regarding the SPS Agreement in the WTO. Accordingly, as the national treatment provision in the GATT lays the foundation for the national treatment provisions in other WTO agreements, and given the specific purpose of this research and the relevant cases being analysed, this section will focus only on the national treatment provision in the GATT and GATS.

a. The national treatment principle in the GATT

The principle of national treatment as embodied in Article III of the GATT specifically prohibits discrimination between domestic and foreign goods in the application of internal

⁴⁷ Denise Prévost, 'National treatment in the SPS Agreement: A *sui generis* obligation', in *The Principle of National Treatment in International Economic Law: Trade, Investment and Intellectual Property*, edited by Anselm Kamperman Sanders, European Intellectual Property Institutes Network series (Edward Elgar Publishing, 31 Oct 2014), at 132.

⁴⁸ Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization*, at 660.

taxation and government regulations once the foreign goods have satisfied customs measures at the border.⁴⁹

Article III of the GATT is structured into several paragraphs: Paragraph 1 lays down the very purpose of the provision, Paragraph 2 breaks the principle down into an operative provision regarding taxes, and Paragraph 4 contains the operative provision with regard to all state measures. The remaining paragraphs contain either more specific applications or exceptions.⁵⁰ The following brief analysis of Article III of the GATT will therefore focus on Paragraphs 1, 2 and 4.

From the very beginning, Article III:1 of the GATT informs the rest of Article III and serves as a guide to understanding and interpreting the specific obligations contained in the other paragraphs of Article III. It prohibits the application of internal taxes and other internal charges to imported or domestic products, as well as regulating those laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions of those products so as to afford protection to domestic production.⁵¹ The Appellate Body in *Japan—Alcoholic Beverages II* established the reading that Article III:1 lays down the fundamental purpose of national treatment provision and explains the relationship between Article III:1 and other paragraphs. This interpretation was refined in *Korea—Alcoholic Beverages* and *Chile—Alcoholic Beverages* and regarded as a general interpretation of the structure of Article III of the GATT.⁵²

Then, with regard to internal taxation, Article III:2 of the GATT requires members to provide national treatment to foreign products with respect to internal taxes or fiscal measures, which mandates that taxes have to be applied on a non-discriminatory basis to both domestic and like imported products originating in other WTO members.⁵³

However, according to the wording of Article III:2, the analysis of Article III:2 should be divided into two parts, namely: the national treatment of *like products* and the national treatment of *directly competitive and substitutable products* with regard to taxes.⁵⁴ Further

⁴⁹ Trebilcock and Giri, 'The National Treatment Principle in International Trade Law', at 3.

⁵⁰ Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization*, at 192.

⁵¹ Trebilcock and Giri, 'The National Treatment Principle in International Trade Law', at 2.

⁵² Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization*, at 192.

⁵³ *Ibid*, 193.

⁵⁴ The explanatory note added to Article III:2 states that a tax conforming to the requirements of Article III:2 would be

analysis regarding the definition of ‘like products’ and ‘directly competitive and substitutable products’ will be included in the ‘*likeness*’ analysis in section III.A.1.a of this chapter.

Finally, concerning internal non-fiscal instruments, Article III:4 prohibits the accordance of less favourable treatment to imported products than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.⁵⁵

In sum, Article III of the GATT plays a critical role since, as its Paragraph 1 makes clear, it is designed to ensure that internal measures are not applied to imported or domestic products so as to afford protection to domestic production. It thus serves the purpose of ensuring that internal measures are not used to nullify or impair the effects of tariff concessions and other multilateral rules applicable to border measures. The role of the national treatment principle of Article III of the GATT must therefore be understood in light of the distinction between border measures and internal measures.⁵⁶

As both the general structure and many of the specific provisions of the WTO agreements are indeterminate, and raise issues of interpretation which are known to be highly contestable,⁵⁷ it is not sufficiently perusable to fully explain the national treatment provision in the WTO agreements.

Without a precise definition of specific terms in the GATT and WTO agreements as a whole, adjudicating bodies in the WTO play a significant role in the interpretation of WTO laws.

According to the Appellate Body, Article III of the GATT obliges members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products,⁵⁸ so from a more pragmatic viewpoint, an equal competitive relationship can be seen to be the main concern of the national treatment principle in the GATT.⁵⁹

considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed products and, on the other hand, directly competitive or substitutable products that were not similarly taxed.

⁵⁵ Trebilcock and Giri, ‘The National Treatment Principle in International Trade Law’, at 3.

⁵⁶ UNCTAD, *International Investment Agreements: Key Issues*, at 163.

⁵⁷ Sol Picciotto, ‘The WTO’s Appellate Body: legal formalism as a legitimization of global governance’, School of Public Policy Working Paper Series: ISSN 1479-9472, January 2005, at 1, available at <https://www.ucl.ac.uk/spp/research/publications/downloads/spp-wp-14.pdf>. [10.07.2017]

⁵⁸ Trebilcock and Giri, ‘The National Treatment Principle in International Trade Law’, at 18.

⁵⁹ Diebold, *Non-Discrimination in International Trade in Services*, at 20.

Further analysis regarding the meaning of specific terms will be included in Part III of this chapter, together with a case-based analysis of the substantive contents of the national treatment principle.

In conclusion, the national treatment rule in the WTO is designed to put the goods of an importing WTO member's trading partners on an equal footing with the importing member's own goods by requiring, among other things, that a WTO member accord no less favourable treatment to imported goods than it does to like domestic goods. More specifically, once imported goods have passed across the national border and import duties have been paid, the importing WTO member may not subject those goods to any further internal taxes or charges in excess of those applied to domestic goods. Similarly, with regard to measures affecting the internal sale, purchase, transportation, distribution or use of goods, the importing WTO member may not treat imported goods less favourably than domestic goods.⁶⁰

b. The national treatment principle in the GATS

The national treatment obligation, set forth in Article XVII (National Treatment) of the GATS, does not apply generally to all measures affecting trade in services, but only comes into play if members choose to include service sectors or sub-sectors in their Schedules of Specific Commitments (SSC). The GATS follows the so called 'positive list' approach, whereby national treatment obligations extend only to those service sectors that members have actually inscribed into their individual SSC. In order to determine the actual level of the national treatment commitments in the GATS, it is therefore necessary to examine each member's SSC, which will indicate the range of activities covered in each service sector and sub-sector and the limitations on national treatment agreed by members pertaining to the different modes of supply.⁶¹

While the national treatment clauses of the GATS and GATT serve the same overall economic purpose of preventing the misallocation of resources through discriminatory measures, there are a number of differences between them in the more specific goals, as

⁶⁰ The United States Trade Representative (USTR), 2015 Report to Congress on China's WTO Compliance, December 2015, at 57, available at: <https://ustr.gov/sites/default/files/2015-Report-to-Congress-China-WTO-Compliance.pdf>. [10.07.2017]

⁶¹ Federico Ortino, 'The principle of non-discrimination and its exceptions in GATS: Selected legal issues', in: Kern Alexander and Mads Andenas (eds.), *The World Trade Organization and Trade in Service* (Leiden: Martinus Nijhoff Publisher, 2008), pp. 173-204, at 174.

well as in the legal structure of the provisions.

First, one of the principal goals of the GATT national treatment clause is to protect tariff concessions by prohibiting discriminatory internal measures. In contrast, services are not generally subject to border measures such as tariffs and quotas. Hence, national treatment in the GATS primarily serves as a broad and general prohibition of discriminatory regulations, in the same way as the national treatment obligations in the GATT do with regard to unbound products. The WTO Secretariat describes the GATS national treatment as implying ‘the absence of all discriminatory measures that may modify the conditions of competition to the detriment of foreign services or service suppliers’.⁶²

Second, in the GATT, national treatment applies to all products, regardless of whether or not they are subject to tariff bindings under the schedules to Article II of the GATT. In contrast, in the GATS, national treatment only applies to those services for which members have undertaken an explicit concession in their SSC. Accordingly, the GATS national treatment framework is composed of positive listing of commitments with negative listing of limitations,⁶³ which is also regarded as a ‘hybrid approach’.

A third difference between national treatment in the GATT and GATS respectively lies in the fact that Article XVII of the GATS stipulates only one standard of service/supplier relationship, namely the one of ‘likeness’; this clause contains no reference similar to the term ‘*directly competitive or substitutable*’ in Article III Paragraph 2 of the GATT. At the same time, national treatment in the GATS differs from Article III of the GATT because it neither distinguishes between different measures, such as taxes and regulatory measures, nor does it provide for different intensities of less favourable treatment, such as ‘*de minimis* taxes’ and ‘not similar taxes’. On the contrary, Paragraph 1 of Article XVII defines the scope of application very broadly as ‘all measures affecting the supply of services’, including both taxes and regulations, as well as other instruments not covered by the national treatment in the GATT, such as subsidies.⁶⁴

Fourth, national treatment in the GATS specifically applies to the service and the service supplier. In contrast, national treatment in the GATT, applies only to the product, not to the

⁶² WTO Secretariat, *A Handbook on the GATS Agreement* (Cambridge University Press, May 2005), at 10.

⁶³ Thomas Cottier, ‘From Progressive Liberalization to Progressive Regulation in WTO Law’, *Journal of International Economic Law*, Vol.9 No.4, 2006, at 780.

⁶⁴ Diebold, *Non-Discrimination in International Trade in Services*, at 119.

producer.⁶⁵

Finally, intangible services are not comparable on the basis of physical characteristics in the same way as products for the purposes of a narrow interpretation of *likeness* under Article III: of the GATT 2, first sentence.⁶⁶

According to the comparison between the national treatment provisions in the GATT and GATS respectively, the national treatment in the GATS is less sophisticated than that of the GATT, which covers a broader scope of application with a commitment-based hybrid approach. In addition, Article XVII of the GATS is simpler, with only three paragraphs, and does not require the formally identical treatment of domestic and foreign suppliers. Moreover, Article XVII of the GATS does not contain an exhaustive list of the types of measure which would constitute limitations on national treatment. Another complex element of the national treatment principle in the GATS is the relationship between national treatment and market access obligations, which will be analysed in Chapter 2 together with a case in the WTO with China as respondent.

Despite the above discrepancies, the function of the national treatment obligation in the GATS is, as it is in the GATT, to ‘ensure equal competitive opportunities for the like services of other members’.⁶⁷ The key requirement is to not modify, in principle or in practice, the conditions of competition in favour of the member country’s own service industry.⁶⁸

The GATS is the first comprehensive multilateral agreement covering the trade in services, and it was inspired by the structure of the GATT, but displays many important elements of its own. The peculiarities of the GATS have their origin in services, which are often heavily regulated at a domestic level, reflecting the importance of many service sectors for the well-being of states and societies. In short, services tend to be more politically sensitive than goods.⁶⁹

In a nutshell, the national treatment provision in the GATS is not a general obligation, neither is it as exhaustive as that of the GATT, due to the flexible system introduced by the SSCs of members. By means of a complex scheduling technique, members may schedule

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *China—Electronic Payment Services* (Panel Report), para. 7.700.

⁶⁸ See the WTO website, The General Agreement on Trade in Services: objective, coverage and disciplines, available at http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm. [10.07.2017]

⁶⁹ Matsushite, Schoenbaum, Mavroidis, *The World Trade Organization*, at 555-556.

horizontal commitments and limitations which apply to all service sectors and all four modes of supply.⁷⁰ In this way, members can maintain a high degree of flexibility in deciding which service sectors should be subject to national treatment.⁷¹ However, the essence of the national treatment clause in the GATS is focus on an equal competitive relationship, making it essentially identical to Article III of the GATT.

2. The national treatment principle in FTAs

FTAs are international treaties between two or more countries which remove barriers to trade and facilitate stronger trade and commercial ties, contributing to increased economic integration between participating countries.⁷² Their purpose is the reduction of barriers to the exports of participating countries, protecting the interests of participating countries, and enhancing the rule of law in the FTA partner countries. FTAs have proved to be one of the best ways to open up foreign markets to participating countries. High-quality and comprehensive, FTAs can play an important role in supporting the liberalisation of global trade and are explicitly allowed under WTO rules.

It is well known that a key rule of the WTO multilateral trade system is that reductions in trade barriers should be applied, on a most-favoured nation basis, to all WTO members. This means that no WTO member should be discriminated against by another member's trade regime. However, FTAs are an important exception to this rule. Under FTAs, reductions in trade barriers apply only to the parties to the agreement. However, this exception is allowed under Article XXIV (Territorial Application Frontier Traffic Customs Union and Free-trade Areas) of the GATT for trade in goods, in Article V (Economic Integration) of the GATS for trade in services, and in the Enabling Clause for developing countries.⁷³

According to Article XXIV of the GATT, FTAs must be consistent with the WTO rules governing such agreements. These require that parties to an FTA must have established

⁷⁰ Diebold, *Non-Discrimination in International Trade in Services*, at 29.

⁷¹ *Ibid*, at 20.

⁷² Australian Government, Department of Foreign Affairs and Trade, About Free Trade Agreements, available at: <http://dfat.gov.au/trade/agreements/Pages/about-ftas.aspx>. [10.07.2017]

⁷³ Australian Government, Department of Foreign Affairs and Trade, The WTO and FTAs, available at: <http://dfat.gov.au/international-relations/international-organisations/wto/pages/the-world-trade-organization-wto-free-trade-agreements.aspx>. [10.07.2017]

free trade on substantially all trade within the regional area, and that the parties may not raise their tariffs or other barriers against countries outside the agreement.⁷⁴

Furthermore, WTO members deciding to enter into an FTA must notify the WTO of their intention to do so. Notifications will be submitted to the Committee on Regional Trade Agreements (CRTA), where the compatibility of the proposed scheme with the multilateral rules will be reviewed. The CRTA is the successor to Article XXIV of the GATT Working Parties, the organ that used to examine the conformity of proposed FTAs with the multilateral rules.⁷⁵

Compliance with WTO rules is therefore important in ensuring that an agreement is beneficial to all parties in the multilateral system, and that FTA participants do not enter into trade agreements that fall short of the benchmarks set by the WTO.⁷⁶ By the same token, the national treatment standards in FTAs are in accordance with the national treatment principle of the GATT, with the entire clause often prescribed as follow:

Each Party shall accord national treatment to the goods of the other Party in accordance with Article III of the GATT 1994, including its interpretative Notes and Supplementary Provisions. To this end, the obligations contained in Article III of the GATT 1994, including its interpretative Notes and Supplementary Provisions, are incorporated into and made part of this Agreement, *mutatis mutandis*.⁷⁷

Although Article 301 of the North American Free Trade Agreement (NAFTA) regarding national treatment has three paragraphs, its standard is essentially in accordance with Article III of the GATT. Therefore, in the international trade regime, the general explanation of the national treatment standard in this research is limited to the WTO national treatment obligation in the GATT and GATS, as this principle is identical or similar in FTAs to the standard in the WTO. Any peculiarities regarding China's national treatment standard in its FTA practices will be included in Chapter 2.

B. The national treatment in the international investment regime

National treatment is one of the basic principles of international investment law. Most BITs and multilateral investment agreements contain national treatment clauses requiring

⁷⁴ *Ibid.*

⁷⁵ Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization*, at 514.

⁷⁶ See *supra* note 73.

⁷⁷ See Article 2.3 of EU-Singapore FTA. Also see Article 12 of EU-Vietnam FTA, Article 2.2 of China-Switzerland FTA, Article 2.3 of China-South Korea FTA, Article 2.3 of China-Australia FTA, etc.

contracting states to accord investors and investments from other contracting parties treatment no less favourable than that accorded to their own investors and investments.⁷⁸

The popularity of national treatment clauses in IIAs is not surprising, as the promotion of non-discrimination – treating foreign investors like domestic investors under like circumstances – is one of the fundamental goals of the international investment regime.⁷⁹

Although trade and investment share a common origin, trade and investment disciplines have traditionally focused on different, but complementary, objectives: the liberalisation of trade flows in the case of trade, and the protection and promotion of foreign investments in the case of investment.⁸⁰ Unlike overall welfare, efficiency, liberalisation, state-to-state exchange of market access and trade opportunities in the trade regime, the investment regime is about fairness; grounded in customary rules on the treatment of aliens, not on efficiency, it is about protection rather than liberalisation, and about individual rights, not the state-to-state exchange of market opportunities.⁸¹

These distinctions between trade and investment regimes have also led to the difference between their legal frameworks. Unlike international trade laws, there is no multilateral framework treaty on international investment laws.⁸² Instead of being governed multilaterally through the WTO since 1947, the FDI has been regulated internationally by close to 2,958 separate BITs,⁸³ which only mushroomed in the 1980s and 1990s.⁸⁴ This figure is in accordance with the commonly accepted conclusion that law in the field of foreign investment protection is a relatively recent treaty-based phenomenon. The first such treaty, which is frequently referenced, is the BIT between Germany and Pakistan, signed in 1959.

In the Germany-Pakistan BIT, Article 3 includes the national treatment principle, which is now commonly litigated under BITs and other IIAs. Since then, the national treatment standard has become the most significant principle in BITs, stemming from foreign

⁷⁸ August Reinisch, 'National Treatment: *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29', in *Building International Investment Law: The First 50 Years of ICSID*, edited by Meg Kinnear, Geraldine R. Fischer, Jara Mínguez Almeida, Luisa Fernanda Torres, and Mairée Uran Bidegain (Kluwer Law International: 2016), at 389.

⁷⁹ Konrad von Moltke, 'Discrimination and Non-Discrimination in Foreign Direct Investment', OECD Global Forum on International Investment, Conference on FDI and the Environment, 7-8 February 2002, at 3, available at: <https://www.oecd.org/env/1819921.pdf>. [10.07.2017]

⁸⁰ Nicholas DiMascio and Joost Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?', *The American Journal of International Law*, Vol. 102, No. 1, January, 2008, pp. 48-89, at 53.

⁸¹ *Ibid.*, at 56.

⁸² Schefer, *International Investment Law*, at 36.

⁸³ The data is provided by UNCTAD, available at: <http://investmentpolicyhub.unctad.org/IIA>. [10.07.2017]

⁸⁴ DiMascio and Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties', at 48.

investors' fear of discrimination, something which is inherent in the asymmetrical relationship between a private investor and a sovereign state.

As one of the main general standards used in international practice to secure a certain level of treatment for FDIs in host countries,⁸⁵ the national treatment standard in international investment laws can be defined as the principle whereby a host country extends to foreign investors treatment that is at least as favourable as the treatment it accords to national investors in like circumstances. In this way, the national treatment standard seeks to ensure a degree of competitive equality between national and foreign investors.⁸⁶

Despite the seemingly identical competitive equality in investment regimes and trade regimes, the national treatment principle enshrined in BITs or IIAs are dissimilar to the national treatment provisions in the GATT/WTO.

As the distinction made in the field of trade in goods between border measures and internal measures has no meaningful equivalent in the field of investment, national treatment clauses in BITs or IIAs differ in scope and purpose from the national treatment principle of Article III of the GATT. In particular, a key question arising concerning the scope of application of the national treatment principle in investment agreements is whether the principle applies to all phases of an investment, i.e. whether it applies only to the treatment of foreign investment after its entry, or whether it also applies to the entry of foreign investment.⁸⁷ This question will be discussed in detail in Part IV of this chapter.

Despite the distinctions between the national treatment principle in the regimes of trade and investment and the different national treatment clauses in thousands of BITs between different countries, there are some key components which are crucial to the further understanding of the national treatment principle in the national treatment principles of both regimes.

C. Case law tests to determine a violation of the national treatment principle

The textual analysis of the national treatment principle mentioned above is ambiguous as

⁸⁵ UNCTAD, *International Investment Agreements: Key Issues*, at 161.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, at 161-162.

regards an understanding of the essence of the national treatment obligation. In both trade and investment regimes, the tests established by WTO adjudicating bodies and international investment tribunals to determine a violation of national treatment obligation are also necessary for an understanding of the national treatment principle. Case law tests for the determination of violations of the national treatment principle will therefore be incorporated to provide a more intensive understanding of the content of the national treatment principle from a pragmatic perspective.

1. Case law tests to determine a violation of national treatment principle in the trade regime

In different periods, the application of the national treatment obligation in GATT/WTO case law has oscillated between phases of varying severity and laxity. At the centre of these interpretive cycles lies the fundamental tension between the liberal devotion to free trade and the sovereign right of a state to tax, legislate, and regulate according to domestically determined policy.⁸⁸ Moreover, the tests established by WTO adjudicating bodies vary from Article III:2 of the GATT (first sentence) and Article III:2 of the GATT (second sentence) to Article III:4 of the GATT, as the wording is different in each provision.

a. Case law tests of Article III of the GATT

The general principle of the national treatment clause in the GATT was meticulously interpreted by the Appellate Body in *Japan—Alcoholic Beverage II*. According to *Japan—Alcoholic Beverage II*, it suffices under Article III:2 (first sentence) to demonstrate that:

- (1) the imported and the domestic products are ‘like’;
- (2) the taxes imposed on the imported product are ‘in excess of’ the taxes applied to domestic products.⁸⁹

The requirement to meet the two-tier test was confirmed by the Appellate Body, among other cases, in *Korea—Alcoholic Beverages* and *Chile—Alcoholic Beverages* and regarded as a general interpretation of the first sentence of Article III:2 of the GATT

Conversely, the substantive elements for a breach of Article III:2 (second sentence) require that:

⁸⁸ DiMascio and Pauwelyn, ‘Nondiscrimination in Trade and Investment Treaties’, at 62.

⁸⁹ *Japan—Alcoholic Beverage II* (Appellate Body Report), para. 25.

- (i) the imported and domestic products are ‘directly competitive or substitutable’;
- (ii) the imported and domestic products ‘are not similarly taxed’;
- (iii) the dissimilar taxation is ‘applied so as to afford protection’.⁹⁰

According to the Appellate Body in *Korea—Beef* and *EC—Asbestos*, the analysis of the consistency of a measure with the national treatment principle in Article III:4 constitutes a four-tier test:

- (i) with respect to a law, regulation, or requirement;
- (ii) affecting internal sale, offer for sale, purchase, transportation, distribution, or use;
- (iii) a foreign good is afforded in comparison to a domestic like good;
- (iv) the imported products are afforded less favourable treatment than like domestic products.⁹¹

In some other cases the Appellate Body identified a three-tier test, which combines the descriptions in (i) and (ii).

b. The three-tier test of Article XVII of the GATS

The link between the national treatment obligations in the GATT and GATS is genetic, and thus unavoidably quite strong. As a general stance, the Appellate Body has confirmed that the jurisprudence on a national treatment provision in one WTO Agreement may be useful in interpreting a national treatment provision in another WTO Agreement, at least where the relevant provisions use similar language.⁹²

In the GATS, there is a three-part test, applied by the Panel in *China—Publications and Audiovisual Products*, to assess whether a member country’s measure is inconsistent with the national treatment provision in the GATS. Accordingly, in order to sustain a claim that a member country’s measures are in breach of Article XVII, the following three elements need to be established by the complaining party:

- (i) the measure at issue affects trade in services;
- (ii) the foreign and domestic services and service suppliers are ‘like’ services or service suppliers;
- (iii) the foreign services or service suppliers are granted treatment no less favourable.⁹³

⁹⁰ *Ibid.*

⁹¹ See Appellate Body Report on *EC—Asbestos* and *Korea—Various Measures on Beef*.

⁹² *US—Section 211 Appropriations Act* (Appellate Body Report), para. 242.

⁹³ *China—Electronic Payment Services* (Panel Report), para. 7.641; *EC—Bananas III (US)*, para. 7.314.

2. Case law tests to determine a violation of the national treatment principle in the investment regime

In investment law, investor/state disputes involving national treatment provisions in BITs are resolved by arbitral tribunals organised under the rules of various organisations, most often the ICSID.⁹⁴ These tribunals are not required to follow each other's precedents, and unlike trade law, there is no Appellate Body to clarify and resolve conflicts in the tribunals' applications of national treatment. Furthermore, textual variations in the national treatment provisions contained in BITs and other agreements affect their legal interpretation and effect. Consequently, it is difficult, though not impossible, to distil general principles regarding national treatment in an investment context from the decisions of investment tribunals.⁹⁵

For example, the NAFTA tribunal established the structure of a legal test concerning the national treatment rules early, in the case of *Pope & Talbot v. Canada*, and subsequently confirmed by other NAFTA tribunals.

Accordingly, the determination of an alleged breach of the national treatment principle under Article 1102 of the NAFTA can be summarised in three analytical steps:

- (i) identifying domestic investors and/or investments in a comparable position with the claimant (like-circumstanced suppliers, investors or investments);
- (ii) determining whether more-favourable treatment has been provided to the domestic investor/investment;
- (iii) determining whether the circumstances of the application of the measure justify the difference in treatment (like-circumstanced treatment).⁹⁶

According to the three analytical steps, the NAFTA non-discrimination analysis is similar to WTO law. Although the substantive content of the national treatment test in one of the investment tribunals and the WTO adjudicating bodies are identical, investment tribunals have properly declined to import the focus on competition from trade law into their national treatment tests. Despite the fact that the objective and purpose of each investment treaty must be evaluated independently, the overall history of investment treaties demonstrates that national treatment clauses were inserted into most BITs to protect individual foreign investors from targeted attacks by their host governments. The objective

⁹⁴ Todd S. Shenkin, 'Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty', 55 *University of Pittsburgh Law Review* 541, 1994, at 548-549.

⁹⁵ DiMascio and Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties', at 66.

⁹⁶ *Pope & Talbot v. Canada*, para. 42.

of protecting individual investors from discrimination has appropriately led investment tribunals to focus on the circumstances giving rise to governmental choices concerning the regulation of investments.⁹⁷

In addition to all the discrepancies between the national treatment principles of the trade and investment regimes, there are features that unite the national treatment principle in both regimes. For example, in both fields, the national treatment principle protects less well-placed foreigners from government abuse; in addition, the national treatment clauses in both trade and investment agreements fundamentally imply an obligation not to discriminate, either directly or indirectly, on the basis of nationality. More importantly, according to the tests of national treatment mentioned above, '*likeness*' and '*treatment no less favourable than*' are identical elements in almost every test, and constitute the substantive content of the national treatment principle in both international trade and investment regimes.

III. The substantive content of the national treatment principle in international trade and investment regimes

As the structure of any non-discrimination obligation – including national treatment and MFN treatment – requires a comparison between products and services or investors from different origins, it is self-evident that the national treatment principle consists of two principal elements that are comparative in nature: first, what are the actual situations in which national treatment applies? Second, in what manner, and to what extent, is the treatment of foreign actors assimilated to that of nationals? The first issue defines the limits of factual comparison, while the second issue deals with the techniques of comparison, the application of which is limited to the situations identified in answer to the first question.⁹⁸ These two questions are also adopted by national treatment consistency tests in case law.

According to the previous section, in the definition of national treatment in both the trade and investment regimes, in terms of comparison, two key components common to the two national treatment principles are '*likeness*' and '*treatment no less favourable than*'.

The first element, *likeness*, calls for a comparison between the objects of the treatment,⁹⁹

⁹⁷ DiMascio and Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties', at 81.

⁹⁸ UNCTAD, *International Investment Agreements: Key Issues*, at 164.

⁹⁹ Diebold, *Non-Discrimination in International Trade in Services*, at 32.

and the second element, *treatment no less favourable than*, requires a comparison between the treatments accorded to the objects in question in order to assess whether one is treated less favourably than the other. These two elements are cumulative in nature.¹⁰⁰

Therefore, the issue key to defining the national treatment principle is how to set subsidiary rules that will establish which factors are relevant to determining similarity of situations and treatment.¹⁰¹ In this section, these two components will be thoroughly examined in order to reach a better understanding of the national treatment principle, and this will lay a foundation for the specific focus on China's national treatment standard in Chapters 2 and 3.

A. 'Likeness'

1. 'Likeness' in WTO/trade law

As the language of WTO national treatment clauses indicates, a comparison must be made between the two objects or situations to which differential treatment is accorded. Such a comparison can define the actual situations in which national treatment applies. A violation of the national treatment obligation only occurs if the products or services in question are *like*, with the exception of the one difference that provides the (direct or indirect) basis of the discrimination, i.e. origin in the case of international trade.¹⁰²

The concept of *likeness* plays a crucial role in the scrutiny of discrimination because the outcome of the analysis depends strongly on how broadly or narrowly the comparative group of like objects or situations is defined.¹⁰³ In fact, the wider the definition of the scope of the term *likeness* and the comparative group, the wider in scope – and thus the more restrictive – the non-discrimination obligation becomes.¹⁰⁴

Considering that this is such a crucial concept, there is – perhaps surprisingly – no uniform definition of 'likeness' in the context of WTO law. For example, the provision on national treatment in the GATT applies the terms '*like domestic products*' and '*like products*' in the second and fourth paragraphs of Article III respectively. In addition, Ad Article III of the

¹⁰⁰ *EC—Asbestos* (Appellate Body Report), para. 100.

¹⁰¹ Davey, *Non-discrimination in the World Trade Organization*, at 154.

¹⁰² Diebold, *Non-Discrimination in International Trade in Services*, at 65.

¹⁰³ *Ibid.*

¹⁰⁴ *Korea—Alcoholic Beverages* (Appellate Body Report), para. 142.

GATT, adds that the national treatment principle in Paragraph 2 of Article III of the GATT provides for another standard of product relationship, namely ‘*directly competitive or substitutable*’,¹⁰⁵ meaning that the GATT national treatment provides for two different standards of the *likeness* product relationship.

Unlike the GATT, the GATS national treatment in Article XVII provides that a member shall accord to services and service suppliers of any other member treatment no less favourable than that it accords to its own *like services* and *services suppliers*.¹⁰⁶ There is, therefore, only one standard of *likeness* in the GATS national treatment principle.

These two different standards in the GATT and GATS, coupled with the absence of a legal definition in WTO agreements has led to some confusion and uncertainty, which the WTO adjudicating bodies have, as yet, been unable to completely clarify.¹⁰⁷

a. ‘*Likeness*’ in the GATT

A key threshold for the right to national treatment is the *likeness* of the domestic and imported products in question. After more than 20 years, the Appellate Body has still not produced a textbook definition, or, in its own words, a ‘precise and absolute definition of what is “like”’.¹⁰⁸ Therefore, the research into *likeness* in the GATT will combine the text of Article III and WTO case law in this regard.

As Article III:1 of the GATT is about the leitmotiv, purpose and general principle of the national treatment clause, the analysis of *likeness* in the GATT is concentrated in Articles III:2 and III:4.

i. Four criteria in determining ‘likeness’ in the first sentence of Article III:2 of the GATT

According to the Appellate Body in *Japan—Alcoholic Beverages II*, the words of the first sentence of Article III:2 require an examination of the conformity of an internal tax measure with Article III by determining: first, whether the taxed imported and domestic products are ‘like’ and, second, whether the taxes applied to the imported products are ‘in excess of’ those applied to like domestic products.¹⁰⁹

¹⁰⁵ See *Ad Article III* in ANNEX I of GATT 1947, Paragraph 2.

¹⁰⁶ See Article XVII:1 in GATS.

¹⁰⁷ Diebold, *Non-Discrimination in International Trade in Services*, at 67.

¹⁰⁸ *Japan—Alcoholic Beverage II* (Appellate Body Report), para. 21.

¹⁰⁹ *Ibid*, para. 18-19.

Not surprisingly, the Appellate Body said there could be no one precise and absolute definition of what is ‘like’. According to the Appellate Body, the concept of *likeness* is a relative one which evokes the image of an accordion. The accordion of *likeness* expands and squeezes in different places as different provisions of WTO Agreements are applied. In any one of those places, the width of the accordion must be determined by the particular provision in which the term ‘like’ is encountered, as well as by the context and the circumstances that prevail in any given case to which that provision may apply. The Appellate Body believed, in Article III:2 (first sentence) of the GATT, that the accordion of *likeness* is meant to be narrowly squeezed.¹¹⁰

More specifically, the Appellate Body in *Japan—Alcoholic Beverages II* analysed four criteria for the first time when it referred to the Working Party on Border Tax Adjustment, which developed the basic approach for interpreting ‘like products’.

The four criteria employed by the GATT/WTO jurisprudence in determining *likeness* under Article III:2 (first sentence) are: (1) the product’s end-uses in a given market (2) consumers’ tastes and habits, which change from country to country (3) the product’s properties, nature, and quality¹¹¹ and (4) the customs classification of the product.¹¹²

The Appellate Body has stated that these criteria do not constitute a ‘closed list’ and that they are simply tools to assist in the task of sorting and examining the relevant evidence.¹¹³ For example, price may also be a criterion to determine *likeness*: if the price of given products are vastly different, this may be indicative of a non-competitive relationship.¹¹⁴ The adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, all of the pertinent evidence.¹¹⁵

In a recent report, the Appellate Body stated that whereas the determination of *likeness* may start with an analysis of the physical characteristics of the products, none of the four

¹¹⁰ *Japan—Alcoholic Beverages II* (Appellate Body Report), para. 23 and *EC—Asbestos* (Appellate Body Report), paras. 98-99.

¹¹¹ Report by The Working Party on Border Tax Adjustments, L/3464, 20 November 1970, para. 18, available at: https://www.wto.org/gatt_docs/English/SULPDF/90840088.pdf. [10.07.2017]

¹¹² Drawing on the pre-WTO GATT cases (see, for example, *Japan—Alcoholic Beverages* (Panel Report), para. 5.6.), the Appellate Body found that product categorisations or classification by states and (domestic) regulatory regimes may also be helpful in evaluating whether products are ‘like’, thus adding (4) the customs classification of the product and/or the internal regulatory regime of the products.

¹¹³ *EC—Asbestos* (Appellate Body Report), paras. 101-103.

¹¹⁴ *Dominican Republic—Import and Sale of Cigarettes* (Panel Report), para. 7.333 and *Philippine—Distilled Spirits* (Panel Report), para. 7.59; in *Thailand—Cigarettes (Philippines)* (Panel Report), the Panel limited its analysis of likeness to cigarettes within the same price band, see para. 7.428.

¹¹⁵ *EC—Asbestos* (Appellate Body Report), paras. 101-103.

criteria has a superior role for the purposes of determining *likeness*. Rather, the panel had to examine ‘these criteria in order to make a determination about the nature and extent of a competitive relationship between and among the products’,¹¹⁶ and more importantly, on a case-by-case basis.

Despite the narrower interpretation of Article III:2 of the GATT (sentence 1) the catchment area of *likeness* is not limited to products that are identical.¹¹⁷

ii. ‘Directly competitive or substitutable product’ in the second sentence of Article III:2 of the GATT

Although *likeness* is narrowly interpreted in the first sentence of Article III:2 of the GATT, the scope of application becomes broader with the category of ‘directly competitive or substitutable product’ in *Ad Article III*.

There is no authoritative interpretation of the concept of ‘directly competitive or substitutable’ from either those who drafted the GATT or the Marrakesh Agreements Establishing the World Trade Organization, but it is well established through case law that it is a broader concept than *likeness*.¹¹⁸ That is to say, if a product does not meet the narrow definition of ‘like product’, it may still be ‘directly competitive or substitutable’. Therefore, even if there is no violation of the first sentence of Article III:2, one must still consider whether there is an infringement of the second sentence of Article III:2.

The Appellate Body Report on *Korea—Alcoholic Beverages* represents the state of the art as far as the definition of ‘directly competitive or substitutable’ products is concerned in the WTO case law. It is, as a result, now accepted that: (i) two products will be ‘directly competitive or substitutable’ if they are viewed as such by consumers (that is, the test is in the marketplace); (ii) recourse to econometric indicators is not obligatory: a directly competitive or substitutable relationship can also be established through recourse to criteria such as physical characteristics, end uses and consumer preferences.¹¹⁹ These criteria have been consistently referred to in subsequent WTO case law.

¹¹⁶ *Philippine—Distilled Spirits* (Appellate Body Report), para. 119, referring to the *EC —Asbestos* (Appellate Body Report), para.99, that ‘a determination of “likeness” under Article III:4 is , fundamentally, a determination about the nature and extent of a competitive relationship between and among products’.

¹¹⁷ *Philippine—Distilled Spirits* (Appellate Body Report), para. 120.

¹¹⁸ Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization*, at 202.

¹¹⁹ *Korea—Alcoholic Beverage* (Appellate Body Report), para. 115.

According to the Appellate Body Report in *Korea—Alcoholic Beverage*, ‘directly competitive or substitutable products’ include products that are imperfectly substitutable and offer an ‘alternative way of satisfying a particular need or taste’.¹²⁰ The Appellate Body also gave the explanation that ‘like products’ were a subset of ‘directly competitive or substitutable products’: ‘perfectly substitutable products’ were to fall under Article III:2, sentence 1, while ‘imperfectly substitutable products’ were to fall under Article III:2, sentence 2.¹²¹

In addition, the Appellate Body considered that competition in the market place is a dynamic, evolving process, and this means that the concept of ‘directly competitive or substitutable’ implies that the competitive relationship between products is not to be analysed exclusively by reference to current consumer preferences.¹²²

Therefore, ‘like products’ and the broader category of ‘directly competitive or substitutable product’ cover situations where the imported and domestic products compete directly, and it is only to these two constellations that the national treatment obligation applies.¹²³

iii. ‘Likeness’ in Article III:4 of the GATT

In contrast to Article III:2 of the GATT, Article III:4 of the GATT does not distinguish between ‘like’ and ‘directly competitive or substitutable’ products. The question thus arises as to whether the term ‘like’ should have the same meaning across the two paragraphs.¹²⁴ The Appellate Body, however, decided that this should not be the case.

Regarding the criteria for determining *likeness* under Article III:4, the Appellate Body confirmed, in *EC—Asbestos*, the following criteria: (i) the product’s end uses; (ii) consumers’ tastes and habits; (iii) the product’s nature, properties, and quality; and, (iv) the customs classification of the products.¹²⁵ As mentioned above, these criteria are simply tools to assist in the task of sorting and examining the relevant evidence.

However, the scope of *likeness* in Article III:4 has been found by the Appellate Body to be somewhat wider than that in the first sentence of Article III:2, and certainly not broader

¹²⁰ *Ibid.*

¹²¹ *Korea—Alcoholic Beverage* (Appellate Body Report), para. 118. See also *Canada—Periodicals* (Appellate Body), para. 473 and *Philippine—Distilled Spirits* (Appellate Body), para. 149.

¹²² *Korea—Alcoholic Beverage* (Appellate Body Report), para. 114.

¹²³ Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization*, at 197.

¹²⁴ Gene M. Grossman, Henrik Horn and Petros C. Mavroidis, ‘The Legal and Economic Principles of World Trade Law: National Treatment’, Research Institute of Industrial Economics, IFN Working Paper No. 917, 2012, at 71.

¹²⁵ *EC—Asbestos* (Appellate Body Report), paras. 101-103.

than the combined products scope of the two sentences of Article III:2. This is because the scope of the first sentence of Article III:2 must be read in light of its relationship with the second sentence of Article III:2, something that does not apply to Article III:4.

To conclude, according to the WTO adjudicating bodies, the scope of *likeness* in Article III of the GATT is: the ‘like products’ in the first sentence of Article III:2 is a basic criteria which includes four indicative criteria; ‘directly competitive or substitutable’ products is a broader concept which consist of basic criteria and conditions of competition; and ‘like products’ in Article III:4 is in the middle, and is a combination of basic criteria and competitive relationship.

Moreover, the determination of *likeness* is an exercise that must, as a matter of principle, look at all the available facts and circumstances which make the goods in question alike. As a consequence, the four criteria re-stated above are only tools to structure available evidence, as was acknowledged by the Appellate Body.¹²⁶ In particular, they (a) do not constitute a closed list;¹²⁷ (b) are indicative only; and (c) have to be weighed on a case-by-case basis.¹²⁸ The Appellate Body has underlined their function as tools to assist in the task of sorting, examining, and evaluating the relevant evidence.¹²⁹ Clearly, the process of determining *likeness* is less like exact science and more like art, and is thus unavoidably not free from individual, discretionary elements.¹³⁰ To be fair, the Appellate Body has provided panels and members with a number of quite important additional parameters for guiding the holistic determination of whether the products in question are *like*. These will not be discussed explicitly.

In sum, the accurate definition of ‘like products’ under Article III of the GATT is an impossible task, as the GATT agreement left it blank in this regard and the WTO adjudicating bodies use a case-by-case approach which takes four indicative criteria as reference. Essentially, however, the determination of *likeness* is, fundamentally, a

¹²⁶ *Ibid*, para. 131.

¹²⁷ *Japan—Alcoholic Beverage II* (Appellate Body Report), para. 113, 114. The Panel in *Dominican Republic—Importation and Sale of Cigarettes*, paras. 7.333-7.336 viewed price as one such additional criterion; cf. also *Philippine—Distilled Spirits* (Panel Report), para. 7.59.

¹²⁸ *Japan—Alcoholic Beverage II* (Appellate Body Report), para. 114.

¹²⁹ *EC—Asbestos* (Appellate Body Report), paras. 101 and 103; *Philippine—Distilled Spirits* (Appellate Body Report), para. 131. A particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, all of the pertinent evidence.

¹³⁰ *Japan—Alcoholic Beverage II* (Appellate Body Report), para. 21.

determination about the nature and the extent of a competitive relationship between and among imported and domestic products.¹³¹

b. ‘Likeness’ in the GATS

The distinction between the national treatment principles of the GATT and GATS is that the national treatment provision of the GATS stipulates only a single standard of *likeness*, namely ‘like services and service suppliers’, which contains no reference similar to the term ‘directly competitive or substitutable’ in *Article III* Paragraph 2 of the GATT.

Although there are several differences, *likeness* in the GATS shares a common point with *likeness* in the GATT: there is no authoritative explanation of ‘like services and service suppliers’ in the text of the GATS, therefore, interpretations of WTO adjudicating bodies play a significant role in the understanding of *likeness* in the GATS.

To determine when services or suppliers are ‘like’, the Appellate Body and the Panel draw on their *likeness* jurisprudence regarding Article III of the GATT. The criteria developed there play a crucial role in the interpretation of *likeness* in the context of the GATS; at the same time, it seems rather self-evident that this transfer will have to be applied with a pinch of salt, taking into account the particularities of the trade in services.¹³²

To date, only eight cases¹³³ have been decided on the basis of Article XVII of the GATS, all of which lack any conceptual scrutiny of the *likeness* element.

However, for the case law understanding of Article XVII of the GATS, the Panel in *EC—Bananas III* found that the standard of Article XVII of the GATS follows Article III of the GATT, which has been consistently interpreted by past panel reports to be concerned with the conditions of competition between like domestic and imported products on internal

¹³¹ *Philippines—Distilled Spirits* (Appellate Body Report), para. 170.

¹³² Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization*, at 606.

¹³³ These eight cases are:

European Communities—Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, 9 September 1997;

Canada—Certain Measures Affecting the Automotive Industry, WT/DS139/AB/R, WT/DS142/AB/R, 31 May 2000;

Mexico—Measures Affecting Telecommunications Services, WT/DS204/R, 2 April 2004;

United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, 7 April 2005;

China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/AB/R, 21 December 2009;

China—Certain Measures Affecting Electronic Payment Services, WT/DS413/R, 16 July 2012;

Argentina—Measures Relating to Trade in Goods and Services, WT/DS453/AB/R, 14 April 2016.

markets.¹³⁴ The Appellate Body confirmed that the national treatment principle of the GATS is designed to protect equal conditions of competition between domestic and foreign services and suppliers.¹³⁵

Then, confirmed by the Panel in *China—Electronic Payment Service*, Article XVII of the GATS seeks to ensure equal competitive opportunities for like services of other members. This provision further suggests that like services are services that are in a competitive relationship with each other (or would be if they were allowed to be supplied in a particular market).¹³⁶

The Panel also confirmed that the determination of ‘like services’, and ‘like service suppliers’, should be made on a case-by-case basis.¹³⁷ The view of the Panel was that a determination of *likeness* should be based on arguments and evidence pertaining to the competitive relationship of the services being compared.¹³⁸ If it is determined that the services in question in a particular case are essentially or generally the same in competitive terms, those services would be seen as ‘like’ for the purposes of XVII of the Article.¹³⁹

However, no WTO case law exists on the issue of whether *likeness* in the GATS should be construed narrowly, along the line of ‘like products’ in terms of the first sentence of Article III:2 of the GATT, or in a broader sense, similar to the ‘directly competitive or substitutable’ products of the second sentence of Article III:2 of the GATT.

To sum up, unlike the GATT, which has abundant jurisprudence regarding the determination of *likeness* with regard to the national treatment clause, Article XVII of the GATS is imprecise and ambiguous, while few interpretations by WTO adjudicating bodies are related to the further explanation of *likeness*. In their case law, the WTO adjudicating bodies consider that the determination of ‘like services’ and ‘like service suppliers’ should be done on a case-by-case basis, with the emphasis on the competitive relationship. As there are some excellent scholarly works regarding the methodology for the analysis of *likeness* in the GATS,¹⁴⁰ providing a comprehensive review of the analysis of *likeness* in the GATS is not the intention of this dissertation, and it will therefore be limited to the above paragraphs.

¹³⁴ *EC—Bananas III* (Panel Report), para. 244 and 246.

¹³⁵ *EC—Bananas III* (Appellate Body Report), para. 7.302.

¹³⁶ *China—Electronic Payment Services* (Panel Report), para. 7.700.

¹³⁷ *Ibid.*, para. 7.701.

¹³⁸ *EC—Asbestos* (Appellate Body Report), para. 103.

¹³⁹ *China—Electronic Payment Services* (Panel Report), para. 7.702.

¹⁴⁰ For example, see Diebold, *Non-Discrimination in International Trade in Services*.

To conclude: the *likeness* in the WTO and the *likeness* in the national treatment clause of the GATT concerns ‘like products’ and ‘directly competitive or substitutable products’, while the national treatment clause of the GATS contains only ‘like service and service suppliers’. However, the *likeness* in both GATT and GATS requires a case-by-case determination about the nature and the extent of a competitive relationship between and among national and foreign actors.

2. ‘*Likeness*’ in international investment law (BITs)

The comparative element is equally important in all national treatment analysis, regardless of whether this is in the trade or investment regime, as it identifies the actual situations in which the national treatment standard must be applied.

Unlike the indispensable analysis of *likeness* in WTO laws, the actual situations in which the national treatment clause applies in international investment law can be categorised into the following four types: (i) the ‘same’ or ‘identical’ circumstances; (ii) economic activities and/or industries to which national treatment applies; (iii) ‘like situations’, ‘similar situations’ or ‘like circumstances’; and (iv) no factual comparisons.¹⁴¹ As BITs are the most significant instruments of international investment law, this section will discuss the four types of *likeness* in BITs respectively.

BITs, a prominent instrument in international investment law, seek to set out the rules according to which investments made by the nationals of two states parties will be protected in each other’s territory.¹⁴² With regard to the comparative element, *likeness* formulations in BITs differ among states, and may even be different for the same state at different times. Although thousands of BITs exist globally, the *likeness* formulations in BITs can be divided into four types.

a. The ‘same’ or ‘identical’ circumstance

The most restrictive formulation of *likeness* in BITs limits national treatment to the ‘same’ or ‘identical’ circumstances. This offers a narrow scope to national treatment, as the

¹⁴¹ UNCTAD, *International Investment Agreements: Key Issues*, at 171-173.

¹⁴² Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2010, Third Edition), at 175.

incidence of an identical situation may be hard to demonstrate.¹⁴³ Such a formulation can be found in the earlier BITs signed by the United Kingdom (UK). For example, Article 3.1¹⁴⁴ of the UK-Belize BIT signed in 1982 requires that national treatment should be applied to other contracting party's nationals or companies 'in the same circumstances'. More recently, the practice of the UK has been different.

b. The economic activities and/or industries to which national treatment applies

Some BITs specify the economic activities or industries to which the national treatment principle must apply. Such an approach has the effect of narrowing the scope of national treatment to those areas of activity expressly mentioned in such agreements. It is an example of an approach which is used by host countries to preserve their degree of flexibility to act by narrowing the scope of national treatment. This is also the effect sought by the GATS provisions, as national treatment is expected to apply only to those sectors in which commitments have been made.¹⁴⁵

Such a formation was used in the Denmark-Indonesia BIT signed in 2007,¹⁴⁶ which refers not to 'treatment', but to the 'imposition of conditions'. This language suggests that the host country is not obliged to give national treatment with respect to benefits and advantages.¹⁴⁷

c. 'Like situations', 'similar situations' or 'like circumstances'

More recently, with the increase in international capital flow, qualifications such as 'like circumstances', 'similar situations' and 'like situations' have become predominant in the practice of BITs. Compared to the 'same' or 'identical' circumstances qualification, this formulation is less restrictive, and is commonly used in the BITs of most states, including the United States¹⁴⁸ and NAFTA¹⁴⁹. As NAFTA is an influential international agreement in

¹⁴³ UNCTAD, *supra* note 142, at 171.

¹⁴⁴ "Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords in the same circumstances to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State."

¹⁴⁵ UNCTAD, *supra* note 142, at 171.

¹⁴⁶ See Article 3 of Denmark-Indonesia BIT:

"Neither Contracting Party shall in its territory impose on the activities of enterprises in which such approved investments are made by nationals or corporations of the other Contracting Party conditions which are less favourable than those imposed in its territory on activities in connection with any similar enterprise, whether owned by its own nationals or corporations or by nationals or corporations of third countries."

¹⁴⁷ UNCTAD, *supra* note 142.

¹⁴⁸ See Article 3.1 and 3.2 of the 2012 US model-BIT, Article. II:1 of the US-Honduras BIT in 1995, Article II:2 of the

both the trade and investment regimes and represents the standard for the United States, it is the *likeness* of the national treatment clause in the Investment Chapter of the NAFTA that will be mentioned specifically.

Although the national treatment standard in the Trade in Goods section of the NAFTA is in accordance with that of the GATT, the concept of 'like circumstance' used in the Investment Chapter of the NAFTA differs in one fundamental point from the simple concept of 'likeness' in WTO law: the wording 'like products' and 'like services and service suppliers' clearly indicate that the comparison only takes place between the subjects, while the NAFTA concept of 'like circumstance' is open as to whether the analysis requires the comparison of the subjects and/or whether the analysis focuses on the questions of whether the differential treatment occurs in like or different circumstances.¹⁵⁰

Despite the increasing use of 'like situations/circumstances', however, there is no clear definition of 'like situations/circumstances' in the text of BITs. The definition of 'like situations/circumstances' is therefore a matter that needs to be determined in the light of the facts of each case. This may not be easy, as the experience of the WTO adjudicating bodies has shown.¹⁵¹

According to a report published by the Organization for Economic Co-operation and Development (OECD), among the most important matters to be considered in the determination of like situations/circumstances are 'whether the two enterprises are in the same sector; the impact of policy objectives of the host country in particular fields; and the motivation behind the measure involved'.¹⁵² A key issue in such cases is to 'ascertain whether the discrimination is motivated, at least in part, by the fact that the enterprises concerned are under foreign control'.¹⁵³

Because the WTO adjudicating bodies have already established a case-by-case approach to determine *likeness*, and have handled many cases in this regard, the case-by-case approach adopted by international investment tribunals has taken the WTO interpretation of *likeness* as their reference in drawing up their own definition of *likeness* in investment disputes.

US-Senegal BIT in 1983.

¹⁴⁹ See Article 1102.1 and 1102.2 of the NAFTA in 1992.

¹⁵⁰ Andrea K. Bjorklund, 'National Treatment', in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press, 2008), at 39.

¹⁵¹ See Aaditya Mattoo, 'National treatment in the GATS: corner-stone or Pandora's box?', *Journal of World Trade*, 31, September 1996, pp. 107-135.

¹⁵² OCED, *National Treatment for Foreign- Controlled Enterprises*, Paris, 1985 edition, at 16-17.

¹⁵³ *Ibid*, 1993 edition, at 22.

However, in determining which foreign and domestic investments should be compared, investment tribunals have departed from the national treatment precedents of trade law, and have formulated their own somewhat conflicting tests.

In the famous *Occidental v. Ecuador* case, the tribunal was of the view that in the context of this particular claim ‘in like situations’ could not be interpreted in the narrow sense of ‘like products’ as used in the GATT. Indeed, the purpose of national treatment in the *Occidental v. Ecuador* case is the opposite of that under the GATT: namely, it seeks to avoid exporters being placed at a disadvantage in foreign markets because of the indirect taxes paid in the country of origin, while in the GATT the purpose is to avoid imported products being affected by a distortion of competition with similar domestic products because of taxes and other regulations in the country of destination.¹⁵⁴

In *Occidental v. Ecuador*, the tribunal also considered that no exporter ought to be put in a disadvantageous position as compared to other exporters, while in the GATT situation the comparison should be made with the treatment of ‘like’ products, and not generally.¹⁵⁵

In short, the tribunal in *Occidental v. Ecuador* took the view that the reference to ‘in like situations’ used in the investment treaty seems to be different to that of ‘like products’ in the GATT. The term ‘situation’ can be taken to relate to all exporters who share such a condition, whereas the ‘product’ necessarily relates to competitive and substitutable products.¹⁵⁶

Most recently, the NAFTA tribunal in the dispute *Methanex v. America* even rejected the direct use of trade law *likeness* tests, including their focus on the competitive relationship between domestic and foreign companies. It emphasised that the goal of protecting individual investors from injury of the Investment Chapter of the NAFTA, along with its use of the phrase ‘in like circumstances’, indicated the ‘intent of the drafters to create distinct regimes for trade and investment’.¹⁵⁷

However, the *likeness* tests devised by international investment tribunals in different disputes have differed in several important respects. Most obviously, tribunals have taken various positions on the breadth of the domestic investments to be compared. At one extreme, the *Occidental v. Ecuador* tribunal compared all foreign and domestic exporters.

¹⁵⁴ *Occidental v. Ecuador*, para. 175.

¹⁵⁵ *Ibid.*, para. 176.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Methanex v. America*, part IV (B), para. 21.

At the other extreme, the *Methanex v. America* tribunal compared only identical foreign and domestic exporters. The majority have fallen between these extremes, comparing foreign and domestic investments in the same business or economic sector based upon the presumption that such investments raise similar public concerns.¹⁵⁸

Therefore, as a matter of fact, the interpretation of *likeness* by the WTO adjudicating bodies cannot simply be transplanted to the investment tribunals' explanations of a 'like situation' in BITs, as a narrow concept of *likeness* would result in fewer findings of discrimination, which is against the intention of the investment protection and promotion advocated by investment tribunals. In addition, as international investment tribunals do not feel themselves bound by prior decisions, it makes the interpretation of a 'like situation' in investment law more unpredictable to some extent.

d. No factual comparisons

A significant number of International Investment Agreements (IIAs) contain a description of the national treatment standard, but are silent on the subject of whether national treatment applies to specified activities or to like situations or circumstances. Here, a simple reference is made to investors and/or investments, usually in separate paragraphs, followed by a description of the standard of treatment required. Such an approach is seen in, for example, the Chilean, French, German, Swiss and UK model for BITs, although the last retains a functional delimitation formula in relation to the treatment of investors. This approach offers the widest scope for comparison, as any matter that is relevant to determining whether the foreign investor is being given national treatment can, in principle, be considered.¹⁵⁹

The interpretation of such an approach can be found in *Sergei Paushok et al. v. Mongolia*. As the Mongolia-Russia BIT, signed in 2005, invoked contains no reference to either 'like situations' or 'like products',¹⁶⁰ the tribunal had to rely on the general provisions of the Vienna Convention on The Law of Treaties (Vienna Convention).¹⁶¹

The four categories above are obviously not an exhaustive description of the formulation of 'likeness' in thousands of BITs. For example, the China-Iran BIT signed in 2000 used

¹⁵⁸ DiMascio and Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties', at 76.

¹⁵⁹ UNCTAD, *International Investment Agreements: Key Issues*, at 173.

¹⁶⁰ See Article 3.2 of the Mongolia-Russia BIT.

¹⁶¹ *Sergei Paushok et al. v. Mongolia*, para.313.

the formulation ‘who are in a comparable situations’¹⁶² to describe *likeness*. As the formulation of *likeness* is determined by the parties signing a BIT, it would be burdensome and meaningless to include all the formulations of *likeness* in the 2,958 BITs to date. The brief introduction above is deemed adequate, and in Chapter 3, attention will be concentrated on the *likeness* formulation in the Sino-BIT, with a comparison of the prevailing *likeness* formulation in Chapter 4.

In sum, as the first substantive content of the national treatment standard, the clear explanation of *likeness* is a precondition for the application of a national treatment clause, as it defines the factual situations in which the standard must be applied. With the discrepancy between the international trade and investment regimes, it is necessary to discuss *likeness* in both regimes respectively.

In WTO law, *likeness* in the GATT involves both ‘like products’ and ‘directly competitive or substitutable products’, and case law has identified four criteria for determining, on a case-by-case basis, whether a product is ‘like or similar’; while in the GATS it only covers ‘like services and service suppliers’ and must be determined on a case-by-case basis. However, in both the GATT and GATS, *likeness* shares a common crucial determinant; namely the competitive relationship between two products or services.

In investment law, and in BITs in particular, *likeness* is more likely to be defined as ‘in like circumstances’. Here the most important factors to be considered in determining *likeness* are whether the two enterprises are in the same sector; the impact of the policy objectives of the host country in particular fields; and the motivation behind the measures involved. Cases in investment tribunals have also indicated that the concept of ‘like circumstance’ in BITs is broader than is required by the investment protection purpose of BITs, and the comparison cannot be done by exclusively addressing the sector in which a particular activity is undertaken. This differs from the wording ‘like products’ and ‘like services and service suppliers’ in WTO law, which clearly indicates that the comparison is taking place only between the subjects.

¹⁶² See Article 4.1 of the China-Iran BIT 2000.

B. ‘Treatment no less favourable than’

As the element of ‘less favourable treatment’ constitutes the basic discriminatory component and represents the essence of discrimination, the ‘treatment no less favourable than’, the second substantive content of national treatment principle, is the common formulation used to describe the non-discrimination core of the national treatment standard in treaty practice in international economic law.

As with the research into ‘likeness’, research into this second substantive content of the national treatment principle will be divided into ‘treatment no less favourable than’ in international trade law and investment law respectively.

1. ‘Treatment no less favourable than’ in WTO/trade law

Despite its significance in WTO laws, the term or standard of ‘less favourable treatment’ is not generally defined in WTO agreements, with one exception.¹⁶³ Without a clear textual explanation, it is better to begin an examination of ‘treatment no less favourable than’ with the case law tests mentioned in section II.C.1 of this chapter.

a. The standard of ‘less favourable treatment’ according to case law tests

i. ‘In excess of’ in Article III:2 of the GATT first sentence

According to the previous case law test, the second element of the two-tier test of Article III:2 of the GATT (first sentence) applies when the taxes imposed on the imported product are ‘in excess of’ the taxes applied to domestic products. Therefore, in the context of Article III:2 of the GATT (first sentence), the standard of ‘less favourable’ refers to any excess of taxation, namely the taxes levied on imported products, which may not exceed those levied on like domestic products.

An elaborate standard of taxation excess can be found in the WTO jurisprudence. According to the Appellate Body in *Japan—Alcoholic Beverages II*, even the smallest amount of ‘excess’ would be too much. The prohibition of discriminatory taxes in

¹⁶³ Article XVII:3 of the GATS states that ‘formally identical or formally different treatment shall be considered to be *less favourable* if it *modifies the conditions of competition* in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.’

Article III:2 (first sentence) is not conditional on a ‘trade effects test’¹⁶⁴ nor is it qualified by a *de minimis* standard. Thus, the slightest margin of excessive taxation will constitute an infringement, even if the margin is *de minimis*.¹⁶⁵

ii. ‘Not similarly taxed’ with protectionism in the second sentence of Article III:2 of the GATT

According to the previous case law test, the second element of the three-tier test in the second sentence of Article III:2 of the GATT is that two products are ‘not similarly taxed’.

However, it can be concluded from WTO jurisprudence that the elaborate standard of taxation excess in the first sentence of Article III:2 of the GATT does not apply with regard to the second sentence, where the requirement is that the product must be ‘similarly taxed’. In *Japan—Alcoholic Beverages II*, the Appellate Body interpreted the term ‘not similarly taxed’ as referring only to taxation exceeding the *de minimis* threshold. Accordingly, the difference in tax must be more than *de minimis* to constitute an infringement of the national treatment obligation in the second sentence of Article III:2.¹⁶⁶

Moreover, the three-tier test of the second sentence contains a requirement which is missing in the two-tier test of the first sentence, namely: ‘the dissimilar taxation is applied so as to afford protection to domestic production’. GATT case law responded to the question of what else, beyond differential taxation, the complainant needs to demonstrate in order to establish that a tax scheme operates or is applied in such a way as to afford protection to the directly competitive or substitutable domestic products in a series of reports. First established in *Japan—Alcoholic Beverages II*, reiterated in *Korea—Alcoholic Beverages*, the approach to examining the protective purpose was finalised in *Chile—Alcoholic Beverages*.

The Appellate Body in *Chile—Alcoholic Beverages* reiterated that, although it is true that the aim of a measure may not be easily ascertainable, nevertheless its protective

¹⁶⁴ The Appellate Body stated that ‘the trade effects’ of tax differentials between imported and domestic products as reflected in the volumes of imports being insignificant or even non-existent is irrelevant, as Article III protects expectations not of any particular trade volume, but rather of the equal competitive relationship between imported and domestic products. See Trebilcock and Giri, ‘The National Treatment Principle in International Trade Law’, at 18.

¹⁶⁵ *Japan—Alcoholic Beverages II* (Appellate Body Report), para. 25.

¹⁶⁶ *Ibid*, paras. 26-27.

application can most often be discerned from the design, the architecture, and the revealing structure of a measure.¹⁶⁷

iii. ‘Less favourable treatment’ in Article III:4 of the GATT

According to the previous case law test, the last element in the four-tier test of Article III:4 of the GATT is ‘less favourable treatment’.

The elaborated standard of ‘less favourable treatment’ can be found in GATT jurisprudence. The Appellate Body in *Korea—Beef*, reiterated the conclusion of the GATT panel in *US—Section 337 Tariff Act*¹⁶⁸ and made it clear that a formal difference in treatment between imported products and like domestic products, even if based exclusively on the origin of the products, is neither necessary nor sufficient to demonstrate a violation of Article III:4. Rather, what is relevant is whether such regulatory differences serve to modify the conditions of competition to the detriment of imported products.¹⁶⁹ In other words, the ‘treatment no less favourable’ standard prohibits WTO members from modifying the conditions of competition in the market place to the detriment of imported products vis-à-vis like domestic products.¹⁷⁰

In addition to this, the examination of whether imported products are afforded less favourable treatment cannot rest on a simple assertion; there must be further identification or elaboration of the implications of the measure for the conditions of competition in order to properly support a finding of less favourable treatment under Article III:4.¹⁷¹ This is, in particular, the case for origin-neutral measures.¹⁷² The Appellate Body in *Thailand—Cigarettes (Philippines)* provided detailed guidance on how to evaluate the implications of the contested measures for the equality of competitive conditions between imported and like domestic products.

First, such an analysis must begin with careful scrutiny of the measure, including consideration of the design, structure, and expected operation of the measure.¹⁷³ Such an analysis may involve, but need not be based on, the actual effects of the contested measure in the market place, nor should the panel anchor the analysis of less favourable treatment

¹⁶⁷ *Chile—Alcoholic Beverages* (Appellate Body Report), para. 65.

¹⁶⁸ *US—Section 337 Tariff Act* (Panel Report), para. 5.11.

¹⁶⁹ *Korea—Various Measures on Beef* (Appellate Body Report), paras. 137–144.

¹⁷⁰ *Ibid.*, para. 137.

¹⁷¹ *Thailand—Cigarettes (Philippines)* (Panel Report), para. 132.

¹⁷² *Ibid.*, para. 133.

¹⁷³ *Ibid.*, para 130 and 134.

in an assessment of the degree of likelihood that an adverse impact on competitive conditions will materialise.¹⁷⁴

Second, if the regulation at issue indicates an origin-based, *de jure* discrimination, that is, the sole difference in regulatory treatment consists of requirements applied only to imported products, this is a significant indication that imported products are accorded less favourable treatment.¹⁷⁵

Third, in any event, there must, in every case, be a *genuine relationship* between the measure at issue and its adverse impact on competitive opportunities for imported versus like domestic products.¹⁷⁶ The relevant question to establish the existence of a *genuine relationship* is whether it is the governmental measure at issue that affects the conditions under which like goods, domestic and imported, compete in the market within a member's territory.¹⁷⁷

Fourth, under Article III:4, less favourable treatment must affect the *group* of imported products, as compared to the *group* of domestic products. The national treatment obligation is breached only if imported products from the complaining party, *on the whole*, are treated less favourably than like domestic products. It is not enough that some of the like imported products from the complaining party receive worse treatment than some like domestic goods. This is because it is always possible to find a violation of Article III:4 as long as the type of product disfavoured is imported and the favoured type exists domestically.¹⁷⁸

The Appellate Body report on *US—Clove Cigarettes* then added that ‘treatment no less favourable’ does not prohibit regulatory distinctions between products found to be like, provided that the group of like products imported from the complaining member is treated no less favourably than the group of like domestic products.¹⁷⁹

With respect to the regulatory purpose of Article III:1, there has also been a long debate on whether the regulatory purpose should be considered in the interpretation of ‘treatment no less favourable than’ in Article III:4. It was not until *EC—Seal Products* that the Appellate Body finally stated its position on the role of regulatory purpose in interpreting ‘treatment

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*, para. 133.

¹⁷⁶ *Ibid.*, paras. 139-140.

¹⁷⁷ *Ibid.*, para. 134.

¹⁷⁸ Lothar Ehring, ‘*De Facto Discrimination in World Trade Law: National and Most-Favored-Nation Treatment or Equal Treatment?*’, *Journal of World Trade*, Vol.36, 2002, pp. 921-977, at 944.

¹⁷⁹ *US—Clove Cigarettes* (Appellate Body Report), para. 193-194.

no less favourable’ unequivocally. In the *EC–Seal Products*, the Appellate Body supported the position that less favourable treatment is equal to a detrimental impact on the competitive opportunities for imported products. There is no need to consider the regulatory purpose of the measure in the ‘treatment no less favourable’ analysis.¹⁸⁰

iv. ‘Less favourable treatment’ in Article XVII of the GATS

As mentioned above, the term ‘less favourable treatment’ is not generally defined in WTO agreements, with one exception: in Article XVII:3 of the GATS.

Article XVII:3 of the GATS provides useful clarification; it states that ‘formally identical or formally different treatment shall be considered to be *less favourable* if it *modifies the conditions of competition* in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member’.¹⁸¹

According to the Panel Report on *China—Electronic Payment Services*, subject to all other Article XVII conditions being fulfilled, formally identical or different treatment of the service suppliers of another member constitutes a breach of Article XVII if and only if such treatment modifies the conditions of competition to their detriment.¹⁸²

In a nutshell, the ‘less favourable treatment’ examination in Article XVII of the GATS is made on case-by-case basis, with the essence being whether such treatment modifies the conditions for the competition to their detriment.

b. *De jure* and *de facto* discrimination

A measure constitutes *de jure* discriminatory when discriminatory treatment between imported and like domestic products is clear from the wording of the legal instrument. When the discrimination is not clear in the text or on the face of the legal instrument, it may still be *de facto* – or discriminatory – in practice. In the case of the national treatment principle, *de facto* discrimination occurs when a legal instrument favours domestic products over like imported products in effect or in fact.¹⁸³

¹⁸⁰ Ming Du, “‘Treatment No Less Favorable’” and the Future of National Treatment Obligation in GATT Article III:4 after *EC–Seal Products*, *World Trade Review*, Vol.15, Issue 01, January 2016, pp. 139-163, at 154.

¹⁸¹ See Article XVII:3 of GATS.

¹⁸² *China—Electronic Payment Services* (Panel Report), para. 7.687.

¹⁸³ WTO ECampus, *Trade in Goods: Non-Discrimination Principle-Most Favoured Nation and National Treatment in the GATT 1994*, Module 2, at 17, available at: <https://ecampus.wto.org/admin/files/course179/module531/moduledocuments/ewto-m2-rl-e.pdf>. [10.07.2017]

According to Article III of the GATT and Article XVII of the GATS, national treatment clauses in the GATT and GATS obviously prohibit *de jure* discrimination. Besides, the WTO adjudicating bodies have confirmed that the prohibition of *de facto* discrimination extends to the national treatment obligation of both the GATT and GATS.

Historically, the GATT was more preoccupied with explicit or *de jure* discriminatory measures than implicit or *de facto* discrimination.¹⁸⁴ According to GATT/WTO jurisprudence, of the first 207 legal complaints filed with the GATT between 1948 and 1990, only a small number of complaints involved claims of *de facto* discrimination by internal regulatory measures.¹⁸⁵ The first affirmative ruling sustaining a claim of *de facto* discrimination with regard to an internal regulatory measure was the 1987 panel decision in *Japan—Alcoholic Beverages*.¹⁸⁶ However, this trend has changed since 1990, and the WTO dispute settlement system has been more concerned with measures which are – on the face of it – neutral, rather than with explicitly discriminatory internal tax or regulatory measures.¹⁸⁷

In respect of the GATS, an affirmative ruling sustaining a claim of *de facto* discrimination can be found in case law from the very beginning, according to Article XVII:3 of the GATS. The requirements concerning ‘less favourable treatment’ in the GATS are met not only by according formally different treatment to services and suppliers, but also by according formally identical treatment, *de facto* discrimination, which is, on the face of it, origin-neutral.¹⁸⁸

From a pragmatic perspective, discrimination which falls under the categorisation of *de facto* is much more difficult to recognise, as it concerns measures which appear, either on the face of it or formally, to be neutral. Such measures differentiate directly on the basis of a permitted criterion, but at the same time indirectly treat one group defined by a prohibited criterion less favourably.¹⁸⁹ As a corollary, the WTO adjudicating bodies have not developed a consistent approach concerning the recognition of *de facto* discrimination, but have shown a strong tendency towards the narrower approach, requiring an asymmetric

¹⁸⁴ Robert Hudec, ‘GATT/WTO Constrains on National Regulation: Requiem for an ‘Aim and Effects’ Test’, in Hudec, *Essays on the Nature of International Trade Law* (Cameron May, 1999), at 360.

¹⁸⁵ *Ibid*, at 363.

¹⁸⁶ *Japan—Alcoholic Beverages* (Panel Report), para. 3.5.

¹⁸⁷ Warren H. Maruyama, ‘A New Pillar of the WTO: Sound Science’, *International Lawyer*, Vol.32, Fall 1998, at 651.

¹⁸⁸ Ortino, ‘The Principle of Non-Discrimination and its Exceptions in GATS’, at 177.

¹⁸⁹ Diebold, *Non-Discrimination in International Trade in Services*, at 38.

impact between the imported and domestic groups of products or services.¹⁹⁰

Accordingly, there are numerous excellent scholarly works which concentrate on *de facto* discrimination, and this dissertation will not conduct intensive research concerning *de jure* and *de facto* discrimination. The above brief will provide guidance on China's inconsistent national treatment measures in Chapter 2 in this regard, as China has a tendency to use internal measures which are apparently neutral against foreign goods and services.

2. 'Treatment no less favourable than' in international investment law (BITs)

In the investment regime, the treatment under national treatment obligation varies from 'same/as favourable as' to 'no less favourable'. The 'no less favourable treatment' standard, however, is the most common formulation in treaty practice in international investment law. Without a clear definition or description of 'no less favourable', its explanation relies massively on international investment tribunals. As the ICSID tribunal's explanation in this regard depends on whether the BIT and NAFTA invoked contains a national treatment clause in its investment chapter which covers all the BITs concerned, it is the NAFTA tribunal's explanation of 'no less favourable' which will be used as an example.

The tribunal in *Pope & Talbot v. Canada* was very explicit about how the language in the Investment Chapter of the NAFTA should be interpreted.

First, the tribunal stated that, in essence, 'Article 1102 prohibits treatment that discriminates *on the basis* of the foreign investment's nationality'.¹⁹¹ It does not, however, prohibit differential treatment based on certain other reasons. Every subsequent major investment decision regarding the NAFTA has agreed that the objective of the national treatment test is to ferret out discrimination based on nationality, though some tribunals have disagreed about the method of accomplishing that result. Discrimination in the investment regime is therefore limited to *de jure* discrimination only, thereby allowing for *de facto* differentiation in the treatment of foreign investors.

Second, although the NAFTA tribunal's interpretations concerning discrimination based upon nationality are identical, its jurisprudence on the issue of 'less favourable treatment'

¹⁹⁰ *Ibid*, at 44.

¹⁹¹ *Pope & Talbot v. Canada*, para. 79.

varies from one case to another. The tribunal in *Pope & Talbot v. Canada* considered that “no less favorable” means equivalent to, not better or worse, than, the best treatment accorded to the comparator’.¹⁹² The *Methanex* tribunal concluded that a foreign investment is entitled to the best treatment ‘accorded to some members of the domestic class’.¹⁹³ In general, most NAFTA cases interpreted national treatment as an obligation to ensure that the treatment of foreign investors is equivalent to the ‘best’ treatment accorded to domestic investors in like circumstances.¹⁹⁴ Accordingly, it is self-evident that investment tribunals have not discussed what constitutes ‘less favourable treatment’ as intensively as they have ‘in like circumstances’. However, these few precedents strongly indicate that the object and purpose of investment agreements greatly influence the test for determining whether a measure treats a foreign investment less favourably than comparable domestic investments. Because their goal is to protect individual investors from injury, national treatment provisions in investment agreements entitle foreign investments to treatment equivalent to the best treatment afforded to comparable domestic investments.¹⁹⁵

Obviously, according to the above explanations, more positive evidence of nationality-based discrimination is required for a national treatment infringement in international investment law. Competition and differential treatment do not normally suffice, as other policy justifications can be considered.¹⁹⁶ This approach is different to that of the international trade law approach, in which differential treatment between products that sufficiently compete is almost automatically found to be a violation of the national treatment principle.

In short, according to a number of investment tribunal awards, at least two important components of ‘no less favourable treatment’ in an investment context can be identified: (1) whether proof is needed of discriminatory intent, and (2) whether a foreign investment is entitled to the most favourable treatment afforded to comparable domestic investments.¹⁹⁷ Other analysis of violations of the national treatment principle in investment regimes depends on specific clauses in BITs or IIAs, where there is a strong

¹⁹² *Ibid*, para. 42.

¹⁹³ *Methanex v. America*, para. 21.

¹⁹⁴ *Archer and Tate & Lyle v. Mexico*, para. 205. See also *Loewen v. America*, para. 140 and *Methanex v. America*, para. 21.

¹⁹⁵ DiMascio and Pauwelyn, ‘Nondiscrimination in Trade and Investment Treaties’, at 78.

¹⁹⁶ *Ibid*, at 72.

¹⁹⁷ *Pope & Talbot v. Canada*, para. 76.

tendency to protect individual investors from the arbitrary or discriminatory measures of the host government.

In conclusion, the above section discusses the two substantive elements of the national treatment principle: '*likeness*' and 'treatment no less favourable' than.

In international trade law, the determination of *likeness* in the GATT concerns the nature and extent of a competitive relationship between and among imported and domestic products: 'like products' is a basic concept in the first sentence of Article III:2, which includes the four indicative criteria employed by GATT jurisprudence (the product's end-uses in a given market; consumers' tastes and habits; the product's properties, nature, and quality; and the customs classification of the product). In the second sentence of Article III:2, 'directly competitive or substitutable products' is a broader concept, which must be determined in the marketplace with recourse to econometric indicators, and it includes products that are imperfectly substitutable and offer an alternative way of satisfying a particular need or taste. In Article III:4, the four indicative criteria above are also applicable to determining 'like products', and the scope of *likeness* is wider than that in the first sentence of Article III:2, but not broader than the scope of the combined products in the two sentences of Article III:2. In addition, the determination of *likeness* in the GATS is the determination of a competitive relationship, and the scope of 'like services and service suppliers' in Article XVII should not be construed narrowly.

In international investment law, especially in BITs, *likeness* is more likely to be defined as 'in like circumstances'. The most important matters to be considered in determining *likeness* are whether the two enterprises are in the same sector; the impact of policy objectives of the host country in particular fields; and the motivation behind the measure involved. Awards in investment tribunals have also indicated that the 'like circumstance' in BITs is broader, as the purpose of the investment protection of BITs requires that the comparison cannot be made exclusively by addressing the sector in which the particular activity is undertaken.

As for the second content, 'treatment no less favourable', this must be examined with regard to the different standard of *likeness* in the GATT. In the first sentence of Article III:2 of the GATT, any excess of taxation for like products is regarded as 'less favourable treatment', and even the slightest margin of excessive taxation will constitute a national treatment infringement; in the second sentence of Article III:2, not to be similarly taxed

constitutes ‘less favourable treatment’ as does any dissimilar taxation applied so as to afford protection to domestic production which exceeds the *de minimis* threshold. Under Article III:4, a formal difference which modifies the conditions of competition to the detriment of imported products constitutes a ‘less favourable treatment’, without taking the regulatory purpose set forth in Article III:1 into consideration. In addition, ‘less favourable treatment’ is defined explicitly in Article XVII:3 of the GATS as anything which modifies the conditions of competition in nature.

In international investment law, particularly in BITs, ‘no less favourable treatment’ is the most common formulation in national treatment clauses. According to the awards of investment tribunals, national treatment clauses prohibit treatment that discriminates *on the basis* of the nationality of the foreign investment, and a stipulation for ‘no less favourable’ treatment requires the host country to offer treatment to foreign investors that is equivalent to the ‘best’ treatment accorded to domestic investors in like circumstance.

IV. The scope of the national treatment standard

With regard to the scope of the national treatment standard, a national treatment clause can apply either to the pre- and post-entry stage, or to the post-entry stage only. Although it is the post-entry model that has been most prevalent, some recent IIAs have extended national treatment to the pre-entry stage through a combined pre- and post-entry clause. In addition to this, the operation of national treatment in the GATS offers a unique hybrid approach which requires separate consideration.¹⁹⁸

A. The scope of the national treatment standard in the trade regime

Article III of the GATT describes a complex and comprehensive national treatment obligation, and it is clear that the principle of national treatment is applied only to internal measures and other internal regulations – namely the post-entry stage – in the GATT. This means that once goods have lawfully crossed the border, they are entitled to the benefit of the right to equal treatment with the local competition, and what happens before goods

¹⁹⁸ UNCTAD, *International Investment Agreements: Key Issues*, at 167.

have legally entered the market is beyond the reach of the national treatment clause of the GATT.¹⁹⁹

However, national treatment under the GATS may be binding on both pre-entry and post-entry measures,²⁰⁰ as it is difficult, if not impossible, to define exactly when services have legally crossed the border. The GATS accordingly adopts a commitment-based hybrid approach, nevertheless, this approach is not free from doubts and concerns, and the inherently blurred demarcation between market access and national treatment in the GATS causes confusion; something which is not a concern in the GATT. This issue will be further discussed in Chapter 2 section II.C together with the *China—Electronic Payment Services* case.

In short, in the trade regime, the post-establishment national treatment obligation in the GATT and the pre- and post- establishment national treatment obligations in the GATS are explicit according to WTO provisions.

B. The scope of the national treatment standard in the investment regime

Compared to the trade regime, the scope of the national treatment standard in the investment regime is more complicated. The question is often asked in an investment law context: ‘at what stage of the investment process does national treatment apply’? This issue involves a consideration of whether national treatment applies to both the pre- and post-entry stages of the investment process, or whether the national treatment standard applies only to investments that have already been admitted to a host country.²⁰¹

The distinction between pre- and post- establishment origins amounts to whether a host has the obligation to treat foreign investors as it does its own nationals prior to the investment itself, or only once the investment has been made. Historically, host countries maintained tight control over foreign investments, and national treatment was only accorded after the investment had been made. With the increasing volume of global investment flow, many capital-exporting countries have loosened their control and also accorded national treatment in the pre-establishment stage. For example, the United States is one of the

¹⁹⁹ Matsushite, Schoenbaum, Mavroidis, *The World Trade Organization*, at 180.

²⁰⁰ Wei Wang, ‘On the Relationship Between Market Access and National Treatment Under the GATS’, *The International Lawyer*, Vol.46, No.4, at 1058.

²⁰¹ UNCTAD, *International Investment Agreements: Key Issues*, at 164.

advocates of the more recently prevailing pre-establishment national treatment, and incorporates this standard into the investment chapter of the NAFTA, however, most current BITs still limit the host's obligations to the national treatment of existing investments.²⁰²

1. Post-establishment national treatment

The post-establishment national treatment model is typified by IIAs, which restrict the operation of the treaty to investments from other contracting parties admitted in accordance with the laws and regulations of the host contracting party.²⁰³

This model has two options: limited and full post-establishment national treatment. Limited post-establishment national treatment preserves the strongest host country discretion while offering national treatment to foreign investments and/or investors at the post-entry stage. This option can be used by host countries who may wish to offer a degree of national treatment without limiting their regulatory powers too greatly, reserving the right to treat domestic and foreign investors differently at the point of entry.²⁰⁴

Full post-establishment national treatment, on the other hand, offers a higher standard of national treatment for the foreign investor, and limits the discretion of the host country to treat national and foreign investors differently. It also applies to both *de jure* and *de facto* discrimination, thereby ensuring both formal and informal protection for foreign investors.²⁰⁵

In terms of the above options: in the past, Sino-BITs have adopted limited post-establishment national treatment, effected by means of screening laws and operational conditions on admission. This issue will be further discussed in Chapter 3 section II.

2. Pre-establishment national treatment

The pre-establishment national treatment option adds national treatment at the pre-establishment phase to post-establishment national treatment. This approach has its origins in United States' treaty practice, as clauses to this effect have been present in United States

²⁰² Schefer, *International Investment Law*, at 304.

²⁰³ UNCTAD, *International Investment Agreements: Key Issues*, at 167.

²⁰⁴ *Ibid*, at 185.

²⁰⁵ *Ibid*, at 186.

FCN treaties, and have been perpetuated in BITs signed by the United States and, more recently, by Canada.

In the context of foreign investment relations, until relatively recently national treatment was seen to be relevant almost exclusively to the treatment accorded to foreign investors after they had entered a host country. The recent pre-establishment approach promoted by the United States has extended national treatment to the pre-entry stage so as to ensure market access for foreign investors on terms equal to those enjoyed by national investors. As national treatment traditionally applied only to the post-establishment phase of an investment in most BITs, and there was little question that the pre-establishment phase was left to the sovereign right of states in terms of deciding on the admission of an investment, the extension of national treatment to the pre-investment phase has been seen as revolutionary by many countries,²⁰⁶ including China.

The United States is a prominent advocate of pre-establishment national treatment, and Article 1102 of the NAFTA grants national treatment to the investors and investments of another contracting party with respect to ‘the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments’.²⁰⁷

However, pre-establishment national treatment is rarely granted without exceptions, as every country has sensitive sectors where foreign investment is not permitted. When it comes to exceptions to pre-establishment national treatment, should these exceptions be structured on the basis of a GATS-style ‘opt-in’ or ‘positive list’²⁰⁸ approach or a NAFTA-style ‘opt-out’ or ‘negative list’²⁰⁹ approach? The former may be preferable where gradual liberalisation is sought. By contrast, the ‘opt-out’ approach may have certain disadvantages: this approach may curtail the ability of a host country to distinguish between domestic and foreign investments, as it may be difficult to identify with precision all the industries and activities to which national treatment should not apply.²¹⁰ In practice,

²⁰⁶ *Ibid.*, at 162.

²⁰⁷ See Article 1102 of the NAFTA.

²⁰⁸ A member wishing to maintain any limitations on national treatment – that is any measures which result in less-favourable treatment of foreign services or service suppliers – must indicate these limitations in the third column of its SSC. A specific commitment in a services schedule is an undertaking to provide market access and national treatment for the service activity in question on the terms and conditions specified in the schedule. When making a commitment a government therefore binds the specified level of market access and national treatment and undertakes not to impose any new measures that would restrict entry into the market or the operation of the service.

²⁰⁹ For IIAs with pre-entry national treatment obligations, the parties often make exemptions for sensitive sectors, for example, member governments of NAFTA have made extensive use of an exemption list, namely a ‘negative list’. Such a list is supposed to become shorter over time, but the parties are not always quick to remove sectors.

²¹⁰ UNCTAD, *International Investment Agreements: Key Issues*, at 185.

compared with the ‘opt-in’ or ‘positive list’ approach, the NAFTA ‘opt-out’ or ‘negative list’ approach is more often adopted by parties to IIAs.

Pre-establishment national treatment with a negative-list approach limits, to a considerable extent, a host country’s traditional right to control the entry of aliens into its territory. It may be of value where the government of a host country considers that a number of industries or activities may benefit from increased openness and from a more competitive market environment. At the same time, a host country may protect certain industries or activities by way of a negative list, although this involves a difficult assessment as to which industries or activities need such special treatment. Failure to include an industry or activity may result in its being subjected to potentially damaging competition from foreign investors, especially where an IIA contains a standstill commitment on further restrictive policies. This would prevent a host country from adding industries or activities to a ‘negative list’ in the future.²¹¹

For this reason, the proper limit of national treatment takes the form of a negative list of excepted areas of investment activity to which national treatment does not apply. In addition, several types of general exceptions to national treatment exist concerning public health, safety and morals, as well as national security, although these may not be present in all agreements, particularly not in BITs.²¹²

As it is not the intention of this dissertation to evaluate pre-establishment national treatment intensively, the pros and cons of the positive and negative list approaches will not be discussed further here, however, the approach of China in this regard will be discussed in Chapter 3.

V. Concluding remarks

The national treatment principle in international economic law serves to eliminate distortions in competition and is thus seen to enhance the efficient operation of the economies involved. The internationalisation of both trade and investment regimes has meant that access to foreign countries under non-discriminatory conditions is necessary for the effective functioning of an increasingly integrated world economy.²¹³

²¹¹ Sornarajah, *The International Law on Foreign Investment*, at 337.

²¹² UNCTAD, *International Investment Agreements: Key Issues*, at 161.

²¹³ *Ibid.*, at 161-162.

According to previous discussion, the national treatment principle in the trade regime ensures that ‘like products’ (or ‘directly competitive or substitutable products’) enjoy an equal competitive relationship regardless of their origins, and that ‘less favourable treatment’ which modifies the conditions of competition is forbidden. In addition, the jurisprudence of the adjudicating bodies of the WTO has established theories which interpret the substantive content of national treatment obligations in WTO laws. Although, in recent decades, the interpretations of the adjudicating bodies of the WTO have shown signs of following a cyclical pattern through varying degrees of strictness and laxity, these theories are sufficiently abundant to enable application to a particular case in the WTO context in order to determine a violation of the national treatment obligation.

In the investment regime, national treatment protects foreign investors ‘in like circumstances’, entitling them to ‘no less favourable treatment’ than domestic enterprises. The most important matters to be considered in determining *likeness* are whether the two enterprises are in the same sector; the impact of policy objectives of the host country in particular fields; and the motivation behind the measure involved. Awards from investment tribunals have indicated that the ‘like circumstance’ in BITs is broader because the purpose of investment protection in BITs requires that a comparison cannot be made exclusively by addressing the sector in which the particular activity is undertaken. Besides, according to the awards of investment tribunals, the national treatment clause prohibits any treatment that discriminates *on the basis* of the foreign investment’s nationality, and the concept of ‘no less favourable’ requires the host country to accord foreign investors treatment equivalent to the ‘best’ treatment accorded to domestic investors in like circumstance.

In short, Chapter 1 provides an introduction to the basic textual knowledge of the national treatment principle, as well as the case law interpretation of specific terms in the national treatment clauses of both international trade and investment law. This chapter lays the foundation for the research into China’s national treatment standard in both the trade and investment regimes. As this dissertation is not intended to provide a comprehensive review of the national treatment principle itself, and excellent scholarly work on this subject is readily available elsewhere, the issues chosen for discussion above are those which are relevant to the research into China’s national treatment principle, and are not intended to address all the doubts and concerns concerning the national treatment principle in general.

Chapter Two China's National Treatment Standard in The Trade Regime

After examining the basic textual knowledge concerning the national treatment principle in international trade and investment law in Chapter 1, Chapter 2 turns to China's national treatment standard in the international trade regime. China's WTO accession and the relationship between China and the WTO is an unavoidable topic when it comes to the subject of international trade law and China, because the WTO is the most significant multilateral trade system in the world, and China is an important member of the WTO with a gigantic volume of trade. The first section of this chapter will therefore focus on the intertwining relationship between the national treatment principles of China and the WTO.

I. Evaluating China's national treatment commitments and compliance in the WTO: textual analysis

A. China and the WTO: the accession and commitments in brief

1. China's WTO accession in brief

China applied for admission to the WTO's predecessor, the GATT, in July of 1986. This was seen in Chinese terms as resuming its membership of the GATT.²¹⁴ In March 1987, the GATT formed a Working Party composed of all interested GATT contracting parties to examine China's application and negotiate the terms of China's accession. Like all WTO applicants, China conducted negotiations to join the WTO on two tracks – bilateral and multilateral. Concurrent with its bilateral negotiation with the United States, the EU, Japan, and Canada, China negotiated multilaterally with a WTO Working Party consisting of the United States, the EU and more than 40 other interested members.²¹⁵ Following the

²¹⁴ As of 1947, the Republic of China was among the first signatories to the GATT. In March 1950 the Nationalist Regime of the 'Republic of China' on Taiwan, which claimed to be the legitimate representative of China, withdrew from the GATT. The People's Republic of China (PRC), which asserted its sovereignty over Chinese territory after 1 October 1949, had no connection with the GATT until 1982, when China was granted observer status in the GATT. In 1984, China became a member of the Multi-fibre Agreement, which was unique among GATT-administered trade agreements and allowed the membership of non-GATT members. China argues that the withdrawal of the Taiwanese authority from the GATT was null and void, because the Nationalist Regime had ceased to be the legitimate government of China and the government of the PRC had never consented to the withdrawal. See, generally, Chung-chou Li, 'Resumption of China's GATT Membership', *Journal of World Trade*, Vol. 21, NO. 4, 1987, pp. 25-48.

²¹⁵ The United States General Accounting Office, *World Trade Organization: Analysis of China's Commitments to Other*

formation of the WTO on 1 January 1995, and pursuant to the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), a successor WTO Working Party, entirely composed of interested WTO members, took over the negotiations.²¹⁶

After another six years of bilateral and multilateral negotiations, the WTO Ministerial Conference approved the terms of China's accession in Doha on 10 November 2001, and the Chinese government notified its acceptance on 11 November. In line with customary practice, and as set out in the *Protocol on the Accession of the People's Republic of China* (China Protocol), China became a member of the WTO 30 days later, on 11 December 2001.²¹⁷

As well as being the most prolonged and arduous negotiation process in the history of the WTO, the time of China's accession negotiations was also the period in which China gradually opened up and integrated itself into the world economy. During this process, political and economic issues were intertwined, domestic reform and international negotiations were reinforced, and domestic bureaucratic politics and international relations were correlated.²¹⁸ Nevertheless, the positive conclusion of China's accession reflects a culmination of China's long-standing efforts to expand foreign trade and investment in pursuit of economic growth.²¹⁹

After its WTO accession, which was seen as a win-win event for both China and the rest of the world, China agreed to undertake a series of important commitments to open and liberalise its trade regime in order to better integrate into the world economy and offer a more predictable environment for trade and foreign investment in accordance with WTO rules.

Members, Report to Congressional Committees, October 2002, GA0-03-4, at 1, available at: <http://www.gao.gov/new.items/d034.pdf>. [10.07.2017]

²¹⁶ USTR, *supra* note 61, at 29.

²¹⁷ Jeffrey L. Gertler, 'What China's WTO Accession is All About', WTO Secretariat, 14 December 2002, at 1, available at: <http://siteresources.worldbank.org/INTRANETTRADE/Resources/Gertler.pdf>. [10.07.2017]

²¹⁸ Wei Liang, 'China's WTO Negotiation Process and its Implications', *Journal of Contemporary China*, Vol. 11, No. 33, 2002, pp. 683-719, at 719.

²¹⁹ Pitman B. Potter, 'The Legal Implications of China's Accession to the WTO', *The China Quarterly*, Vol.167, September 2001, pp. 592-609, at 593.

2. China's WTO commitments in brief: a compromise with a more liberal approach

a. China's WTO accession agreements

China's accession to the WTO represents a major step in China's reform efforts; for the rest of the world, however, it is the commitments made by China that attract attention.

Textually, China's WTO accession commitments are described and documented in China's final accession agreement, the China Protocol,²²⁰ which includes the accompanying *Report of the Working Party on the Accession of China* (China WPR),²²¹ the consolidated market access schedules for goods and services, and other annexes.

The China Protocol consists of a main text of 11 pages, with nine annexes (including China's Goods and Services Schedules), and 143 paragraphs incorporated by reference from the China WPR. The main text of the China Protocol has 17 sections of substantive provisions (including 56 paragraphs and many additional subparagraphs). The China WPR consists of a main text of 64 pages (with 343 paragraphs), a draft decision,²²² and a draft protocol,²²³ the China Protocol is therefore a summary of the China WPR, which describes and documents China's commitments according to the negotiations and the opinions of the Working Parties. In addition, according to the WTO, the commitments set forth in the protocol and working party report have the same status and carry the same legal effect under WTO rules.²²⁴

In a nutshell, the China Protocol and the China WPR contain legally binding commitments which describe China's promise to fulfil its WTO obligations.

b. China's WTO accession commitments in brief

As a result of negotiations, China agreed to a series of important commitments to open up and liberalise its trade regime in order to better integrate into the world economy and offer

²²⁰ WTO, *Protocol on the Accession of the People's Republic of China*, WT/L/432, 23 November 2001, available at: https://www.wto.org/english/thewto_e/countries_e/china_e.htm. [10.07.2017]

²²¹ WTO Working Party on the Accession of China, *Report of the Working Party on the Accession of China*, WT/ACC/CHN/49, 1 October 2001, available at: https://www.wto.org/english/thewto_e/countries_e/china_e.htm. [10.07.2017]

²²² Draft Decision: Accession of the People's Republic of China.

²²³ Draft Protocol: Protocol on the Accession of the People's Republic of China.

²²⁴ The United States General Accounting Office, 'World Trade Organization', at 5.

a more predictable environment for trade and foreign investment in accordance with WTO rules. In essence, China has committed to:

- To provide non-discriminatory treatment to all WTO Members.
- To eliminate dual pricing practices as well as differences in treatment accorded to goods produced for sale in China in comparison to those produced for export.
- To remove price controls for protecting domestic industries or services providers.
- To implement the WTO Agreement in an effective and uniform manner by revising its existing domestic laws and enacting new legislation fully in compliance with the WTO Agreement.
- To allow all its enterprises to import and export all goods and trade with them throughout the customs territory with limited exceptions, within three years of accession.
- To stop maintaining and not to introduce any export subsidies on agricultural products.²²⁵

More specifically, China's above commitments spanned eight broad areas²²⁶ and ranged from general pledges as to how it would reform its trade regime in accordance with WTO principles (WTO rules-based commitments) to rules governing the specific market access commitments for goods and services (market access commitments). WTO rules-based commitments required China to adhere to more than 20 existing multilateral WTO agreements (for instance, the GATT, the GATS, the TRIPS, TRIMs, the TBT Agreement, etc.) that cover various areas of international trade, while market access commitments were aimed at reforming China's trade regime²²⁷ as well as liberalising access²²⁸ to China's market.²²⁹

It is an arduous task to cover and analyse the numerous commitments made by China, as well as their relationship with existing WTO Agreements. As many official and organisational reports and scholarly works have already conducted excellent research into this issue, this dissertation has chosen to focus on China's WTO commitments concerning the national treatment principle, which is relevant to the question of whether China can

²²⁵ See WTO official news, WTO successfully concludes negotiations on China's entry, 17 September 2001, Press/243, available at: https://www.wto.org/english/news_e/pres01_e/pr243_e.htm. [10.07.2017]

²²⁶ In sum, these eight areas include trade framework, import regulation, export regulation, trading rights and industrial policies, agriculture, services, intellectual property rights, safeguards and trade remedies.

²²⁷ Concerning the reform of China's trade regime, there are almost 700 commitments on transparency, non-discrimination, law changes, implementation guidance, reporting requirement and more.

²²⁸ In respect of liberalisation of access to China's market, the commitment is related to tariffs and is binding with regard to the reduction of over 7,000 rates and the removal of 600 other restrictions in the trade of goods, while opening nine broad sectors (professional services, financial services, distribution services, communication services, construction and related engineering services, educational services, environmental services, tourism and travel related services, transport services) with some limitations in the trade of services.

²²⁹ The United States General Accounting Office, 'World Trade Organization', at 1.

adopt a more liberal approach to the international trade regime.

c. China's WTO-plus obligation according to its commitments

For China to fulfil its commitments, it was first necessary for China to act in accordance with the then-existing multilateral WTO Agreements signed by China. However, China also made numerous specific commitments, and it is therefore necessary to scrutinise the China Protocol, which contains a large number of special provisions that expand the existing WTO Agreements.²³⁰ These special commitments are known as 'WTO-plus' obligations, and it is necessary to brief these terms before focusing on China's WTO-plus obligation.

Since it is unlikely that all aspects of a developing country or a less-developed country's trade regime will be in full compliance with WTO rules, WTO Working Parties often impose special terms, one of which is to describe terms not found in any of the WTO multilateral agreements, but which are imposed as a precondition to membership ('WTO-plus' conditions).²³¹ 'Plus' terms represent precise commitments that other states (developed or developing) are not subject to as current WTO members.²³² These negotiated obligations are incorporated into specific commitment paragraphs contained in each acceding state's Protocol of Accession. They have the same status and legal effect as the rest of the WTO agreements and are equally enforceable through the Dispute Settlement Mechanism (DSM).²³³

Very few WTO-plus obligations existed for the several acceding WTO members prior to the accession of China, however, China undertook to meet extensive WTO-plus obligations.²³⁴ The major WTO-plus obligations undertaken by the Chinese government concern the following areas: transparency, judicial review, uniform administration, national treatment, foreign investment, market economy, and transitional review.

More specifically, the WTO-plus obligation undertaken by China regarding the national

²³⁰ Julia Ya Qin, "'WTO-Plus' Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol", *Journal of World Trade*, Vol. 37, No. 3, pp. 483–522, 2003, at 483.

²³¹ Jolita Butkeviciene, Michiko Hayashi, Victor Ognitvsev and Tokio Yamaoka, 'Terms of WTO Accession', in *WTO Accession And Development Policies* (UNCTAD ed. 2002), pp. 155–174, at 156 and 159.

²³² *Ibid.*, at 167.

²³³ Nhan Nguyen, 'WTO accession at any cost? Examining the use of WTO-plus and WTO-minus obligations for least-developed country applicants', *Temple International and Comparative Law Journal*, 2008, Vol. 22, No. 1, pp. 243–277, at 257.

²³⁴ Qin, "'WTO-Plus' Obligations and Their Implications for the World Trade Organization Legal System", at 483.

treatment principle includes national treatment regarding conditions affecting production in China, national treatment regarding the right to trade, and equal treatment between Chinese and foreign nationals, which will be further analysed in section I.B of this chapter.

In short, China undertook several WTO-plus obligations which cannot be found in any of the WTO multilateral agreements as a precondition to China's membership.

3. Concluding remarks concerning China's WTO accession

With regard to the previous brief concerning China's WTO accession and commitments, particularly those WTO-plus obligations undertaken by China, what did those Chinese commitments manifest, and what was the motivation behind them? This section will conclude on the approach behind China's WTO accession commitments.

In fairness, never in the history of the world has a country committed to so much change, on a voluntary basis, as China has done to conform with the rules of the WTO.²³⁵ China's accession protocol clearly entailed significant concessions (WTO-plus obligations) which far exceeded the obligations of previous 'developing country' applicants.²³⁶

For some Chinese scholars, the WTO-plus obligations contained in the China Protocol not only exceeded the normal requirements of WTO agreements, but also directly contradicted the underlying philosophy of non-discrimination and fair trade. Some Chinese scholars even consider that China joined the WTO under exceptionally unfavourable, non-reciprocal and asymmetric terms of membership,²³⁷ and argue that insisting on WTO-plus obligations which single out one member for differential treatment under the WTO Agreement is inconsistent with the basic WTO principle of non-discrimination, as the 'elimination of discriminatory treatment in international trade relations' is set out in the Preamble of the WTO Agreement as one of the objectives of the WTO.²³⁸

Given that the WTO-plus obligations impose more stringent disciplines on China than standard WTO rules, it could be said that China has been subjected to discriminatory treatment compared to other WTO members. China was, however, well aware of its rather

²³⁵ Gerald Chan, 'China and the WTO: the theory and practice of compliance', *International Relations of the Asia-Pacific*, Volume 4, 2004, pp.47-72, at 48.

²³⁶ Shaun Breslin, 'Reforming China's Embedded Socialist Compromise: China and the WTO', *Global Change, Peace & Security*, October 2003, Vol. 15, No. 3, pp. 213-229, at 221.

²³⁷ See Xiaohui Wu, 'No Longer Outside, Not Yet Equal: Rethinking China's Membership in the World Trade Organization', *Chinese Journal of international Law*, 2011, Vol. 10, pp. 227-270.

²³⁸ Qin, "'WTO-Plus' Obligations and Their Implications for the World Trade Organization Legal System", at 511.

disadvantaged position during the accession negotiation process, and chose to accept the discriminatory but more liberal approach offered by other members.

But accession to the WTO has not only been a 'giving' game for China, as it has also meant that China has been able to enjoy the tremendous benefits of the multilateral trade system since its accession. That has been one of the motivations behind China's determination to embrace a more liberal trade system. Besides, China also intended to use external pressures to overcome domestic obstacles to furthering reform,²³⁹ as China's WTO-plus commitments regarding a market economy²⁴⁰ went beyond the requirements of the then-existing Chinese law. It was the WTO commitments that finally rid China of its legacy of a centrally-planned economy. Moreover, these commitments cannot be unilaterally altered by China, whereas Chinese domestic legislation can be, and has been, revised from time to time. For as long as China remains a member of the WTO, it will not be able to negate these commitments without incurring the consequences of breaching WTO obligations.²⁴¹ Thus, Chinese legislators are now subject to external disciplines which limit their discretion. For this reason, the final agreements of China's WTO accession should be seen as an external tool to enforce marketisation and reform of the rule of law in China.

Regardless of the analysis of give and take, in short, the WTO accession has been a critical step in China's trade reform process. According to China's accession and commitments, China is determined to change its previous image; that of being impenetrable to the international community as a result of thousands of years of imperial traditions and decades of communist rule.

The existence of a gap between China's commitments and practices is nevertheless apparent, as has been fully documented in the United States' annual China WTO Compliance Report. For example, there are signs that the Chinese government is tightening its control over foreign businesses and dragging its feet in the implementation of some of

²³⁹ Julia Ya Qin, 'Trade, Investment and Beyond: The Impact of WTO Accession on China's Legal System', *The China Quarterly*, September 2007, Vol. 191, pp 720-741, at 721.

²⁴⁰ For instance, China committed to allowing market forces to determine the price of all goods and services except for a few specified categories; allowing any Chinese or foreign entity to engage in the import-export business within three years of accession, to limiting state trading to a list of specified products; and to not influencing the commercial decisions of SOEs except in a manner consistent with the WTO Agreements. See Qin, 'Trade, Investment and Beyond', at 724.

²⁴¹ For example, the Price Law of 1997 merely declared that the state should gradually move to a market-based pricing system. As for trading rights, under the Foreign Trade Law of 1994, the government still controlled the allocation of all rights to conduct imports and exports. See Qin, 'Trade, Investment and Beyond', at 725.

the more difficult WTO commitments.²⁴² Taking China's trade volume and FDI flows into consideration, China's trade liberation is a bumpy road, and the rest of the world should be tolerant of some slight reversals. Neither should Chinese efforts concerning legislative overhaul, in which thousands of laws and regulations relating to WTO matters have been scrutinised, revised or repealed, be ignored.

In sum, WTO membership marks a milestone that signifies China's integration into the international legal order, and also represents a shift in the Chinese attitude toward international economic law. The past decade has witnessed the evolution of China's more liberal approach to the international trade regime, moreover, from a Chinese perspective, WTO accession is not an end to this liberalisation, but a fresh start in the opening-up process.

B. China's WTO commitments and compliance regarding national treatment

The national treatment principle is one of the most significant general principles included in the bilateral and multilateral negotiations of China's pre-WTO accession. Prior to its WTO accession, China's trading partners had complained that China's trade regime discriminated against foreign enterprises and individuals. After China's WTO accession, like all other members, China has made the commitment to abide by all WTO agreements, including those provisions requiring the application of the national treatment principle. This section will therefore concentrate on China's commitments and compliance regarding the national treatment principle in WTO law.

1. An overview of China's national treatment commitments

In general, almost all of the non-discrimination commitments made by China pertain to the national treatment accorded to foreign enterprises and individuals. More specifically, according to the China Protocol, the following provisions entail the obligation to comply with the national treatment principle as a member of the WTO.

First, in Sections 2.B.3 (enterprises within special economic areas), China committed as

²⁴² Qin, 'Trade, Investment and Beyond', at 721.

follows:

Except as otherwise provided for in this Protocol, in providing preferential arrangements for enterprises within such special economic areas, WTO provisions on non-discrimination and national treatment shall be fully observed.

Second, Section 3 (non-discrimination) establishes the general obligation concerning national treatment as follows:

Except as otherwise provided for in this Protocol, foreign individuals and enterprises and foreign-funded enterprises shall be accorded treatment no less favourable than that accorded to other individuals and enterprises in respect of:

- (a) the procurement of inputs and goods and services necessary for production and the conditions under which their goods are produced, marketed or sold, in the domestic market and for export; and
- (b) the prices and availability of goods and services supplied by national and sub-national authorities and public or state enterprises, in areas including transportation, energy, basic telecommunications, other utilities and factors of production.

Third, in Section 5 (right to trade) China committed as follows:

1. China shall progressively liberalize the availability and scope of the right to trade..... Such right to trade shall be the right to import and export goods. All such goods shall be *accorded national treatment* under Article III of the GATT1994, especially paragraph 4 thereof, in respect of their internal sale, offering for sale, purchase, transportation, distribution or use, including their direct access to end-users.
2. Except as otherwise provided for in this Protocol, all foreign individuals and enterprises, including those not invested or registered in China, shall be accorded treatment no less favourable than that accorded to enterprises in China with respect to the right to trade.

Fourth, in Section 7.2 (non-tariff measures), China committed as follows:

In implementing the provisions of Articles III and XI of the GATT 1994 and the Agreement on Agriculture, China shall eliminate and shall not introduce, re-introduce or apply non-tariff measures that cannot be justified under the provisions of the WTO Agreement.

Fifth, in Section 8.2 (import and export licensing), China committed as follows:

Except as otherwise provided for in this Protocol, foreign individuals and enterprises and foreign-funded enterprises shall be accorded treatment no less favourable than that accorded to other individuals and enterprises in respect of the distribution of import and export licences and quotas.

Sixth, in Section 9.2 (price control), China committed as follows:

The goods and services listed in Annex 4 may be subject to price controls, consistent with the WTO Agreement, in particular Article III of the GATT 1994 and Annex 2, paragraphs 3 and 4 of the Agreement on Agriculture. Except in exceptional circumstances, and subject to notification to the WTO, price controls

shall not be extended to goods or services beyond those listed in Annex 4, and China shall make best efforts to reduce and eliminate these controls.

Seventh, in Section 11.4 (taxes and charges levied on imports and exports), China committed as follows:

Foreign individuals and enterprises and foreign-funded enterprises shall, upon accession, be accorded treatment no less favourable than that accorded to other individuals and enterprises in respect of the provision of border tax adjustments.

Eighth, in Section 13 (TBT), China committed as follows:

Upon accession, China shall ensure that the same technical regulations, *standards and conformity assessment procedures* are applied to both imported and domestic products. For imported and domestic products, all bodies and agencies shall *issue the same mark and charge* the same fee. They shall also provide the *same processing periods and complaint procedures*.

The China WPR also contains certain paragraphs regarding China's national treatment commitments. Paragraphs 18 and 19 in the China WPR are general national treatment commitments, as follows:

18. The representative of China further confirmed that China would provide the *same treatment* to Chinese enterprises, including foreign-funded enterprises, and foreign enterprises and individuals in China. China would *eliminate dual pricing* practices as well as *differences in treatment* accorded to goods produced for sale in China in comparison to those produced for export. The Working Party took note of these commitments.

19. The representative of China confirmed that, consistent with China's rights and obligations under the WTO Agreement and the Draft Protocol, China would provide non-discriminatory treatment to all WTO Members, including Members of the WTO that were separate customs territories. The Working Party took note of this commitment.

Paragraphs 22 and 23 in the China WPR are fully compliant with the principle of non-discrimination between domestically produced and imported products, and a commitment to repeal or modify specific legislation inconsistent with Article III of the GATT:

22. The representative of China confirmed that the full respect of all laws, regulations and administrative requirements with the principle of non-discrimination between domestically produced and imported products would be ensured and enforced by the date of China's accession unless otherwise provided in the Draft Protocol or Report. The representative of China declared that, by accession, China would repeal and cease to apply all such existing laws, regulations and other measures whose effect was inconsistent with WTO rules on national treatment. This commitment was made in relation to final or interim laws, administrative measures, rules and notices, or any other form of stipulation or guideline.

23. In particular, the representative of China confirmed that measures would be taken at national and sub-national level, including repeal or modification of legislation, to provide full GATT national treatment in respect of laws, regulations

and other measures applying to internal sale, offering for sale, purchase, transportation, distribution or use of the following:

- After sales service (repair, maintenance and assistance), including any conditions applying to its provision imposing mandatory licensing procedures for the supply of after-sales service on various imported products;
- Pharmaceutical products, including regulations, notices and measures which subjected imported pharmaceuticals to distinct procedures and formulas for pricing and classification, or which set limits on profit margins attainable and imports, or which created any other conditions regarding price or local content which could result in less favourable treatment of imported products;
- Cigarettes, including unification of the licensing requirements so that a single licence authorized the sale of all cigarettes, irrespective of their country of origin, and elimination of any other restrictions regarding points of sale for imported products. It was understood that in the case of cigarettes, China could avail itself of a transitional period of two years to fully unify the licensing requirements. Immediately upon accession, and during the two year transitional period, the number of retail outlets selling imported cigarettes would be substantially increased throughout the territory of China;
- Spirits, including requirements applied under China's 'Administrative Measures on Imported Spirits in the Domestic Market', and other provisions which imposed distinct criteria and licensing for the distribution and sale of different categories of spirits, including unification of the licensing requirements so that a single licence authorized the sale of all spirits irrespective of their country of origin;
- Chemicals, including registration procedures applicable to imported products, such as those applied under China's 'Provisions on the Environmental Administration of Initial Imports of Chemical Products and Imports and Exports of Toxic Chemical Products';
- Boilers and pressure vessels, including certification and inspection procedures which had to be no less favourable than those applied to goods of Chinese origin, and fees applied by the relevant agencies or administrative bodies, which had to be equitable in relation to those chargeable for like products of domestic origin.

So, how best to evaluate the above national treatment commitments made by China? Are those commitments standardised WTO accession commitments, or are they so called WTO-plus obligations which demonstrate China's determination to embrace a more liberal multilateral trade approach concerning national treatment?

2. China's national treatment commitments: WTO-plus obligations in nature

Because provisions containing national treatment obligations are scattered throughout the China Protocol, some of these provisions merely confirm existing WTO national treatment obligations, while some prescribe national treatment obligations that are not contained in the WTO agreements. According to the analysis of the national treatment clause in the GATT in Chapter 1, China's national treatment obligations exceed the existing national treatment requirements of other WTO Agreements in the following respects.

a. National treatment regarding conditions affecting production in China

According to Section 3 (non-discrimination) of the China Protocol, China's national treatment obligation applies to the treatment of foreign individuals and enterprises and foreign-funded enterprises with respect to the conditions affecting the production of goods in China and the marketing and sales of such products.

This commitment, which covers both goods and services, far exceeds the generally applicable WTO disciplines in two respects: firstly, existing WTO rules do not cover foreign investment, except for measures directly pertinent to or affecting trade in goods or services specifically included in the GATS schedules; secondly, it is a unilateral, non-reciprocal concession granted to foreign investors and enterprises, and Chinese investors and enterprises are not accorded the same treatment in other WTO countries.²⁴³

As such, this obligation is beyond the scope of Article III of the GATT, Article XVII of the GATS and Article 2 of the TRIMs.

b. National treatment regarding the right to trade

As part of its commitment concerning market economy reform, in Section 5.2 of the China Protocol, China has undertaken to progressively liberalise its availability and the scope of the right to trade, granting all enterprises in China the right to import and export goods within three years of its WTO accession.

In addition, in Section 8.2 of the China Protocol, China has undertaken to provide national treatment to foreign individuals and enterprises and foreign-funded enterprises concerning the distribution of import and export licenses and quotas.

These provisions address the national treatment of foreign individuals with respect to their business and trading opportunities in China, and are therefore beyond the scope of Article III of the GATT and Article 2 of the TRIMs. Insofar as import and export activities may constitute a service sector, they are, however, not included in China's SSC, and are consequently not covered by the national treatment clauses of the GATS.²⁴⁴ Thus, without any doubt, the national treatment obligation of China regarding trading rights exceeds

²⁴³ Wu, 'No Longer Outside, Not Yet Equal', at 262.

²⁴⁴ In comparison, domestic wholesale and retailing services are included in China's SSC, see Annex 9 to the Protocol, Schedule of Specific Commitments on Services, 4. Distribution Services: (B) Wholesale Trade Services, and (C) Retailing Services.

existing WTO requirements.

c. Equal treatment between Chinese and foreign nationals

In addition to the specific national treatment clauses in the China Protocol, paragraph 18 of the China WPR sets out a comprehensive commitment that was incorporated into the China Protocol. This commitment undertakes to accord the same treatment to Chinese enterprises and all foreign persons in China, without any limitation on its scope of application. In addition, the wording of 'same' is narrower than the 'no less favourable' prescription in the GATT/GATS national treatment provisions. Therefore, this commitment undoubtedly goes beyond the scope of all existing national treatment obligations under WTO agreements.

In general, the national treatment clauses in the China Protocol identified above are primarily concerned with the treatment of foreign individuals and enterprises and the activities of foreign-funded enterprises in China. As described in Chapter 1, it is clear that the GATT national treatment clause applies only to imported products, and foreign individuals or enterprises are not included. By requiring China to accord national treatment to foreign enterprises and foreign-funded enterprises with respect to their activities, China's obligation concerning national treatment has clearly exceeded the scope of current WTO agreements. China has therefore undertaken several WTO-plus obligations regarding the national treatment principle, which demonstrates China's determination to solve the issues which most concern other members and embrace a more liberal approach with regard to the national treatment principle as well.

3. China's WTO compliance regarding the national treatment principle: an overhaul of domestic legislation

Although numerous efforts have been made by China before and after its WTO accession, there are still concerns regarding China's WTO compliance. For example, the USTR issues an annual report to Congress on China's WTO Compliance,²⁴⁵ intensively reviewing and examining China's WTO compliance. While those reports and other scholarly works

²⁴⁵ Full texts of these reports are available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases>. [10.07.2017]

already fully describe China's efforts and the gaps between its commitments and practices, this section will focus solely on China's compliance with regard to the national treatment principle. As compliance is the act of implementing and enforcing agreements – a correspondence between behaviour and agreed rules²⁴⁶ – examining China's legal practices regarding national treatment commitments will disclose China's determination to adjust its legal system in this regard.

a. A brief account of China's domestic legislation overhaul

Generally, in order to comply with the requirements of the WTO, China has begun a wide-ranging campaign of revising existing legislation and administrative regulations.

WTO membership required some fundamental changes to those Chinese laws, regulations and policies relating to trade and investment, and these were to be in place within five years of its accession. To comply with its obligations, China initiated a massive legislative campaign to amend WTO-inconsistent laws and regulations, or to enact new ones. The Chinese government reported that, from the end of 1999 to the end of 2005, China adopted, revised or abolished more than 2,000 laws, administrative regulations and department rules which covered trade in goods, trade in services, trade-related intellectual property right (IPR) protection, transparency, uniform application of trade measures etc.²⁴⁷

With regard to the legislation in China, the National People's Congress (NPC) and its Standing Committee exercise legislative power, and the NPC or its Standing Committee may empower the State Council to first develop administrative regulations as required on certain matters.²⁴⁸ In practice, however, it is the State Council, empowered by the NPC or its Standing Committee, who actively promulgate administrative regulations regarding a wide variety of matters, including the WTO-related matters.

More specifically, the State Council issues the *Legislative Work Plan* annually as guidance for legislative work to be undertaken throughout the year. Although the *2001 Legislative Work Plan for the State Council* was issued before China's WTO accession, it did issue a general guidance for China's overhaul of the legislative system in order to comply with its

²⁴⁶ Chan, 'China and the WTO: the theory and practice of compliance', at 56.

²⁴⁷ Rongzhen Yang, 'Research of China's Participation in the WTO Trade Policy Review Process', Indiana University, Research Center for Chinese Politics and Business, RCCPB Working Paper No. 8, October 2011, at 2, available at: <https://www.indiana.edu/~rccpb/wordpress/wp-content/uploads/2015/11/Yang-Rongzhen-RCCPB-8-TPR-PUB.pdf>. [10.07.2017]

²⁴⁸ See Article 7 and Article 9 of the *Legislation Law of the PRC* (2015 Amendment).

WTO commitments. In the *2001 Legislative Work Plan for the State Council*, the revision and creation of Chinese laws and administrative regulations according to the WTO requirements was among the top priorities of the legislative work for 2001. According to the *Legislative Work Plan*, from 2001 to 2008 (except for 2005 and 2007), there were numerous laws and administrative regulations which needed to be revised or created so as to comply with the WTO rules. The following table shows more detailed information in this regard.

Table 1. Number of laws and administrative regulations of central government identified as in need of revision, creation or repeal in the annually issued *Legislative Work Plan for the State Council*

Name of legal documents	Number of laws and administrative regulations of central government in need of revision, creation or repeal
<i>2001 Legislative Work Plan for the State Council</i>	38
<i>2002 Legislative Work Plan for the State Council</i>	5
<i>2003 Legislative Work Plan for the State Council</i>	2
<i>2004 Legislative Work Plan for the State Council</i>	1
<i>2005 Legislative Work Plan for the State Council</i>	0
<i>2006 Legislative Work Plan for the State Council</i>	2
<i>2007 Legislative Work Plan for the State Council</i>	0
<i>2008 Legislative Work Plan for the State Council</i>	1
Total	49

Obviously, this table shows only a small part of the legislative overhaul conducted in China, as numerous local provincial legislations, local governmental administrative regulations and relevant legal documents have been revised, created or repealed according to the *Legislative Work Plan of the State Council*.

The overhaul of China's trade law regime within such a short time was truly impressive, and it is fair to conclude that the Chinese government made genuine and largely successful efforts to ensure the consistency of China's trade law and practice with WTO rules and

their accession commitments.²⁴⁹ Many of the restrictions and discriminatory measures faced by foreign enterprises or individuals in China have been eliminated or considerably eased since the overhaul of domestic legislation. Thus, it is time to turn the specific focus to China's legislative campaign regarding its national treatment commitments.

b. China's efforts to realise the modification of legislation required by national treatment commitments

According to China's commitments, of all the topics in the agreement that required China to revise its laws – the creation and modification of some laws and the repeal of others – it is the topic of non-discrimination which involved the largest number of commitments.²⁵⁰

Table 1 shows 49 laws and administrative regulations at a central level which needed to be revised, created or repealed according to WTO rules. In this section, the focus will be limited to the provisions in those 49 laws and administrative regulations which relate to China's national treatment commitments. Among them, the revision of the *Foreign Trade Law of the PRC* (FTL) is of great significance, because it is central to the realisation of China's national treatment commitments.

i. The compliance of national commitments as a general principle

The compliance of national treatment was emphasised by China, from the Communist Party of China (CPC) to the government, and from central government to all levels of local government.

According to Document No. 22 of the General Office of the CPC Central Committee, issued in 2001, all relevant legislation bodies, central and local governments should actively create, revise and repeal all laws and regulations in order to be consistent with WTO requirements. In addition, any regulation and policy which was directly inconsistent with China's WTO commitments should be revised or repealed accordingly and the compliance of national treatment, among others, was emphasised.²⁵¹

In the aftermath of the above document being issued by the CPC, all relevant bureaus in central government and all levels of local governments issued Notices or Opinions

²⁴⁹ Wu, 'No Longer Outside, Not Yet Equal', at 245.

²⁵⁰ The United States General Accounting Office, 'World Trade Organization', at 48.

²⁵¹ See the Notice of State Administration of Taxation, No. 986 in 2001, available at: <http://www.ctaxnews.com.cn/ww/detail/ntdetail.jsp?DOCID=7959>. [10.07.2017]

regarding the enforcement of the CPC document so as to regulate the revision and abolition of WTO-inconsistent laws, regulations and policies.

In those Notices and Opinions, the national treatment principle was one of the leading principles regulating the entire task of legal revision and abolition. Moreover, these Notices and Opinions strictly required that all measures should comply with the national treatment principle in the WTO; equal treatment must be accorded to imported goods/service/service suppliers and domestic goods/service/service suppliers, and to foreign IPR and national IPR as well.²⁵²

ii. Compliance with national treatment commitments in the revised *Foreign Trade Law of the People's Republic of China*

In its General Provision section, the revised FTL emphasises the granting of national treatment to other contracting parties or members according to international treaties and agreements.²⁵³

In the Foreign Trade Business Operators chapter, the revised FTL further states that individuals, both nationals and foreigners, must be allowed to conduct foreign trade. This replaces the article in the 1994 FTL in which individuals were forbidden to do so. The revised FTL also removes the differential treatment of foreign-funded enterprises and Chinese enterprises.²⁵⁴

In general, the revision of the FTL in 2004 lives up to its main aim of implementing China's WTO commitments and promoting the healthy development of foreign trade according to WTO rules. Compared to the 1994 FTL, major improvements were made in the 2004 FTL in accordance with the requirements of China's foreign trade and WTO rules at that time. As such, the revised FTL, which is general legislation, provides a good and complete framework.

²⁵² See Document No. 20 in 2001, issued by Hangzhou government, available at: <http://www.southcn.com/law/fzzt/fgsjk/200502180281.htm>. [10.07.2017]

²⁵³ Article 6 of the FTL (2004 revised):

'In the field of foreign trade, the People's Republic of China grants, according to the international treaties and agreements it concluded or acceded to, most-favored-nation treatment or national treatment to other contracting parties or members, or grants most-favored-nation treatment or national treatment to its counterparts according to the principle of mutual benefit and reciprocity.'

²⁵⁴ See Article 8 and 9 of the old FTL (1994) and the new FTL (2004 revised).

iii. Compliance with national treatment commitments as regards the import and export of goods

In 2001, the State Council issued the *Regulation of the PRC on the Administration of the Import and Export of Goods*. As a general principle, this provided that China grant national treatment to other contracting parties or Member States party to the international treaties or pacts it had concluded or acceded to.²⁵⁵

This regulation repealed the *Interim Regulations on Licensing System for Import Commodities of the PRC*, which had required the practice of a licensing system for the import of goods.²⁵⁶

China therefore allows the free importation and exportation of goods, and maintains the fairness and orderliness of the system which allows the import and export of goods by foreign individuals and foreign-invested enterprises (FIEs) to enjoy the same rights as the free importation and exportation of goods by nationals, unless otherwise provided for.

Local government accordingly repealed the following measures regarding the import and export of goods:

- taxes and charges levied on imported products which are higher than the identical type of domestic products;
- treatment accorded to imported products which are less than the identical type of domestic products regarding internal sales, transportation, purchase and use, etc;
- treatment accorded to FIEs regarding the internal purchase of ingredients and parts or the internal and international sales of their products less than those accorded to domestic enterprises;
- charges levied on imported and exported products which are more than their service cost;
- standards (including technical standards) applied to imported products which are higher than local products;
- quantitative restrictions, subsidies and other non-tariff measures and process applied to imported and exported products;

²⁵⁵ See Article 5 of the *Regulation of the PRC on the Administration of the Import and Export of Goods*: 'The People's Republic of China grants the most-favored-nation treatment or national treatment to other contracting parties or member states to the international treaties or pacts that it has concluded or acceded to, or grants the most-favored-nation treatment or national treatment to its counterparts according to the principle of mutual benefit and reciprocity.'

²⁵⁶ See Article 2 of the *Interim Regulations on Licensing System for Import Commodities of the PRC*: 'The People's Republic of China practices the Licensing System of import commodities. For all commodities imported on the strength of licenses as stipulated in these regulations unless otherwise stipulated by the State, an application shall be filed and the licence of import commodities obtained in advance, and an order or orders for import should be placed through the corporations approved by the State to engage in the business of importing such commodities. The Customs offices may give clearance after examination upon the strength of licence of import commodities and other documents concerned.'

- different procurement conditions and process applied to products originated from different WTO members in local government procurement activities;²⁵⁷

iv. Compliance with national treatment commitments in income tax laws

In 2007, China promulgated the *Enterprise Income Tax Law of the PRC* (EITL) which repeals the *Income Tax Law of the PRC for Enterprises with Foreign Investment and Foreign Enterprises (FIEs Income Tax Law)*.

The EITL unified the tax rates for foreign and domestic enterprises and brought China's tax laws more into line with international standards. The new system superseded two former tax codes – one for domestic enterprises and the other for FIEs. According to the EITL, the income tax rate for all companies in China, both foreign and domestic, is 25%, with a qualified exception for enterprises with small profits which retain a 20% preferential tax rate.

The statutory income tax rate applied to domestic companies was previously 33%, while certain FIEs enjoyed a preferential tax rate of 24% or 15%, and the income tax for other FIEs was 33%. As well as differential treatment regarding income tax rate, the domestic enterprises and FIEs were subject to a different legal system regarding income tax issues, with the *Provisional Regulations of the PRC on Enterprises Income Tax* applying to domestic enterprises and the *FIEs Income Tax Law* applying solely to FIEs.

The differential tax rate for domestic companies had also previously been subject to certain limitations on specific types of expenses. The EITL eliminated those limitations, creating a more level field of competition between domestic enterprises and FIEs. However, after more comparisons between the EITL and the old tax system, it is surprising to find that the previous income tax system had given preferential treatment to FIEs, also known as 'super-national treatment' for FIEs. The concept of 'super-national treatment' will be fully discussed in Chapter 3.

In sum, with regard to the current tax system, China has made improvements with regard to the national treatment accorded to FIEs when it comes to income tax, and has abolished the preferential value-added tax (VAT) for domestically produced or designed integrated circuits. The latter will be analysed in the case study in section II.B of this chapter.

²⁵⁷ See Document No. 20 in 2001, issued by Hangzhou government, available at: <http://www.southcn.com/law/fzzt/fgsjk/200502180281.htm>. [10.07.2017]

v. Compliance with national treatment commitments in laws concerning the service industries

With regard to the service industry, according to the specific commitments made by China under the GATS in eleven service sectors,²⁵⁸ there are no unified laws or regulations concerning the opening and adjustment of those service sectors in general. On the contrary, however, according to specific commitments made by China under the GATS regarding specific service sectors, numerous regulations and notices have been issued by the relevant Chinese authorities so as to comply with the national treatment commitments made by China, if any.

Although China made numerous national treatment commitments with regard to 11 service sectors, according to the structure of the GATS and the SSC, national treatment commitments in a specific subsector are subject to the market access commitments of that subsector. For instance, China inscribes no limitation in the national treatment column regarding accounting, auditing and bookkeeping services, which means that China commits to according full national treatment to foreigners with a commercial presence in that subsector. However, this does not, in reality, lead to full national treatment for foreigners, as China does inscribe limitations regarding market access in the same subsector. The market access limitation reads: 'Partnerships or incorporated accounting firms are limited to Certified Public Accountants licensed by the Chinese authorities'.²⁵⁹ The requirement that partnerships of incorporated accounting firms are limited to Certified Public Accountants licensed by the Chinese authorities in existing Chinese laws and regulations does not therefore constitute a breach of China's national treatment commitment in this regard.

In short, as China's national treatment commitments regarding service industries are subject to the inscriptions in the market access column, the compliance with national treatment commitments in laws regarding service industries will not be further discussed. However, in order to gain an impression of China's efforts with regard to market access in the service sector, some relevant regulations in the sectors which most concern foreigners are as follows:

²⁵⁸ These eleven service sectors include: profession services, computer and related services, real estates services, other business services, communication services, construction and related engineering services, communication services, construction and related engineering services, distribution services, educational services, environmental services, financial services, tourism and travel related services, and transportation services.

²⁵⁹ See the SSC of the PRC, GATS/SC/135, 14 February 2002, at 7.

*Provisions on the Administration of Foreign-funded Telecommunications Enterprises*²⁶⁰

*Regulations on the Administration of Foreign Law Firms' Representative Offices in China*²⁶¹

*Regulations of the PRC on the Administration of Foreign-Funded Financial Institutions*²⁶²

*Opinions on Regulating the Access to and Administration of Foreign Investment in the Real Estate Market*²⁶³

*Provisions on the Administration of Foreign-invested Construction Engineering Service Enterprises*²⁶⁴

*Provisions on the Administration of Foreign-invested Advertising Enterprises*²⁶⁵

In those abovementioned regulations, China regulates relevant service sectors according to the market access and national treatment commitments it made in the SSC.

vi. Compliance with national treatment commitments in laws concerning IPR

The law concerning IPR in China is composed of the *Patent Law of the PRC*,²⁶⁶ the *Copyright Law of the PRC*,²⁶⁷ the *Trademark Law of the PRC*,²⁶⁸ and regulations on the implementation of those three laws and other administrative regulations. Following China's WTO accession, these laws were subject to revision so as to comply with the TRIPS.

The three laws and relevant regulations were revised after 2001 in order to comply with TRIPS rules in various respects. Among these revisions, the *Patent Law of the PRC* was revised in 2008 to repeal the approval requirement regarding the assignment of the right to apply for a patent, or of the patent right, from a Chinese entity or individual to a foreigner.²⁶⁹ Foreigners are therefore now subject to the same procedure regarding assignment of patents as are Chinese nationals.

According to the revision of these three laws, regulations issued by local IPR authorities correspondingly require that the same fees should be charged to domestic and foreign applicants and the same remedial procedure should be applied to domestic and foreign IPR

²⁶⁰ Promulgated by the State Council in 2001, revised in 2016.

²⁶¹ Promulgated by the State Council in 2001.

²⁶² Promulgated by the State Council in 2001, repealed in 2006.

²⁶³ Promulgated by the Ministry of Construction, MOFCOM, National Development and Reform Commission (NDRC), the People's Bank of China, the State Administration for Industry of Commerce and the State Administration of Foreign Exchange in 2006.

²⁶⁴ Promulgated by the Ministry of Construction, MOFCOM in 2007.

²⁶⁵ Promulgated by the MOFCOM and the State Administration of Industry and Commerce in 2008, repealed in 2015.

²⁶⁶ Promulgated in 1984, and revised in 199, 2000 and 2008.

²⁶⁷ Promulgated in 1990, and revised in 2001 and 2010.

²⁶⁸ Promulgated in 1982, and revised in 1993, 2001 and 2013.

²⁶⁹ See Article 10 of the *Patent Law of the PRC*, 2000 revised.

holders.²⁷⁰

- vii. Compliance with national treatment commitments in laws governing foreign invested enterprises

China does not so far have a unified foreign investment law, although the *Foreign Investment Law of the PRC* (Draft for Comments) was issued in 2015, but, as yet without further ratification. This means that the laws governing FIEs are scattered throughout the Chinese legal system, the most important among them being: *Law of the PRC on Chinese-Foreign Equity Joint Ventures* (promulgated on 8 July 1979; amended on 4 April 1990 and 15 March 2001), *Law of the PRC on Foreign-Capital Enterprises* (promulgated on 12 April 1986; amended on 31 October 2000), and *Law of the PRC on Chinese-Foreign Contractual Joint Ventures* (promulgated on 13 April 1988; amended on 31 October 2000).

Obviously, the three laws mentioned above were also subject to revision around 2001 as a result of China's WTO accession. As these laws constitute a significant portion of China's foreign investment regime, the detailed analysis of these three laws and the associated national treatment compliance in this regard will be discussed as part of the evolving foreign investment regime in China in Chapter 3.

c. Concluding remarks concerning China's compliance with WTO national treatment principles

The aforementioned laws and regulations describe China's compliance with the national treatment principle according to its national treatment commitments in the China Protocol.

With regard to the national treatment accorded to foreign individuals and enterprises and their right to trade and import and export goods, since its WTO accession, China has made huge concessions in its trade regime to achieve national treatment which complies with WTO standards. Alongside these changes, the unification of income tax and the more equal treatment of FIEs meet China's national treatment commitments with regard to foreign enterprises, and even in the less liberalised service and IPR regimes, China has actively implemented its national treatment commitments. In short, therefore, it can be seen that China has lived up to its commitments regarding the national treatment principle since its

²⁷⁰ See Document No. 20 in 2001, issued by Hangzhou government, available at: <http://www.southcn.com/law/fzzt/fgsjk/200502180281.htm>. [10.07.2017]

WTO accession.

To put it bluntly, however, this positive conclusion does not mean that China has complied with every single national treatment commitment it made, nor that it has revised its laws and regulations perfectly according to WTO rules. There are undoubtedly some gaps between China's commitments and practices, for example, China continues to discriminate against foreign enterprises across a range of industries. As the USTR 2014 Report to Congress on China's WTO Compliance report explained, 'China's industrial policies on automobiles and steel call for discrimination against foreign producers and imported goods ... discriminatory treatment also remains prevalent in a variety of services sectors'.²⁷¹ Moreover, certain aspects of China's legal framework, such as China's extensive use of administrative licensing, 'create opportunities for Chinese government officials to treat foreign companies and foreign products less favorably than domestic companies and domestic products'.²⁷²

China has also, since its WTO accession applied preferential VAT for domestically produced or designed integrated circuits;²⁷³ penalised manufacturers for using imported parts in the manufacture of vehicles for sale in China;²⁷⁴ granted refunds, reductions or exemptions from taxes and other payments owed to government by enterprises;²⁷⁵ applied different pre-distribution and pre-authorisation review processes for the works of Chinese nationals and the works of foreign nationals;²⁷⁶ discriminated against foreign suppliers of distribution services for publications and foreign suppliers of audiovisual services for audiovisual home entertainment products;²⁷⁷ adversely affected financial information

²⁷¹ USTR, *2014 Report on China's WTO Compliance*, at 56.

²⁷² *Ibid.*

²⁷³ The United States requested consultations with China concerning China's preferential VAT for domestically produced or designed integrated circuits. See WTO dispute DS309 *China—Value-Added Tax on Integrated Circuits*.

²⁷⁴ The European Communities, the United States and Canada requested consultations with China regarding China's imposition of measures that adversely affect exports of automobile parts from the European Communities, the United States and Canada to China. See WTO dispute DS339 *China—Measures Affecting Imports of Automobile Parts*.

²⁷⁵ The United States requested consultations with China concerning measures granting refunds, reductions or exemptions from taxes and other payments owed to government by enterprises. See WTO dispute DS358 *China—Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*.

²⁷⁶ The United States requested consultations with China concerning measures pertaining to the protection and enforcement of intellectual property rights in China. See WTO dispute DS362 *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*.

²⁷⁷ The United States requested consultations with China concerning: (1) certain measures that restrict trading rights with respect to imported films for theatrical release, audiovisual home entertainment products (e.g. video cassettes and DVDs), sound recordings and publications (e.g. books, magazines, newspapers and electronic publications); and (2) certain measures that restrict market access for, or discriminate against, foreign suppliers of distribution services for publications and foreign suppliers of audiovisual services (including distribution services) for audiovisual home entertainment products. See WTO dispute DS363 *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*.

services and foreign financial services suppliers;²⁷⁸ offered grants, loans, and other incentives which benefited products of Chinese-origin but not imported products;²⁷⁹ discriminated against foreign electronic payment services suppliers;²⁸⁰ and unfairly taxed imported aircraft.²⁸¹

The discriminatory measures listed above have all triggered other members to resort to dispute settlement procedures in the WTO, and these aforementioned national treatment inconsistencies constitute the majority of China's disputes as a respondent in the WTO DSB. The analysis of these cases of Chinese national treatment inconsistency in the next section will further reveal the extent of China's national treatment compliance from a more practical perspective.

II. Evaluating China's national treatment commitments and compliance in the WTO: cases analyses

Before concentrating on China's disputes in the WTO concerning the violations of the national treatment clause, a brief review of China's performance in the WTO DSM is necessary.

A. China and the Dispute Settlement Mechanism: from a marginal participant to an active player

The WTO DSM is a legalistic rule-based system, which is regarded by some to be the 'crown-jewel of the WTO' as well as 'the most important international tribunal'.²⁸² It derives its unique power as an international dispute-settlement body from its exclusive and compulsory jurisdiction over matters arising under WTO agreements, its virtually

²⁷⁸ The European Communities requested consultations with China with respect to measures affecting financial information services and foreign financial information services suppliers in China. See WTO dispute DS372 *China—Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*.

²⁷⁹ The United States requested consultations with China with regard to certain measures offering grants, loans and other incentives to enterprises in China. See WTO dispute DS387 *China—Grants, Loans and Other Incentives*.

²⁸⁰ The United States requested consultations with China with respect to certain restrictions and requirements maintained by China pertaining to electronic payment services for payment card transactions and the suppliers of those services. See WTO dispute DS413 *China—Certain Measures Affecting Electronic Payment Services*.

²⁸¹ The United States requested consultations with China regarding tax measures in relation to the sale of certain domestically produced aircraft in China. See WTO dispute DS501 *China—Tax Measures Concerning Certain Domestically Produced Aircraft*.

²⁸² Valerie Hughes, 'WTO Dispute Settlement: Past, Present and Future', in Henry Gao & Donald Lewis, eds., *China's Participation in the WTO*, (England: Cameron May, 2005), at 272-273.

automatic process, and the economic impact of its decisions. Many trade disputes have been resolved through this mechanism, and it has proven to be a central element in providing security and predictability to the current multilateral trading system.²⁸³

Before China's accession to the WTO, the only way its trade partners could try to resolve problematic trade issues was through bilateral negotiations. Since its accession, however, China submits to the exclusive and compulsory jurisdiction of the WTO DSB, and its trade partners have every right to take China before the WTO DSB for any trade dispute.²⁸⁴ Notably, the WTO DSB is the only international 'court' of compulsory jurisdiction that China has recognised without reservation, and it remains the only international judicial body to which China has resorted.²⁸⁵

Although it has accepted the full compulsory jurisdiction of the DSB, China has not been an active player in the DSB since its WTO accession. According to WTO case statistics, since the establishment of the WTO, the United States and the EU, the most active WTO complainants, have each initiated cases, on average, roughly six times per year (once every two months). In contrast, China has only initiated 17 cases in 16 years of WTO membership. Up to June 2017, many other developing economies in the WTO have complained more frequently than China.²⁸⁶

There are several reasons behind China's inactivity in the WTO DSM. First, deeply influenced by non-litigious legal traditions, China prefers to settle disputes behind closed doors without public loss of face for either party. Second, China's legal capacity is relatively low in comparison to that of developed countries such as the United States and the EU, and even some emerging economies like Brazil. In these countries, there is a long tradition of formal litigation in courts, and an abundance of lawyers who are proficient in the WTO official languages of English, French and Spanish. Third, many countries have developed formal and informal private and public partnerships to identify foreign trade barriers, prioritise them according to their impact, and mobilise resources for WTO

²⁸³ Wei Zhuang, 'An Empirical Study of China's Participation in the WTO Dispute Settlement Mechanism: 2001-2010', *The Law and Development Review*, 2011, Vol. 4: No. 1, pp. 218-243, at 218.

²⁸⁴ Henry Gao, 'China's Participation in the WTO: A lawyer's perspective', *Singapore Year Book of International Law and Contributors*, Vol. 11, 2007, pp. 41-74, at 71.

²⁸⁵ China ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States in 1993, but submits to the jurisdiction of the ICSID only those disputes concerning compensation for expropriation and nationalisation. In 1972, the PRC notified the United Nations (UN) Secretary-General that it did not recognise the compulsory jurisdiction of the International Court of Justice (ICJ), which the Republic of China had accepted in 1946. See Zhuang, 'An Empirical Study of China's Participation in the WTO Dispute Settlement Mechanism', at 218.

²⁸⁶ WTO, disputes by country/territory, available at: http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm. [10.07.2017]

complaints. China does not yet have such strong and effective mechanisms.²⁸⁷ Finally, China's accession package greatly limits the country's right to complain,²⁸⁸ imposing discriminatory limits to market access for Chinese goods in foreign markets.

However, facing rising protectionism and a distressed export sector, China has realised that a cultural characteristic of non-litigiousness is not entirely compatible with the defence of Chinese trade and economic interests and the ability to influence trade rules through dispute settlement. In 2007, China filed its first independent complaint (without any third party) against the United States, concerning preliminary anti-dumping and countervailing duty determinations. Since then, China has resorted to the WTO every year and its sceptical attitude toward international law and tribunals has transformed into an 'assertive legalism' strategy in the WTO arena.²⁸⁹

Compared to its gradually active status as complainant, China has been involved in more disputes (39²⁹⁰ cases up to April 2017) as respondent in the WTO, which demonstrates that China bites others much less frequently than it is bitten.

However, China was not among the most targeted respondents in the first five years after its WTO accession. In the run up to WTO accession, China reached compromises, mainly with the European Communities and the United States, to delay the implementation of certain commitments concerning important industries. This was in accordance with China's negotiation objective to make commitments consistent with its development status. These transitional periods were to last between three and five years.²⁹¹ Therefore, in the initial years after China's accession, China's major trade partners gave China some leeway in implementing its commitments, and did not initiate complaints against China.²⁹²

²⁸⁷ Zhuang, 'An Empirical Study of China's Participation in the WTO Dispute Settlement Mechanism', at 231.

²⁸⁸ For example, according to Section 16 of the China Protocol:

- China agreed to a transitional product-specific safeguard mechanism, allowing other WTO members to impose restrictions on Chinese imports when it causes or threatens to cause market disruption rather than serious injury to the domestic industry for 12 years after accession.
- China accepted a discriminatory provision in anti-dumping cases brought against its goods in other markets, that of allowing the importing WTO member to use a methodology not based on a strict comparison to domestic prices or costs in China, until 10 December 2016.
- WTO Member reservations incorporated in the accession protocol also inhibit China from initiating WTO complaints. For example, Mexico listed some measures, subject to neither WTO Agreement provisions nor the anti-dumping provisions of the accession protocol, that would remain in effect for six years following China's accession.

²⁸⁹ Pasha L. Hsieh, 'China's Development of International Economic Law and WTO Legal Capacity Building', *Journal of International Economic Law*, Vol. 13, No. 4, pp. 997–1036, at 999.

²⁹⁰ WTO, disputes by country/territory, available at: https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm. [10.07.2017]

²⁹¹ Zhuang, 'An Empirical Study of China's Participation in the WTO Dispute Settlement Mechanism', at 219.

²⁹² Pasha L. Hsieh, 'China–United States Trade Negotiations and Disputes: The WTO and Beyond', *Asian Journal of WTO and International Health Law and Policy*, 2009, Vol. 4, No.2, pp. 368–399, at 375–377.

According to WTO dispute settlement statistics from 1995 to 2010, China was a minor respondent, involved in only 21 of the 419 cases (roughly 5% of all disputes). In contrast, the United States was the most challenged WTO Member (110 cases, or about 26%), followed by the EU (70 cases, or about 17%).²⁹³ During this period, China was only a marginal participant in the DSM, basically as a perennial third party in panel proceedings.

Since the expiry of initial transitional periods, China has been a prime target of WTO litigation by other WTO members, either due to its rapidly increasing volume of exports or as a result of its perceived unfair trade practice. This trend is primarily prompted by the fact that most of China's WTO commitments had been phased in by the end of 2006. To put it simply, the WTO honeymoon with China was over.²⁹⁴ In the aftermath of the honeymoon, China's failure to bring some of its laws and regulations into conformity with either WTO Agreements or the China Protocol caused frequent challenges by the major trading powers. In the period between 2006 and 2010, China found itself a respondent in almost a quarter of all WTO disputes, receiving complaints roughly four times per year.

Although faced with numerous disputes, in the early stages China engaged to solve those disputes by diplomacy and bilateral negotiations. Among the 39 cases as respondent, 50% of cases were settled with complainants at the consultation stage – known as 'early settlement' – without initiating full litigation proceedings. In the majority of cases, China agreed to withdraw its WTO-inconsistent measures in less than a year as a result of consultation.²⁹⁵ This indicates that China has a 'soft' approach to WTO disputes, and reaffirms its traditional preference for solving international disputes by diplomacy rather than litigation.

However, as it disengages from bilateral channels of dispute resolution China's attitude and strategy toward WTO litigation is gradually changing. Due to the defeats it has experienced, China has gradually realised the significance of active defence and appeal, and has started to become one of the most frequent users of the DSM; it has also intensified its participation in WTO dispute settlement in recent years.

The multilateral trade system has been delighted to witness the adoption by China of a more liberal approach regarding trade disputes, as fears had been expressed prior to

²⁹³ WTO, disputes by country/territory, available at: http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm. [10.07.2017]

²⁹⁴ Hsieh, 'China's Development of International Economic Law and WTO Legal Capacity Building', at 1029.

²⁹⁵ *Ibid*, at 1030.

China's accession to the WTO that once it became a member it might disrupt the organisation's work or try to reshape the institution.²⁹⁶ But China's previous record of participation in other international organisations, particularly the UN, gave reason to expect that it would not have a disruptive impact on the WTO, but rather that it would try to use the institution to advance its own interests.²⁹⁷

China has not challenged the authority of the WTO dispute settlement system or attempted to frustrate the procedures so far. It has conformed to dispute settlement practice, and when its measures have been found to be WTO-inconsistent, China has agreed to comply. Although China's WTO compliance regarding dispute settlement is not perfect, China has played the role of a system-maintainer under the DSM, rather than that of a reformer or of a transformer.²⁹⁸

In sum, China's recent active participation in WTO dispute settlement seems to suggest that it has quietly changed its attitude, at least on trade issues. As China has traditionally been reluctant to submit its disputes with other countries to international adjudication,²⁹⁹ this shift in attitude is a sign of China's determination to integrate into the global trade governance regime. At this point in time, it might be premature to say that China has embraced international dispute settlement in an overall manner, but it cannot be disputed that, by actively participating in WTO dispute settlement, China has made a good start, and is becoming more accommodating towards and confident about international dispute settlement in general.³⁰⁰ The following sections will concentrate on specific discussion of cases in which inconsistent national treatment measures were adopted by China.

B. General analysis: national treatment provisions are often cited by complainants filing actions against China with the WTO

Since its accession to the WTO on 11 December 2001, China has been involved in 17 cases as a complainant, 39 as a respondent, and 133 as a third party.³⁰¹ China-related cases have

²⁹⁶ Nicholas R. Lardy, *Integrating China into the Global Economy* (Washington, DC: Brookings Institution, 2002), at 155.

²⁹⁷ *Ibid.*, at 156.

²⁹⁸ Matthew Kennedy, 'China's Role in the WTO Dispute Settlement', *World Trade Review*, 2012, Vol. 11, No. 4, pp. 555-589, at 588.

²⁹⁹ Chi, Manjiao, 'China's Participation in WTO Dispute Settlement Over The Past Decade: Experiences and Impacts', *Journal of International Economic Law*, March 2012, Vol. 15, No. 1, pp. 29-49, at 37.

³⁰⁰ *Ibid.*, at 48.

³⁰¹ WTO, disputes by country/territory, available at: https://www.wto.org/english/tratop_e/di

not overburdened the WTO dispute settlement system – contrary to all pre-entry predictions – but since 2006, following the longest ever transitional period of five years, China has recently emerged as the leading target in WTO disputes, and has come under increased scrutiny from other WTO members, notably the United States and the EU.

To evaluate China's compliance with WTO rules against this background, it is essential to analyse China's WTO disputes as a respondent. This case analysis will uncover the truth behind the veil of statistics and clarify the approach adopted by China with regard to WTO compliance. More specifically, only those disputes which concern an inconsistency in national treatment provision will be included and discussed, in order to evaluate China's WTO compliance with regard to the national treatment principle.

Disputes against China in the WTO DSB substantially cover three trade sectors: goods, services and IPR.³⁰² Among the 39 cases with China as respondent, 17 cases relate to the national treatment clauses in various WTO agreements, while other cases are related to anti-dumping and subsidies. These disputes reveal the contradiction between China's efforts to comply with WTO principles and its internal need to protect domestic industries. These disputes are listed in Table 2.

Table 2: Disputes invoking a national treatment clause with China as respondent as of June 2017

No	Case	Relevant industry	Dispute resolution	Cited national treatment clauses
1	DS309	Integrated Circuits	Settled after consultation.	GATS and GATT national treatment clauses.
2	DS339	Automotive Parts	Appellate Body Report.	GATT and TRIMs national treatment clauses.
3	DS340	Automotive Parts	Appellate Body Report.	GATT and TRIMs national treatment clauses.
4	DS342	Automotive Parts	Appellate Body Report.	GATT and TRIMs national treatment clauses.
5	DS358	Taxes	Settled after consultation.	GATT and TRIMs national treatment clauses.

spu_e/dispu_by_country_e.htm. [10.07.2017]

³⁰² The WTO Secretariat tracks the main agreements at stake in each dispute settlement case and categorises disputes according to four broad categories: (1) Goods: the GATT 1994 and agreements covered by its annex, such as the Agreement on Subsidies and Countervailing Measures and the TRIMs; (2) Services: the GATS; (3) Intellectual property: the TRIPS; and (4) Dispute settlement: Understanding on rules and procedures governing the settlement of disputes.

6	DS359	Taxes	Settled after consultation.	GATT and TRIMs national treatment clauses.
7	DS362	IPR	Panel Report.	TRIPS national treatment clause.
8	DS363	Publications and AVEH Products	Appellate Body Report.	GATS and GATT national treatment clauses.
9	DS372	Financial Information Services	Settled after consultation.	GATS national treatment clause.
10	DS373	Financial Information Services	Settled after consultation.	GATS national treatment clause.
11	DS378	Financial Information Services	Settled after consultation.	GATS national treatment clause.
12	DS387	Export Subsidies	Settled after consultation.	GATT national treatment clause.
13	DS388	Export Subsidies	Settled after consultation.	GATT national treatment clause.
14	DS390	Export Subsidies	Settled after consultation.	GATT national treatment clause.
15	DS413	Electronic Payment Services	Panel Report	GATS national treatment clause.
16	DS451	Apparel and Textile Products	In Consultation	GATT national treatment clause.
17	DS501	Aircraft	In Consultation	GATT national treatment clause.

Among these 17 national treatment-related disputes, it is the national treatment clause in the GATT which is most often cited, followed by the national treatment provisions in the GATS and TRIMs. The aforementioned disputes will be analysed further in the section which follows, with the emphasis on disputes which cited the national treatment clauses in the GATT and GATS. Investment-related measures will be discussed in Chapter 3.

1. DS309: China's VAT policy violates Article III of the GATT

DS309 was the very first case against China in the WTO, and focused on the treatment of imported semiconductor memory chips in the Chinese market. Due to the rapidly growing trade deficits with China of major trading partners, these partners adopted a more aggressive attitude towards China in the WTO litigation. In 2004, the United States filed the very first WTO case against China, challenging its exemption from VAT of domestically produced integrated circuits.³⁰³

This dispute centred on China's policy of levying 17% VAT on semiconductors, but refunding up to 14% VAT to those companies that designed and made semiconductor chips in China while continuing to collect the full VAT on imported chips.³⁰⁴ According to a Notice, issued by the State Council, China had provided for 17% VAT on integrated circuits.³⁰⁵ Based on the same provision and other implementation notices issued by the Ministry of Finance, the State Administration of Taxation (SAT), and the General Administration of Customs (GAC), enterprises in China were entitled to a partial refund of the VAT on the integrated circuits they had produced, resulting in a lower VAT rate on their products.³⁰⁶ China therefore appeared to be subjecting imported integrated circuits to higher taxes than those which applied to domestic integrated circuits, and to be according less favourable treatment to imported integrated circuits than they did to the domestically produced chips eligible for the special tax rebates, which effectively lowered the tax rate to between 3 and 6%.

As semiconductors are one of the United States' main exports to China, on 18 March 2004 the United States alleged that the above-mentioned practice was a violation of the GATT national treatment principle and requested consultations with China. The European Community and other suppliers had also notified an interest in the case to the WTO.

After constructive consultations on 27 April 2004 in Geneva, and bilateral meetings in

³⁰³ Hsieh, 'China's Development of International Economic Law and WTO Legal Capacity Building', at 1007.

³⁰⁴ Jinyan Li, 'Relationship between International Trade Law and National Tax Policy: A Case Study of China', *Bulletin for International Taxation*, Vol. 59, No.2, 2005, pp. 77-87, at 84.

³⁰⁵ Article 5 of *Notice of the State Council Regarding Issuance of Certain Policies Concerning the Development of the Software Industry and Integrated Circuit Industry*.

³⁰⁶ Article 5 of *Notice of the State Council Regarding Issuance of Certain Policies Concerning the Development of the Software Industry and Integrated Circuit Industry*; also see *Notice of the Ministry of Finance, State Administration of Taxation, and General Administration of Customs on Relevant Tax Policy Issues Concerning Encouraging the Development of the Software Industry and the Integrated Circuit Industry*; *Notice of the Ministry of Finance, State Administration of Taxation Regarding Furthering Tax Policies to Encourage the Development of the Software Industry and Integrated Circuit Industry*.

Washington and Beijing, China and the United States signed a Memorandum of Understanding (MOU)³⁰⁷ regarding China's VAT on integrated circuits. China and the United States agreed that China would amend the measures described in the United States' consultation request to eliminate the eligibility for VAT refunds on their domestic sales of firms producing integrated circuits in China.

In October 2004, China issued the *Notice of the Ministry of Finance and the State Administration of Taxation on Stopping the Tax Refund Policy for Value-added Tax on Integrated Circuits*, which ended the implementation of the legal documents mentioned in the consultation request of the United States within the time agreed in the MOU. This meant that all imported and domestically produced semiconductors would be subject to a standard VAT rate of 17% and the domestic refunding was abolished.

In this way, the first dispute with China as a respondent in the WTO was settled in a 'soft' way, without the initiation of Panel and Appellate Body proceedings. As a respondent, China was well aware of its national treatment inconsistency here, and the only remedy was the repeal of the cited legal documents.

2. DS339/DS340/DS342: China's measures on the imports of automobile parts violate Article III of the GATT

DS339/DS340/DS342 was the first case in the WTO DSB in which China appealed to the Appellate Body, although it resulted in China suffering its first WTO defeat in which both the Panel and Appellate Body found the tariff imposed by China on imported automobile parts to be in violation of the national treatment principle. As both the Panel and Appellate Body issued reports regarding this case and China expressed its opinion in the appeal procedure, DS339/DS340/DS342 will be analysed in detail.

a. Complainants' arguments regarding the national treatment violation

In 2005, China issued three legal instruments³⁰⁸ which imposed a 25% 'charge' on

³⁰⁷ See WT/DS309/7, Memorandum of Understanding Between China and the United States Regarding China's Value-Added Tax on Integrated Circuits, available at: http://trade.ec.europa.eu/doclib/docs/2004/july/tradoc_11813_1.pdf. [10.07.2017]

³⁰⁸ See *Policy on Development on Automotive Industry*, Order of the NDRC (No. 8), entered into force on 21 May 2004; *Administrative Rules on Importation of Automobile Parts Characterized as Complete Vehicles*, Decree of the PRC, No. 125, entered into force on 1 April 2005; and *Rules on Verification of Imported Automobile Parts Characterized as*

imported auto parts 'characterized as complete motor vehicles' based on specified criteria, and prescribed administrative procedures associated with the imposition of that charge.

Accordingly, the aforementioned charge discouraged the purchase of imported auto parts by Chinese enterprises. This discriminated against foreign auto parts and violated the national treatment principle. The complainants therefore argued that China's measures were inconsistent with the GATT, Subsidies and Countervailing Measures, TRIMs and the China Protocol. In order to simplify the dispute, the following analysis will only focus on the violation of national treatment provisions in the GATT and TRIMs.

More specifically, the complainants argued that China had acted inconsistently with Articles III:2, III:4, and III:5 of the GATT and Article 2 of the TRIMs.

To elaborate; the complainants argued as follows regarding the inconsistency of China's national treatment provisions:

China has imposed a charge on imported auto parts but not on domestic auto parts, applying internal charges so as to afford protection to domestic production.³⁰⁹

Therefore, the imported auto parts in China subjected to internal charge in excess of those applied to like domestic products, which constitutes the violation of Article III:2 of the GATT.

China has treated imported auto parts less favourably than like domestic auto parts by imposing additional administrative burdens and additional charges upon manufacturers that use imported parts in excess of specified thresholds, thereby affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of imported auto parts,³¹⁰ which constitutes the violation of Article III:4 of the GATT.

China has required that a specified amount or proportion of the auto parts assembled into a complete motor vehicle be supplied from domestic sources, and otherwise applying internal quantitative regulations so as to afford protection to domestic production,³¹¹ which constitutes the violation of Article III:5 of the GATT.

China violated Article 2.1 and paragraphs 1(a) and 2(a) of Annex 1 of the TRIMs, by requiring motor vehicle manufacturers in China to purchase or use domestic auto parts in order to obtain advantages such as the avoidance of administrative burdens and the payment of additional charges and by imposing restrictions which generally restrict the importation by a manufacturer of auto parts used in or related to its local production.³¹²

In short, according to the complainants, the overall impact of China's measures was to discriminate against imported auto parts by encouraging the use of domestic parts in auto

Complete Vehicles, Public Announcement of the GAC of the PRC, No. 4 of 2005, entered into force on 1 April 2005. [10.07.2017]

³⁰⁹ *China—Automobile Part*, Panel Report, para. 3.1 (d).

³¹⁰ *Ibid*, para. 3.4 (b).

³¹¹ *Ibid*, para. 3.4 (d).

³¹² *Ibid*, para. 3.4 (c).

parts and vehicle manufacturing in China.

b. China's arguments regarding the national treatment violation

First, China argued that the measures at issue were border measures subject to the disciplines of Article II of the GATT rather than the Article III national treatment clause. As the role of national treatment clauses in the GATT must be understood in the light of the distinction between border measures and internal measures, this argument by China was an attempt to design a complete solution to the alleged violation of national treatment clause. China therefore rejected the complainants' arguments, claiming instead that the measures under which the charge had been imposed were an 'ordinary customs duty' under Article II:1(b), first sentence, of the GATT.³¹³

Second, without the application of Article III of the GATT, China focused on the argument that the measures at issue were consistent with Article II of the GATT and that they had not collected ordinary customs duties in excess of China's bound commitments.

Finally, China argued that any inconsistency with the GATT was subject to the general exception under Article XX (d),³¹⁴ as the charges and measures were necessary to secure compliance with 'a valid interpretation of China's tariff provisions for motor vehicles'.³¹⁵

The Panel found that the tariff China had imposed on imported auto parts violated the national treatment principle. In the appeal procedure, China made the following claims of error:

China argued that Panel's conclusion that characterized the measures at issue as internal charge failed to take into account that it is the Harmonized Commodity Description and Coding System (Harmonized System). China insisted that if the measures at issue impose a charge based upon a valid method of classifying the product under the Harmonized System, the charge is an ordinary customs duty under Article II:1(b), and not an internal charge subject to Article III:2.³¹⁶

³¹³ *Ibid.*, para. 7.102.

³¹⁴ GATT Article XX:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;"

³¹⁵ *China—Automobile Part*, Panel Report, para. 7.284.

³¹⁶ *China—Automobile Part*, Appellate Body Report, paras. 16-17.

For the inconsistency of Article III:2 of the GATT concluded by the Panel, China submitted that because the Panel erred in its conclusion that the charge imposed under the measures is an internal charge, the Panel's finding under Article III:2 is also in error and its conclusion that the charge is inconsistent with Article III:2 cannot be sustained.³¹⁷

For the inconsistency of Article III:4 of the GATT concluded by the Panel, China contends that the Panel's finding that the measures fall within the scope of Article III:4 was 'premised upon' its finding that the charge imposed under the measures is an internal charge. Because, in China's view, the latter finding is in error, the Panel's findings under Article III:4 must also be reversed.³¹⁸

With arguments from both parties, the Panel and Appellate Body concluded that the following points at issue were relevant to the national treatment principle in this dispute:

China's measures are considered as internal measures, not border measures.
The charge under the measures is inconsistent with Article III:2 of the GATT.
The charge under the measures is inconsistent with Article III:4 of the GATT.
The Panel exercised judicial economy with respect of complainants' claim under Article III:5 of the GATT.
The charge under the measures cannot be justified under GATT Article XX (d)
The Panel exercised judicial economy concerning TRIMs Agreement.
The Appellate Body uphold the abovementioned conclusion of the Panel.

In sum, the Panel considered the Chinese measures at issue to be inconsistent with Article III:2 and Article III:4 of the GATT, and ruled that they could not be justified under Article XX of the GATT. The Appellate Body also upheld the Panel's findings regarding China's national treatment inconsistency.

c. Conclusion

China lost its first appeal case in the WTO, and the Ministry of Industry and Information Technology and NDRC issued a joint decree to stop the implementation of the relevant provisions concerning the importation of auto parts in the *Policy on Development of Automobile Industry*.³¹⁹ The GAC and relevant agencies also promulgated a joint decree to repeal the WTO-inconsistent legal documents. With this apparent defeat, it is the claims and approach adopted by China during the appeal procedure which need to be mentioned.

On appeal, China did not contend that the Panel had erred in finding that the products on which the measures imposed a charge were 'like' domestic products, or in finding that the charge was 'in excess' of that applied to like domestic products. Instead, China's claim of

³¹⁷ *Ibid*, para. 19.

³¹⁸ *Ibid*, para. 20.

³¹⁹ In the Order 10 of the Ministry of Industry and Information Technology and the NDRC, it amends provisions in the *Policy on Development of Automobile Industry* regarding import administration.

error was dependent upon its claim that the Panel had erred in finding the charge imposed under the measures to be an internal charge rather than an ordinary customs duty.³²⁰

It is surprising to find that China's claims regarding the violation of Article III of the GATT only focused on the identification of border measures, without a substantial rebuttal concerning the key components of the national treatment clause itself. Some may argue that this reflected the fact that China was not skilled, and revealed its limited experience of appealing in the DSM, as this was the first decision China had appealed.

However, from the author's perspective, it is likely that China was well aware of this national treatment inconsistency and intended to apply Article II of the GATT to the measures at issue. In other words, China felt that there was a low probability of rebuttal within the scope of the national treatment provision, as all factors which might constitute a violation of Article III of the GATT had been fulfilled and it was impossible to justify under Article XX of the GATT. Therefore, instead of claiming that the Panel's conclusions regarding 'like products' and 'less favourable than' were in error, and being under the illusion that the application of Article II of the GATT would fundamentally justify the measures at issue, China adopted a tactic which concentrated on the identification of border measures.

In short, as compared with earlier disputes which had been settled during consultation, in this dispute China was more consciously using an active defence, however, the violation of the national treatment principle was obvious in this dispute, and for China the defeat was not entirely unexpected.

3. DS358/DS359: China's enterprises income tax measures violate the national treatment provision in the GATT and TRIMs

In this dispute, the United States requested consultations with China regarding certain measures granting refunds, reductions, or exemptions from taxes or other payments otherwise due to the government by enterprises in China. Although this dispute ended with agreement being reached between the United States and China, its implications are among the reasons why China promulgated the EITL, which unified the system of income taxation for enterprises, as previously discussed in section I.B.3.b.iv of this chapter.

³²⁰ *China—Automobile Part*, Appellate Body Report, para. 184.

In the *Request for Consultations by the United States*,³²¹ the United States identified seven legal documents,³²² issued by the Chinese government, which appeared to provide refunds, reductions or exemptions to enterprises in China on condition that those enterprises purchased domestic over imported goods, or on condition that those enterprises met certain export performance criteria. Accordingly, to the extent that the measures accorded imported products treatment less favourable than that accorded to 'like' domestic products, they appeared to be inconsistent with Article III:4 of the GATT and Article 2 of the TRIMs.

More specifically, for example, according to the *Circular on the Distribution of Interim Measures Concerning Reduction and Exemption of Enterprise Income Tax for Investment in Domestically Made Equipment for Technological Renovation*, issued in 1999, the use of imported products by Chinese enterprises was not within the scope of enterprise income tax reductions and exemptions, while the use of domestic products fell within the scope of tax reductions and exemptions.³²³

In addition, the *FIEs Income Tax Law* and its rules of implementation set less favourable conditions, including certain export portion requirements, for applications for tax refunds and exemptions by FIEs.³²⁴

It is undoubtedly the case that the measures adopted by China violated the national treatment principles of both the GATT and TRIMs. Because of this clear breach of national treatment clauses, China decided to not waste time and energy in the Panel procedure and reached an agreement with the United States.

³²¹ WTO, *China—Taxes, Request for Consultations by the United States*, WT/DS358/1, G/L/813, G/SCM/D74/1, G/TRIMS/D/25, 7 February 2007.

³²² These legal documents are:

- *Circular of the State Administration of Taxation Concerning Transmitting the Interim Measure for the Administration of Tax Refunds to Enterprises with Foreign Investment for Their Domestic Equipment Purchases*
- *Circular of the Ministry of Finance and the State Administration of Taxation Concerning the Issue of Tax Credit for Business Income Tax for Homemade Equipment Purchased by Enterprises with Foreign Investment and Foreign Enterprises*
- *Circular on Distribution of Interim Measures Concerning Reduction and Exemption of Enterprise Income Tax for Investment in Domestically Made Equipment for Technological Renovation*
- *FIEs Income Tax Law Implementing Rules*
- *Provisions of the State Council on the Encouragement of Foreign Investment*
- *Circular of the People's Bank of China, the State Administration of Foreign Exchange, the Ministry of Foreign Trade and Economic Cooperation and the State Administration of Taxation Concerning Printing and Distribution Detailed Rules on Rewarding and Punishment Concerning Provisional Regulations over Examination of Export Collections of Foreign Exchange*

³²³ Article 3 of the *Circular on Distribution of Interim Measures Concerning Reduction and Exemption of Enterprise Income Tax for Investment in Domestically Made Equipment for Technological Renovation*.

³²⁴ See Article 75(7), (8), Article 73(6) and Article 81 of *Rules for Implementation of the Income Tax Law of the People's Republic of China on Enterprises with Foreign Investment and Foreign Enterprises*.

In order to bring the measures concerned into line with WTO rules, China issued the *Notice on Stopping the Implementation of the Policy of Refunding Tax to Foreign-funded Enterprises for Their Purchase of Home-made Equipment* in December 2008. They further promulgated the EITL in March 2007, and this repealed the *FIEs Income Tax Law* and *FIEs Income Tax Law Implementation Rules*. China also revised the legal documents listed by the United States, and ensured that imported equipment received VAT treatment under terms and conditions no less favourable than those applicable to domestically produced equipment.

In sum, without resort to Panel and Appellate Body proceedings, China repealed and revised its legal documents regarding the less favourable treatment regarding tax refunds and exemptions for FIEs and imported products. As an indirect result of this dispute, China unified its taxation system concerning domestic and foreign enterprises by promulgating the EITL, which is an example of China's passive WTO compliance with regard to national treatment principles in the taxation system.

4. DS362: China's IP measures violate the national treatment clause in the TRIPS

In 2009, China's changing attitude towards the DSM resulted in a limited success in *China—Intellectual Property Rights*. Although the United States, the complainant in this case, had succeeded in most of their claims, the Panel disagreed with the challenge to China's high threshold for criminal prosecution for copyright infringement, something which is critical for the enforcement of a higher IPR protection standard. Given China's defence, the United States failed to prevail in this issue, presumably most vital from an industry perspective. The mixed ruling in this case taught China a lesson: active defence can be successful.

Among other claims, the national treatment claim of the United States was as follows:

China appears to establish different pre-distribution and pre-authorization review processes for Chinese nationals' works, performances (or their fixations) and sound recordings than for foreign nationals' works, performances (or their fixations) and sound recordings. These requirements appeared to result in earlier and otherwise more favourable protection and enforcement of copyright rights for Chinese

authors' works than for foreign authors' works, inconsistently with China's obligations under Article 3.1(national treatment) of the TRIPS.³²⁵

However, the United States made no submission to the Panel in respect of these claims. China then submitted that the United States had neglected to assert any claim whatsoever, and had thus seemingly abandoned their national treatment arguments. The United States confirmed that it was not pursuing a claim under Article 3.1 of the TRIPS Agreement before this Panel.³²⁶

Therefore, although having cited the national treatment principle of the TRIPS for the consultation, the United States abandoned the national treatment argument before the Panel, rendering discussion of the national treatment clause in this dispute unnecessary.

China prevailed in the significant issue for the entire dispute, as its criminal thresholds were not deemed inconsistent with the TRIPS. Nevertheless, in 2010, China revised the *Copyright Law* and the *Regulations of the PRC for Customs Protection of IPR* so as to bring those inconsistencies into conformity with the TRIPS.

5. DS363: China's trade and service measures violate national treatment clauses in the GATT and GATS

In April 2007, the United States filed two IPR-related WTO complaints against China. The first was the aforementioned *China—Intellectual Property Rights*, and the second challenged China's compliance with its national treatment obligations regarding certain foreign products and service suppliers, namely *China—Publications and Audiovisual Products*. It was also the first GATS-related case for China as a respondent in the WTO.

China—Publications and Audiovisual Products concerned China's commitments to grant the 'right to trade' (i.e. the right to import and export goods) as well as national treatment claims under both GATT and GATS. With both Panel and Appellate Body proceedings, this dispute will be discussed in detail.

a. Complainant's arguments regarding the national treatment clause

In the *China—Publications and Audiovisual Products*, the dispute arose over certain

³²⁵ *China—Intellectual Property Rights*, Panel Report, paras. 7.187-7.189.

³²⁶ *Ibid.*

measures that affected (i) the importation into China of certain goods, (ii) the distribution within China of certain goods, and (iii) services and service suppliers in relation to certain products.³²⁷

With regard to the national treatment violation, the United States argued as follows:

- i. China's measures regarding distribution services are inconsistent with China's national treatment obligations under the GATS

According to the United States, China made market access and national treatment commitments in the distribution (Sector 4B) and audiovisual (Sector 2D) services sectors in its SSC.

In Sector 4B, China committed to permit foreign-service suppliers to engage in wholesale trade services via mode 3 with respect to books, newspapers and periodicals within three years of China's accession. Also, having inscribed 'None' in mode 3 under the national treatment column in Sector 4B, China promised to provide full national treatment commitments with respect to wholesaling services through commercial presence.³²⁸

China's measures regarding foreign wholesalers of reading materials were therefore inconsistent with China's GATS Article XVII (national treatment) commitments, since they were treating foreign suppliers of these services far less favourably than their domestic counterparts.³²⁹ The United States then argued that China's measures met the three-tier test for national treatment violation in the GATS. Within the broad scope of 'affect' and apparent 'likeness', the United States focused on the violation of the third requirement, 'less favourable treatment' which is, in nature, the modification of the competition condition.

The United States argued that certain Chinese distribution requirements were treating foreign-invested wholesalers of reading materials operating under mode 3 less favourably than wholly Chinese-owned wholesalers. First, China was prohibiting foreign-invested enterprises from engaging in several forms of reading-material wholesaling. Further, where China had made a limited exception to this general ban, foreign service suppliers were being subjected to requirements, governing of registered capital, operating terms, pre-establishment violations, and examination and approval procedures, that were more

³²⁷ *China—Publications and Audiovisual Products*, Panel Report, para. 2.1.

³²⁸ *Ibid*, para. 4.51.

³²⁹ *Ibid*, para. 4.52.

onerous than those applicable to their wholly Chinese-owned competitors. This treatment was less favourable because it modified the conditions of competition in favour of wholly Chinese- owned wholesalers of reading material compared to like foreign-invested wholesalers of reading material.³³⁰

In Sector 2D, China undertook market access and full national treatment commitments under mode 3 for the distribution of a range of products, including AVHE products such as video cassettes, VCDs, and DVDs.³³¹ In the same vein, the measures at issue were treating foreign services and services suppliers less favourably than China's own like services and service suppliers, limiting the operations of foreign-invested enterprises wishing to engage in the relevant distribution services by imposing more stringent requirements on foreign-invested enterprises engaged in these services as compared to their wholly Chinese-owned competitors.³³²

ii. China's measures regarding imported products are inconsistent with China's national treatment obligations under the GATT

China was significantly limiting the distributors and distribution channels available to imported reading materials; they imposed a restrictive subscription regime on a large portion of these imported products. China also discriminated against imported sound recordings intended for electronic distribution by imposing more burdensome content review requirements prior to distribution. Finally, China confined imported films for theatrical release to two Chinese state-controlled distributors. In each instance, China was according treatment to imported reading materials, sound recordings intended for electronic distribution, and films for theatrical release that was less favourable than that accorded to like domestic products.³³³

According to the three-tier test for violation of Article III:4 of the GATT adopted by the Appellate Body, for each product, imports were 'like' with those made in China within the meaning of Article III:4. In addition, the term 'affecting' in Article III:4 was understood to have a 'broad scope of application', and to cover measures even beyond those which directly regulated or governed the sale of imported and domestic like products. The measures at issue here all regulated, at the least, the internal sale, offering for sale,

³³⁰ *Ibid*, para. 4.54.

³³¹ *Ibid*, para. 4.55.

³³² *Ibid*, para. 4.66.

³³³ *Ibid*, para. 4.72.

purchase, distribution or use of imported and domestic like products, and thus readily qualified as 'affecting' these activities within the meaning of this term in Article III:4.³³⁴

The United States then focused on the last element, whether the measure at issue modified the conditions of competition in the relevant market to the detriment of imported products. The measures at issue systemically distorted competition between imported and like domestic products. These regulatory constraints, from which competing Chinese products were exempt, created major disadvantages for imported products in the Chinese market place.³³⁵ Therefore, according to the United States, the Chinese measures constituted a violation of Article III:4 of the GATT.

In conclusion, the United States requested that the Panel find that, *inter alia*, China's measures were inconsistent with China's national treatment obligations under the GATS and the GATT.

b. China's arguments regarding the national treatment clause

In reply to the claims of the United States, China argued correspondingly regarding the national treatment violation:

i. Measures at issues regarding the distribution services

As regards the breach of the national treatment provision in the GATS, China argued that the translation offered by the United States regarding the distribution services of reading materials was not accurate, and one of the measures at issue did not fall within the scope of Sector 4B Distribution Service in China's SSC.

Then, with regard to the modification of conditions of competition, China argued that the only difference between Chinese enterprises and FIEs with regard to the approval process in distribution services was that an additional application was required from the FIEs, something which caused only a five-day difference. Thus, China claimed that this tiny difference in the length of the approval process could not be considered as affecting the conditions of competition. In addition, for the distribution of audiovisual products, China claimed that the formal differences specified by the United States were insufficient to qualify as the modification of the conditions of competition.

³³⁴ *Ibid*, para. 4.77.

³³⁵ *Ibid*, para. 4.78.

With regard to the sound recording distribution services, China argued that the measure at issue corresponded to network music services, which are totally different from sound recording distribution services in Sector 2D of China's SSC. Network music services were not included in China's SSC as a new type of service.

ii. Measures at issue regarding product distribution

As for the violation of Article III:4 of the GATT, China argued that the measures at issue did not modify the conditions of competition, therefore the United States had failed to establish the 'less favourable treatment' requirement.

In addition, with regard to motion pictures for theatrical release, because no physical goods were actually being distributed, these should be qualified as services, and therefore did not fall within the scope of Article III:4 of the GATT. In any case, even if the distribution of motion pictures was to be scrutinised under Article III:4 of the GATT, the Chinese regulations challenged did not modify the conditions of competition and did not therefore violate Article III:4 of the GATT.

In sum, with regard to the claims of the United States, China argued that some claims unduly extended China's commitments beyond those in the SSC, and the Chinese regulations challenged did not modify the conditions of competition, and that there had therefore been no violation of the national treatment obligation under either the GATS or the GATT.

c. Findings regarding the national treatment clause in the Panel/Appellate Body Report

The Panel drew the following conclusion with regard to the national treatment violation in this dispute:

i. Measures at issues are inconsistent with the national treatment clause in the GATS

First of all, with regard to the translation issue of distribution services, the Panel preferred to use the terms suggested by the United States, not China. The differences in wording between the US version and that of the independent translator are minor, and what mattered for the Panel's legal analysis was the service activities involved, not so much the

terms used to refer to them.³³⁶

Second, the Panel considered that with respect to wholesale trade services (4B) supplied via a commercial presence, China had listed no limitations in the national treatment column of its SSC. This national treatment commitment is subject only to the limitations listed in the market access column of China's SSC. These limitations do not restrict the types of materials that the foreign wholesaler is entitled to distribute. China had thus undertaken a national treatment commitment with respect to the wholesale trade service.³³⁷

Third, the Panel focused on whether China's measures had been inconsistent with its national treatment commitments. The Panel identified two types of measure³³⁸ imposed on FIEs which had violated China's national treatment obligations, firstly, a measure that prohibited foreign service suppliers from supplying a range of wholesale services that could, subject to satisfying certain conditions, have been supplied by a like domestic supplier cannot constitute treatment 'no less favourable', since it has deprived the foreign service supplier of any opportunity to compete with like domestic suppliers. In terms of paragraph 3 of Article XVII, such treatment modifies conditions of competition in the most radical way by eliminating all competition by foreign service suppliers with regard to the service at issue.³³⁹ Therefore, within the broad explanation of 'affecting' and differential treatment based exclusively on the origin of service suppliers, a prohibition on the distribution of certain reading materials was inconsistent with China's national treatment commitments under Article XVII of the GATS.

For the second type of measure, which consisted of discriminatory requirements applying to FIEs, the Panel considered that the higher registered capital requirement applied to FIEs had a negative effect on their ability to compete with domestic service suppliers due to the higher cost of market entry. This had placed FIEs at a competitive disadvantage in seeking to establish a commercial presence. In addition, the 30 year operating term requirement applied only to FIEs, while wholly Chinese-owned wholesalers were free of any limitation. The maximum 30-year operating term imposed of foreign-invested wholesalers, coupled

³³⁶ *Ibid*, paras. 7. 930-931.

³³⁷ *Ibid*, para. 7. 954.

³³⁸ These two categories of measure with respect to the violation of national treatment under the GATS identified by the United States were:

- Prohibitions on FIEs: a prohibition on the distribution/master distribution of reading materials, and a prohibition on the master wholesale and wholesale of electronic publications.
- Discriminatory requirements applying to FIEs: registered capital, operating terms.

³³⁹ *China—Publications and Audiovisual Products*, Panel Report, para. 7. 979.

with a renewal process subject to three conditions, imposed risk, and might therefore lead to costs for FIEs to which their like, wholly Chinese-owned competitors were not subject. Therefore, this requirement modified the conditions of competition for like foreign service suppliers, and was inconsistent with China's national treatment obligations under the GATS.³⁴⁰

Fourth, for the distribution of sound recordings in electronic form, the Panel concluded that the inscription of 'sound recording distribution services' under the heading of Audiovisual Services (Sector 2.D) of China's SSC did extend to the distribution of sound recordings in non-physical form, notably through electronic means. As to the extent of China's national treatment commitment for 'sound recording distribution services' supplied through commercial presence, the Panel considered that this had been limited by the requirement that foreign service suppliers must take the form of a contractual joint venture. China's national treatment commitment for the services at issue was also limited by other types of measures indicated in the horizontal section of its SSC but, as stated, these types of measure were not at issue in this dispute.³⁴¹ As with the method adopted in analysing the distribution of trade in services, the Panel concluded that measures regarding sound recording prohibited FIEs from engaging in the electronic distribution of sound recordings, while like domestic service suppliers were not similarly prohibited.

Fifth, the United States also put forward claims under Article XVI and XVII of the GATS for the distribution of AVHE products in physical form. As regards the national treatment obligation, the Panel examined whether the alleged discriminatory requirements with respect to foreign equity participation and operating term were inconsistent with Article XVII of the GATS. The core issue was to determine the extent of China's commitments as regards national treatment for the distribution of AVHE products in physical form. As there had been no limitation in the national treatment column, the Panel turned to examining the horizontal section of China's SSC, and finally, scrutiny of the market access column, as a limitation in the market access column is also, by virtue of Article XX:2 of the GATS, a limitation on national treatment.

As some measures did violate Article XVI of the GATS in this regard, the Panel exercised the principle of judicial economy and only concluded that the requirement that only the

³⁴⁰ *Ibid*, para. 7. 1276.

³⁴¹ *Ibid*, para. 7. 1280.

Chinese partner may hold the dominant position in a contractual joint venture was in violation of China's national treatment commitment. As for the 15-year operating term, the Panel arrived at the conclusion that this was inconsistent with Article XVII of the GATS, taking the similar argument and counterargument of parties regarding the discriminatory requirement in the distribution of wholesale services.

In sum, with regard to the distribution of reading materials, the Panel concluded that nine provisions out of ten in the Chinese regulations were inconsistent with the Chinese national treatment commitments under Article XVII of the GATS. With regard to the electronic distribution of sound recordings, five provisions out of six were inconsistent with China's national treatment commitments under Article XVII of the GATS. With regard to the distribution of AVHE products, two provisions were inconsistent with China's national treatment commitments under Article XVII of the GATS. The panel exercised judicial economy principle with respect to three provisions which were inconsistent with market access commitments.

ii. Measures at issues are inconsistent with the national treatment provision in the GATT

As to violation of Article III:4 of the GATT, the Appellate Body clarified that three elements must be satisfied: the imported and domestic products at issue are 'like products'; the measure at issue is a 'law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use'; and the imported products are accorded 'less favourable' treatment than that accorded to like domestic products.³⁴² Only once the two first elements are established does the obligation to afford no less favourable treatment apply.

There was no conflict with regard to the first and second elements, and what raised the issue was the question of what constituted 'distribution' within the meaning of Article III:4 of the GATT. The United States argued that the concept of 'distribution' encompassed the range of activities undertaken to move a product through the stream of commerce, while China argued that distribution within the context of Article III:4 of the GATT referred to the supply of goods to consumers or to those selling-on. The Panel came to the conclusion that for the purposes of Article III:4 of the GATT, internal distribution is the portion of that process or series of transactions from the point of importation (i.e. it begins when the

³⁴² *Korea—Various Measures on Beef*, Appellate Body Report, para. 133.

goods enter the customs territory of the importing Member) until the good is received by the consumer.³⁴³

The Panel then analysed the measures affecting imported reading materials, sound recordings, and film for theatrical release according to the aforementioned elements.

For the measures regarding imported reading materials, the Panel considered that the subscription requirements applied to all imported newspapers and periodicals, whether in the 'limited' or 'non-limited' categories, whereas the subscription requirements only applied to books in the 'limited' category. In addition, the different treatment with respect to 'limited' imported books was not exclusively based on the foreign origin of the imported books, but was based rather on whether the imported book contained prohibited content. Therefore, the United States had not demonstrated that the challenged measure created a distinction in treatment between imported and domestic books exclusively based on origin. As a result, the Panel considered imported newspapers and periodicals to be 'like' domestic counterparts under Article III:4, while imported books are not 'like' domestic books.

Further, with regard to imported newspapers and periodicals, as the second element was easily satisfied, the Panel focused on 'less favourable treatment'. According to the Panel, it was undisputed that domestic newspapers and periodicals could be distributed through multiple channels to consumers, whereas their imported counterparts were limited to one channel. Moreover, imported newspapers and periodicals could only be moved along that single channel by wholly state-owned Chinese enterprises. Domestic newspapers and periodicals, however, could reach consumers through a variety of distributors. Such a measure placed restrictions on who may distribute imported newspapers and periodicals, and on the method by which they may be distributed, which were not faced by like domestic products. Furthermore, with respect to the mandatory subscription requirements, the Panel noted that this meant that a distributor of domestic newspapers and periodicals could distribute individual issues to consumers via newsstands, bookstores, and other shops, as well as via subscription, while a distributor of imported newspapers and periodicals could only distribute products through a subscription to every issue of that publication. Additionally, distributors of imported newspapers and periodicals could not distribute their products through channels that would place them in direct competition with domestic publications in front of consumers. Therefore, this limitation in the manner in

³⁴³ *China—Publications and Audiovisual Products*, Panel Report, para. 7.1465.

which imported newspapers and periodicals could be distributed not only constituted formally different treatment, but also treatment which could reasonably be concluded to modify the conditions of competition to the detriment of imported newspapers and periodicals.³⁴⁴ The Panel thus concluded that the measures applied to imported newspapers and periodicals were inconsistent with China's obligation under Article III:4 of the GATT.

For the measures regarding imported sound recordings, the Panel considered that as the measures made a distinction between two groups of audiovisual products exclusively based on origin, the *likeness* requirement for the violation of Article III:4 of the GATT had been met. With respect to the second element, 'laws, regulations or requirements affecting the internal distribution', the Panel confirmed that the measures constituted a regulation within the meaning of Article III:4, however, it found that the United States had not demonstrated that the relevant regulations affected the distribution of imported hard-copy sound recordings intended for electronic distribution. Therefore, the United States had likewise not established that Article III:4 was applicable to those measures, neither had it been able to establish that these measures were inconsistent with Article III:4.

For the measures regarding imported films for theatrical release, the Panel first resolved the dispute as to whether China's rules and regulations in this regard created a *de jure* or *de facto* distribution duopoly, as the United States had argued that there was a film distribution 'duopoly' in China which resulted in the discriminatory treatment of imported films for theatrical release, while China contended that the small number of distributors of imported films was due to the limitation set forth in its GATS schedule, and China had established a licensing system for the activity of distributing motion pictures for theatrical release, but did not impose any quantitative restriction on those companies that could be approved.³⁴⁵

According to the Panel, China was using incentives and penalties to encourage the distribution of domestic films, and could also control the number of films being distributed. However, this fact did not demonstrate that China would not permit any other entity to obtain a licence to distribute imported films. There was also nothing that prevented China from amending the rules if and when additional entities were approved by the authorities to distribute imported films for theatrical release. While this regulatory

³⁴⁴ *Ibid*, paras. 7.1490-1536.

³⁴⁵ *Ibid*, para. 7.1659, 7.1661, and 7.1662.

structure may differ from other systems, this was not sufficient to demonstrate that China had, through its actions, created an imported film distribution duopoly. Therefore, the United States had not been able to demonstrate that China's rules and regulations created a distribution duopoly, either *de jure* or *de facto*. The Panel therefore declined to issue any findings with regard to the claim from the United States as to whether the alleged discriminatory distribution duopoly in China was inconsistent with Article III:4 of the GATT 1994.³⁴⁶

In sum, the Panel concluded that the measures applied to imported newspapers and periodicals were inconsistent with China's obligations, but the measures applied to imported books were not inconsistent with China's obligations under Article III:4 of the GATT. As to the measures applied to imported sound recordings and films for theatrical release, these were not inconsistent with China's obligations under Article III:4 of the GATT.

During the appeal, China did not focus on the national treatment violation conclusion reached by the Panel, but concentrated on trading rights and the 'necessity' test of Article XX (a) of the GATT. China's only appeal was that the Panel had erred in finding that the commitment on 'sound recording distribution services' inscribed in China's GATS SSC encompassed the distribution of sound recordings through electronic means.³⁴⁷ However, the Appellate Body upheld the Panel's conclusion that the provisions of China's measures prohibiting FIEs from engaging in the distribution of sound recordings in electronic form were inconsistent with Article XVII of the GATS.³⁴⁸

In conclusion, as to the violation of the national treatment clause in the GATS with regard to the distribution of reading materials, 14 out of 15 measures were found to be inconsistent with China's national treatment commitments under Article XVII of the GATS. With regard to the electronic distribution of sound recordings, six out of seven measures were inconsistent with China's national treatment commitments under Article XVII of the GATS, and with regard to the distribution of AVHE products, two measures were inconsistent with China's national treatment commitments under Article XVII of the GATS. The Panel exercised judicial economy regarding the other three measures, as they violated the market access obligation. As to the violation of the national treatment clause in

³⁴⁶ *Ibid*, para. 7.1685, 7.1687, 7.1692-94.

³⁴⁷ *China—Publications and Audiovisual Products*, Appellate Body Report, para. 36.

³⁴⁸ *Ibid*, para. 416.

the GATT; with regard to the imported reading materials, four out of six measures were found to be inconsistent with China's national treatment commitments under Article III:4 of the GATT, and with regard to the imported sound recordings intended for electronic distribution and the films for theatrical release, all five measures were found not to be inconsistent with China's national treatment commitments under Article III:4 of the GATT.

d. Conclusion

China—Publications and Audiovisual Products was a complicated dispute with a variety of measures at issue, followed by an appeal procedure. From the national treatment perspective, China lost this dispute, as more than 60% of the measures at issue were found to be inconsistent with its national treatment obligations under both GATS and GATT. This result, together with other facts, demonstrates that imported cultural products can face numerous disadvantages in the Chinese marketplace, and do not enjoy national treatment vis-à-vis their domestic counterparts. It is therefore not surprising that China was found to be violating its national treatment obligations and was obliged to revise or modify certain laws and regulations.

China's arguments in this dispute are more interesting. Overall, China did not provide specific responses to the arguments of the United States regarding the modification of conditions of competition, which is the most significant criterion in determining the violation of national treatment provisions, but relied instead on its argument that the measures at issue were not within the scope of certain sectors in its GATS SSC. Unfortunately, the Panel did not support all China's interpretations with regard to its own SSC. Some Chinese scholars argue that the Panel adopted the translation offered by the United States rather than China's translation, and that this is the reason why China's interpretation of the measures at issue and its GATS SSC were refuted by the Panel. After analysing the report of the Panel, however, the Panel specified the relevant activities in its assessment rather than focusing on the translation of the terms. It is therefore unfair to conclude that the Panel didn't support China's interpretation due to translation issues, as the Panel did conduct an intensive assessment with regard to every activity challenged.

There are two possible reasons for China's argument, which provided little or no argumentation concerning the modification of conditions of competition, instead concentrating on the interpretation of its SSC. On the one hand it is possible that the complainant fundamentally misunderstood or misinterpreted China's SSC, but this is not

the case according to the Panel and the Appellate Body. On the other hand, China was unable to find any other persuasive argumentation against the claim that it had violated the national treatment principle, and the interpretation of its SSC had implications for the applicability of the national treatment clause; this was deemed to be an effective argument by China. In short, if it could be demonstrated that there was no national treatment commitment in a given service sector, then China could not be held liable for not according national treatment to foreign services and foreign service suppliers within the scope of that service sector. For China, there were multiple considerations behind this line of contestation, but the latter was believed to play a more significant role in the determination process.

Furthermore, China's measures in this dispute were more likely to be seen to constitute *de jure* discrimination, as foreign origin was the sole criterion used by China in a number of circumstances. For instance, China didn't contest the United States' contention that FIEs were prohibited from engaging in certain distribution services while wholly Chinese-owned enterprises were permitted to supply these services. There was simply no room for China to argue against this claim, as the differences apparent in the treatment of FIEs and wholly Chinese-owned enterprises was based exclusively on the origin of service suppliers. Therefore, as previously mentioned, it is not surprising that China was found to be violating its national treatment obligations in this dispute.

6. DS372/DS373/DS378: China's financial information services measures violate the national treatment clause in the GATS

On 3 March 2008, the European Community requested consultations with China concerning measures affecting financial information services and foreign financial-information service suppliers in China.

The European Community claimed that a number of Chinese measures were adversely affecting financial-information services and foreign financial-service suppliers in China. Such measures included no fewer than 12 legal and administrative instruments³⁴⁹ which

³⁴⁹ According to the *Request for Consultations by the European Communities* (WT/DS372/1, S/L/319, IP/D/27, 5 March 2008), the measures at issue include, but are not limited to:

- the Notice Authorizing Xinhua News Agency to Implement Centralized Administration over the Release of Economic Information in the PRC by Foreign News Agencies and their Subsidiary Information Institutions, issued by the State Council on 31 December 1995

empowered the 'Xinhua News Agency', the State news agency in China, to act as the regulatory authority for foreign news agencies and for foreign financial-information providers. The Xinhua News Agency was also responsible for the examination and approval procedure in respect of foreign financial-information providers and, as a result, these foreign suppliers could only operate in China through an agent designated by Xinhua.³⁵⁰ As such, they were not allowed to directly solicit subscriptions for their services in China.

The European Community, *inter alia*, considered that the measures at issue were inconsistent with China's obligations under Article XVI (market access) and Article XVII (national treatment) of the GATS.

In April 2008, without initiating Panel proceedings, China and the European Community reached an agreement in this dispute in the form of a MOU, in which China confirmed that it would issue new legal instruments and a new licensing system to foreign suppliers of financial-information services.

Accordingly, in April 2009, China issued the *Provisions on Administration of Provision of Financial Information Services in China by Foreign Institutions*, which removed the approval and power of examination from the Xinhua News Agency and transferred it to the

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- the Decision on Establishing Administrative Permission for the Administrative Examination and Approval of Items that Must Be Retained, issued by State Council Order No. 412 on 29 June 2004
 - the Measures for Administering the Release of News and Information in China by Foreign News Agencies, issued by Xinhua News Agency on 10 September 2006
 - the Catalogue of Industries for Guiding Foreign Investment (Revised 2007), issued by the State Council in October 2007
 - the Decisions of the State Council regarding Entrance of Non-Public Capital into Cultural Industries, promulgated by the State Council on 13 April 2005
 - the Several Opinions on Introducing Foreign Investment into the Cultural Sector, issued by the Ministry of Culture on 6 July 2005
 - the Opinion on Foreign Investment in Cultural Industries, promulgated by the Ministry of Culture on 5 August 2005
 - the Detailed Rules on the Approval and Control of Resident Representative Offices of Foreign Enterprises, issued by MOFCOM on 13 February 1995
 - the Procedures of the State Administration for Industry and Commerce of China for the Registration and Administration of Resident Representative Offices of Foreign Enterprises, of 5 March 1983
 - the Rules for Internet Information services
 - the Administrative Rules for Internet News Information Services promulgated by State Council Information Office and Ministry of Information Industry on 25 September 2005

³⁵⁰ See Article 1 of the *Notice Authorizing Xinhua News Agency to Implement Centralized Administration over the Release of Economic Information in the PRC by Foreign News Agencies and their Subsidiary Information Institutions*: 'Foreign news agencies and their affiliated information offices shall apply to the Xinhua News Agency to engage in the economic information business. The Xinhua News Agency shall, in accordance with this Circular and relevant provisions of the State, examine and approve the applicants and the categories of economic information intended to be released.' See also item 373 and 374 of the *Decision on Establishing Administrative Permission for the Administrative Examination and Approval of Items that Must Be Retained*, 'Xinhua News Agency is the implementation organ of the examination and approval of the economic information business undertaken inside the territory of China by foreign news agencies and their information institutions, and of the business of publishing news information inside the territory of China by foreign news agencies.'

State Council Information Office (SCIO). According to this provision, the SCIO was to become the agency which supervised and administered those foreign institutions providing financial information services in China.³⁵¹ In addition, foreign institutions which met certain requirements could apply to provide financial information services in China without any designated entity requirements.

In sum, in this dispute, China had clearly breached its national treatment obligation under the GATS by requiring foreign financial information service suppliers to have a designated entity before being allowed to provide financial information services in China, as there was no such designated entity requirement for domestic financial information services suppliers. It was also clear that the examination and approval powers of the Xinhua News Agency discriminated against foreign suppliers of financial information services. China was therefore fully aware of its violation of the national treatment obligation, and decided to settle this dispute by bilateral negotiation. The result of the negotiations, however, also resulted in a gradual opening of China's financial information services; something which needed to be done step by step in response to these external pressures. Although China had made full national treatment commitments³⁵² in this regard, inscription in the market-access column made the non-discriminatory treatment of domestic and foreign financial information service suppliers a rather difficult goal to achieve.

7. DS387/DS388/DS390: China's export subsidies violate the national treatment clause in the GATT

At the end of 2008, the United States requested consultations with China regarding numerous Chinese measures which appeared to provide grants, loans, and other incentives to enterprises in China on condition that those enterprises met certain export-performance criteria. Accordingly, these measures appeared to be inconsistent with, *inter alia*, Article III:4 of the GATT, to the extent that the measures benefitted products of Chinese origin but not imported products. In the request for consultation, the United States listed 78 legal instruments issued by China in their statement of available evidence.³⁵³

³⁵¹ See Article 4 of the *Provisions on Administration of Provision of Financial Information Services*.

³⁵² 'None' inscription regarding national treatment and market access column in modes of supply (1) and (2), while mode (3) will 'None' in the national treatment column and 'None (Criteria for authorization to deal in China's financial services sector are solely prudential (i.e. contain no economic needs test or quantitative limits on licenses). Branches of foreign institutions are permitted.)' in the market access column.

³⁵³ See *Request for Consultations by the United States, China—Grants, Loans and Other Incentives*, WT/DS387/1,

There is currently no further information regarding this dispute in the WTO. According to the USTR, however, following consultations in Geneva in February 2009, the United States, Guatemala, and Mexico worked intensively and cooperatively with China to reach a pragmatic solution to the dispute without resort to lengthy panel proceedings in the WTO. Under the agreement reached, China confirmed that it had taken steps either to eliminate the measures of concern or to modify them to remove any provisions related to export-contingent brand designations and financial benefits.³⁵⁴

To date, no legal instrument has been issued by China in this regard, however, in April 2016, the USTR announced that the United States and China had signed an agreement terminating the export subsidies China had been providing through the 'Demonstration Bases-Common Service Platform' Programme, which had been challenged by the United States in this dispute.³⁵⁵

In sum, as a result of this dispute, China has effectively terminated the disputed programme channelling export-contingent subsidies to Chinese enterprises across seven economic sectors, together with dozens of sub-sectors, located in more than 179 industrial clusters. China terminated the 'Common Service Platform' subsidies to enterprises in the Demonstration Base category and undertook to remove export-contingent criteria from the Demonstration Base. The termination of prohibited export subsidies under the Demonstration Bases-Common Service Platform Programme will help to level the playing field for foreign workers and businesses in the many affected sectors. From a Chinese perspective, this is another huge concession (or step forward from a US perspective) taken by China in according national treatment to foreigners in more sectors.³⁵⁶

8. DS451 and DS501: currently under consultation

On 15 October 2012, Mexico requested consultations with China concerning a wide variety of measures supporting producers and exporters of apparel and textile products,

G/L/879, G/SCM/D81/1, G/AG/GEN/79, 7 January 2009.

³⁵⁴ See USTR official website, Press Releases, December 2009: 'United States Wins End to China's "Famous Brand" Subsidies after Challenge at WTO; Agreement Levels Playing Field for American Workers in Every Manufacturing Sector', available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2009/december/united-states-wins-end-china-s-famous-brand-sub>. [10.07.2017]

³⁵⁵ See USTR official website, Press Releases, April 2016: 'Chinese Export Subsidies Under the "Demonstration Bases-Common Service Platform" Program Terminated Thanks to U.S.-China Agreement', available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/april/chinese-export-subsidies-under>. [10.07.2017]

³⁵⁶ David J. Lynch and Lucy Hornby, 'China eliminates subsidies for its exporters', *Financial Times*, April 14 2016, available at: <https://www.ft.com/content/4f4d1240-024a-11e6-99cb-83242733f755>. [10.07.2017]

both directly and indirectly. Mexico identified nine types of measure maintained by China, and argued that four³⁵⁷ of them were inconsistent with China's national treatment obligations under Article III:4 of the GATT.

On 8 December 2015, the United States requested consultations with China concerning measures providing tax advantages in relation to the sale of certain domestically-produced aircraft in China. The United States identified four legal instruments³⁵⁸ adopted by China that exempted the sale of certain domestically produced aircraft, including general aviation, regional, and agricultural aircraft, from VAT, while imported aircraft continued to be subject to VAT.

These measures appeared to be inconsistent with China's obligations pursuant to Article III:2 of the GATT because they subjected products imported into the territory of China, directly or indirectly, to internal taxes or other internal charges in excess of those applied, directly or indirectly, to like domestic products. These measures also appeared to be inconsistent with China's obligations pursuant to Article III:4 of the GATT 1994 because

³⁵⁷ According to the *Request for Consultations by Mexico, China—Measures Relating to The Production and Exportation of Apparel and Textile Products*, WT/DS451/1, G/L/1004, G/SCM/D94/1, G/AG/GEN/103, 18 October 2012, the four types of measure identified by Mexico as violating the national treatment clause of the GATT are as follows:

- Income tax exemptions, reductions, offsets, and refunds for certain groups of enterprises, including those designated as FIEs and High and New Technology Enterprises, those located in designated geographic areas including certain Western provinces and special economic zones, and those generating income from the production of certain agricultural goods including cotton.
- Exemptions, refunds, and reductions of import duties and VAT for purchases of equipment by certain groups of enterprises including FIEs and those located in designated geographic regions such as economic development zones.
- Support for the production, sale, transportation, processing, importation, exportation, and use of cotton, which is used in making the thread and fabric that go into the Chinese subsidized product. Such support is provided to cotton farmers, transporters, processors, millers, and spinners through tax breaks, cash payments, loans from state-owned banks, and the distortion of domestic supply volumes through the use of state-trading enterprises, tariff rate quotas, and other means. Producers and exporters of certain apparel and textile products benefit directly to the extent that their operations are integrated, and indirectly through the lower prices for raw materials in China that result from these measures.
- Various measures relating to the production, sale, and use of chemical fibres, which are used in making the thread and the fabric that go into the Chinese subsidized product. China has declared that it will exercise 'absolute' control over the Chinese petrochemical industry and consequently directs the activities of producers of chemical fibers through industrial policies, the power to hire and fire company executives, the provision of subsidies for undertaking designated activities, and other means. Pursuant to government policies, state-owned producers sell chemical fibres in the Chinese market at below-market prices that constitute less than adequate remuneration. Manufacturers and exporters of certain apparel and textile products benefit directly to the extent that their operations are integrated and indirectly through the lower prices for raw materials in China that result from these measures.

³⁵⁸ According to the *Request for Consultations by the United States, China—Tax Measures Concerning Certain Domestically Produced Aircraft*, G/L/1141, WT/DS501/1, 8 December 2015, these four legal instruments identified by the United States regarding the violation of national treatment provision of the GATT are as follows:

- Circular on the Value-Added Tax Exemption for Domestically Produced Regional Aircraft, Ministry of Finance and State Administration of Taxation, No. 51 of 2000
- Circular on the Applicability of the Value-Added Tax Exemption for Domestically Produced Regional Aircraft to the N-5 Aircraft, Ministry of Finance and State Administration of Taxation, No. 97 of 2002
- Circular on the Relevant Tax Policy for the AVIC I New Regional Aircraft, Ministry of Finance and State Administration of Taxation, No. 283 of 2006
- Interim Regulation of the People's Republic of China on Value Added Tax, Order of the State, Order No. 538, amending Order No. 134

they accorded products imported into China treatment less favourable than that accorded to like products of Chinese origin.³⁵⁹

To date, there has been no further information available from the WTO, and nor has any legal document been issued in this regard by China. The two aforementioned disputes can therefore not be regarded as settled, although China's violation of the national treatment obligations under the GATT is obvious by virtue of the clear discrimination. It is anticipated that China will reach agreements with Mexico and the United States regarding these two disputes and eliminate the discriminatory measures.

9. Conclusion of general case analysis regarding the national treatment disputes involving China in the WTO

The previous sections includes all the disputes involving the violation of national treatment obligations by China in the WTO, except for the *China—Electronic Payment Services* dispute, which will be analysed separately in the next section.

Among the 8 disputes analysed, Chinese measures violating national treatment principles have been identified in various industries, from automotive and aircraft to financial information services, from cultural products to agriculture products, and from internal taxes to IPR. Since China's accession to the WTO, there has been, on average, a national treatment violation dispute against China once a year. Moreover, China hasn't won a single dispute involving claims of national treatment violations, and in only one case – *China—Publications and Audiovisual Products* – has the DSB found that nine of the measures adopted by China were not inconsistent with its national treatment obligations, whereas 26 measures other have been found to be inconsistent with those obligations, and 3 measures were not assessed, as the Panel exercised the 'judicial economy' principle. In the remainder of China's national treatment violation disputes, all measures challenged by the complainants and identified by the Panel have been found to be inconsistent with China's national treatment obligations, with only one exception: in *China—Auto Parts*, where the Panel exercised the judicial economy principle regarding the alleged violation of the TRIMs national treatment clause. Taking another nine disputes which were settled after consultation into consideration, almost all the alleged violations of China's national

³⁵⁹ See *Request for Consultations by the United States, China—Tax Measures Concerning Certain Domestically Produced Aircraft*, G/L/1141, WT/DS501/1, 8 December 2015.

treatment obligation under the WTO were upheld by WTO adjudicating bodies, and China has been forced to take action to revise or repeal those alleged measures. Therefore, as a result of the WTO dispute settlement mechanism, China has adjusted numerous governmental measures in order to comply with the national treatment principle, almost always as a result of external pressure.

Moreover, according to these disputes, the alleged Chinese measures have constituted *de jure* discrimination, as the differential treatments in Chinese laws and regulations were based exclusively on the origin of the products or services concerned, and the formal differences in treatment between foreign and domestic products and services have been obvious. According to recent WTO jurisprudence, however, it is the *de facto* discrimination in which ostensibly identical treatment produces differentially disadvantageous effects which is more frequently used by WTO members in order to attempt to disguise discriminatory intentions towards foreign products and services. Apparently, *de facto* discrimination is far more difficult for the WTO adjudicating bodies to identify, and some discriminatory measures against foreign products and services may be deemed to be justifiable, as they accord ostensibly identical treatment to foreign products and services. Chinese measures, however, still stagnate in the 'entry level' of national treatment violations, and do not strive to disguise their obviously inconsistent national treatment intentions. This in itself serves to demonstrate the less positive and consistent national treatment practice in China.

Nevertheless, even given this less positive impression with regard to national treatment compliance, China has already made great, and sometimes painful, efforts to implement WTO obligations and rulings. It is impossible to evaluate how much China has moved forward within the scope of this dissertation simply by enumerating the measures China has adopted to deal with existing national treatment inconsistency measures, therefore, the method adopted by this dissertation is to evaluate how much effort has been made by China to bring its measures into national treatment conformity, so as to offer a worthwhile opinion regarding the question of whether China is adopting a more liberal approach in this regard.

More specifically, in the DS309 (*China—Value-Added Tax on Integrated Circuits*) and DS358/359 (*China—Taxes*), China not only repealed its policy of VAT refunds on domestically produced integrated circuits, but also modified its entire income tax system

for enterprises as a result of the national treatment violation. China's reactions to these two disputes have been consistent with the national treatment clause of the GATT.

According to Article III of the GATT, the national treatment principle requires that member countries should not impose internal taxes or adopt other measures to protect domestic production. The taxes most obviously affected by this principle are indirect taxes, such as excise taxes, VAT and the sales taxes imposed on imported goods. These taxes may not exceed those imposed on similar domestic products or be applied in such a way as to provide protection to domestic production.³⁶⁰ The United States relied on this principle when it challenged China's VAT rebate policy for domestically produced semiconductors and differential enterprise income tax system.

Apart from China's efforts in reducing average tariffs (excluding agricultural products) from 42.7% in 1992 to 15% in 2000,³⁶¹ China has also striven to eliminate non-tariff measures, especially those involving internal taxes and charges. For instance, a two-track tax system was introduced to China in the early 1980s: a Western-style tax system for FIEs and foreign individuals and another system for Chinese-owned firms and Chinese citizens. Over the years, these two tracks have merged in the areas of individual income tax, enterprise income tax, VAT, and other indirect taxes (business tax and consumption tax).³⁶² Among these, VAT and enterprise income tax are the most important, as they contained numerous tax incentives that may have contravened the national treatment principle. China was challenged by the United States before the DSB as a result of its WTO inconsistency, and following these disputes, China brought its VAT concerning certain products and its enterprise income tax into conformity with WTO principles. Although this was in response to external pressure, it was nevertheless an important effort made by China with regard to adopting a more liberal approach towards FIEs and imported products. The unification of enterprise income tax after DS358/359 was also a huge step forward with regard to the national treatment accorded to FIEs and national enterprises.

As for its efforts to eliminate non-tariff measures, along with the revision of VAT and enterprise income tax, China repealed its internal charge measures with regard to imported automobile parts following DS339/340/342 (*China—Auto Parts*). As China's policies towards automotive-sector imports had received particular attention during China's WTO

³⁶⁰ Li, 'Relationship between International Trade Law and National Tax Policy', at 79.

³⁶¹ *Ibid*, at 78.

³⁶² *Ibid*, at 81.

accession talks, China reduced its pre-WTO level of 80% or 100% import tariffs on assembled cars to 25%, while the diverse rates of tariff on auto parts were to be reduced such that the average tariff on auto parts declined to 10%.³⁶³ However, *inter alia*, China imposed internal charges on imported automobile parts 'characterized as complete motor vehicles' so as to afford protection to domestically produced automobile parts. In the aftermath of *China—Auto Parts*, China was forced to compromise on the identical treatment concerning imported and domestic parts in the automobile industry; another step towards more liberal treatment being accorded to imported products.

In addition to tax and internal charging measures which discriminate against foreign products, imported copyright-intensive products face numerous disadvantages in the Chinese marketplace, and are not accorded national treatment vis-à-vis their domestic counterparts. As IPR is a sensitive and less open sector compared with other products, China is reluctant to enhance its IPR protection level and has been inactive in according national treatment to foreign IPR holders and products. However, after two WTO disputes involving national treatment inconsistencies in IPR were filed by the United States in April 2007: DS362 (*China—Intellectual Property Rights*) and DS363 (*China—Publications and Audiovisual Products*), China brought the allegedly inconsistent measures into conformity with WTO Agreements. This included the revision of its *Copyright Law* in order to provide national treatment to foreign IPR holders, as well as the repeal of measures which distinguished between imported and domestic audiovisual and AVHE products.

In addition to IPR, the financial services sector is another sensitive sector in China. According to table 2, of the 17 cases, DS372/373/378 (*China—Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*) and DS413 (*China—Electronic Payment Services*) focus on financial information services and electronic payment services respectively. The first dispute was settled with a MOU after consultation, and China revised its approval system for foreign institutions providing financial information services, changing it to a licensing system, which represents a gradual opening up of China's financial information services. In the same way, China revoked the monopoly of a Chinese company due to laws and regulations, and committed to establishing a licensing system for foreign electronic-payment service suppliers.

³⁶³ Deborah L. Swenson, 'The Influence of Chinese Trade Policy on Automobile Assembly and Parts', Department of Economics, University of California, Davis, USA 95616, NBER and CESifo, January 2012, at 2, available at: http://faculty.econ.ucdavis.edu/faculty/dswenson/ChinaCarParts_CESIFO-2012.pdf. [01.07.2017]

However, according to the SSC under GATS, the financial services sector shares a peculiarity with other services: the national treatment commitment in each service sector is subject to the limitations listed in the market access column. The relationship between national treatment commitments and market access commitments under the GATS remains complicated, and will be discussed in the following section, together with the *China—Electronic Payment Services* dispute.

From the overview of national treatment compliance in goods, services and the IPR sector, and according to the proceeding in the DSB of the abovementioned disputes, it can be seen that China's approach with regard to dispute settlement in general is also becoming more liberal.

There had been concerns with regard to dispute settlement as to whether the WTO's dispute settlement system would be able to cope effectively with the challenge posed by China's accession. China had long been perceived as a country that defies international standards, one that cherishes its hard-won sovereignty so much that it generally shuns the jurisdiction of international tribunals, even though some of its nationals have served, or are serving, as judges in these tribunals.³⁶⁴ However, after China's WTO accession, China began to adjust itself to the international trade tribunal from the first challenged dispute to the first challenging dispute, and from dispute settlement in the form of MOU after consultation to a more frequent appearance before the Appellate Body. All these gradual changes have revealed China's changing attitude towards international adjudicating bodies, however, China has been a rather passive participant in this process compared to its major trading partners. It also seems that, judging by its argumentation, China had not fully grasped the litigation skills required, possibly because of the *de jure* discrimination created by Chinese measures which left China no leeway to put forward better arguments. The result has been positive, however, in that China has revised or repealed its inconsistent national treatment measures after every dispute, and is now maturing into a more active player in the WTO DSM; one which has at least not deviated fundamentally from the expectations of other members' since its WTO accession. Although China has occasionally failed to fully implement WTO rulings,³⁶⁵ China's implementation with regard to the

³⁶⁴ Gao, 'China's Participation in the WTO', at 71.

³⁶⁵ Prior to *China—Publications and Audiovisual Products*, China had an almost perfect record of complying with adverse WTO decisions. As *China—Publications and Audiovisual Products* is related to China's trading right and cultural sector, China has been tightening its grip on the media, the Internet and the censorship machine regarding foreign cultural products, China failed to fully implement the WTO ruling. See Julia Ya Qin, 'Pushing the Limits of Global

national treatment principle has been according to the promulgated laws and regulations.

China has also transformed its initially passive attitude in disputes to protect its legitimate interests under WTO rules. As can be seen from recent disputes, China now not only defends its cases vigorously, but also acts pre-emptively by filing cases against the United States and the EU. This is a transformation which furthers its integration into the international legal order.³⁶⁶

In conclusion, after 17 disputes regarding inconsistent national treatment, China has brought some of its tax, internal charge, and export subsidy measures, IPR measures and financial service measures into line with national treatment principles. This positive result, which also marks a move towards a more liberal approach in this regard, has not, however, been a voluntary revolution. China has been forced by other members – particularly under the strict scrutiny of the United States – to modify its WTO-inconsistent measures or risk being subject to WTO adjudication proceedings and retaliatory measure from other members.

Apparently, China lacks the motivation for a painful voluntary revolution, even though this would lead to a more liberal and efficient Chinese market. But since conclusions are drawn on the basis of results rather than on the inner intentions of China, it is reasonable to conclude that since China joined the WTO, its actions have not deviated from WTO principles from a general perspective. Therefore, regardless of its inner intentions and willingness, China has made progress with regard to its national treatment compliance as a result of numerous WTO disputes, and the approaches adopted by China to the regulation of goods, services and IPR, as well as in the dispute settlement procedure, have in general had a liberalising effect.

C. China's national treatment commitment under the GATS: subject to the discriminatory requirements in the market access column

Looking at the disputes covered in section B of this chapter, we find that Article XVI (market access) and Article XVII (national treatment) of the GATS are often cited together by complainants when filing for action against China before the DSB. This is no

Governance: Trading Rights, Censorship and WTO Jurisprudence—A Commentary on the *China—Publications Case*, *Chinese Journal of International Law*, 2011, Vol. 10, No. 2, pp. 271-322, at 288.

³⁶⁶ Hsieh, 'China's Development of International Economic Law and WTO Legal Capacity Building', at 1033.

coincidence; market access and national treatment clauses are intertwined in the GATS, and it is necessary to take the corresponding market access commitments into consideration when evaluating a member's national treatment commitments under the GATS. For example, in the *China—Publications and Audiovisual Products* case, the complainant's claims focused on China's violation of its national treatment commitments, but also extended to violation of China's market access commitments.

However, the relationship between Article XVI and Article XVII of the GATS is complicated, and revealing the relationship between national treatment and market access is indispensable in evaluating China's compliance with regard to national treatment commitments under the GATS. The research of this relationship is based on the analysis of DS413 *China— Electronic Payment Services*, a significant case which touches upon a puzzle at the core of the GATS.

1. *China—Electronic Payment Services*: points at issue

On 15 September 2010, the United States requested consultations with China concerning certain restrictions and requirements maintained by China and pertaining to the electronic payment services (EPS) for payment card transactions and the suppliers of those services. China's regulatory regime placed severe restrictions on foreign suppliers of EPS. Among other things, China prohibited foreign suppliers from handling the most typical payment card transaction in China, in which a Chinese consumer is billed in and makes a payment in China's domestic currency, known as the RMB. China had created a national monopoly, allowing only one domestic entity, China UnionPay Co. Ltd (CUP),³⁶⁷ to provide these services.

During the Panel proceeding, two points were identified as being at issue in this dispute.

a. The classification of services and the interpretation of a member's Schedule of Specific Commitment

The most significant points at issue in this dispute were the classification of services at

³⁶⁷ Almost immediately after China's WTO accession, CUP was created by the State Council and the People's Bank of China (PBOC) as a jointly owned venture between some 80 Chinese banks, with each member's holding of shares in the entity a function of the size of the respective bank. See Bernard M. Hoekman and Niall Meagher, *China— Electronic Payment Services: Discrimination, Economic Development and the GATS*, Robert Schuman Centre for Advanced Studies Global Governance Programme-66, EUI Working Paper RSCAS 2013/68, September 2013, at 2.

issue and the interpretation of a member's SSC.

As a member's market access and national treatment obligation under the GATS fall into Part III Specific Commitments, whether a member has made commitments in this regard depends on the specific inscription in the relevant subsector of its SSC. Accordingly, the classification of services at issue is a determinant factor in the process of solving a GATS dispute. In practice, interpretation of that subsector is always necessary, as the member's inscription in that column is likely to be ambiguous.

In this case, the United States claimed that the measures at issue – EPS as integrated services – should be classified under SSC Sector 7.B subsector (d),³⁶⁸ in which China's inscription in both mode 1 and mode 3 were more likely to support the United States' claims.

China argued that since EPS, lacking the nature of integrated services, are composed of several independent services such as clearing and settlement services, the services at issue were classifiable under subsector (xiv) of the GATS Annex on Financial Services,³⁶⁹ a subsector for which China had undertaken no commitments.

Moreover, once the Panel had decided that the measures at issue fell under subsector (d) in Sector 7.B of the Schedule, the interpretation of China's SSC became the next challenge.

In this case, the Panel considered that China had not made a market access commitment in subsector (d) in mode 1 with the 'Unbound' inscription, but that it had made a market access commitment in this subsector in mode 3, with certain qualifications and requirements. As for the national treatment obligation in subsector (d), the Panel pointed out that China had made a full national treatment commitment in mode 1 with the 'None' inscription, and a limited national treatment commitment in mode 3, with certain qualifications and requirements.

The above paragraphs describe the most significant issues at stake in this case, issues which raised tremendous concerns in this dispute, however, this dissertation will only focus on the relationship between market access and national treatment under the GATS.

³⁶⁸ The description of sector 7.B subsector (d): "All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts (including import and export settlement)."

³⁶⁹ The description of subsector (xiv) of the GATS Annex on Financial Service: "Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments".

b. The relationship between Article XVI and Article XVII of the GATS

The relationship between Article XVI and Article XVII is not clearly set out in the GATS. In an attempt to clarify the blurred demarcation, Article XX of the GATS offers a possible solution, which is also analysed in this case.

There are divergences between China and the United States in this case regarding the interpretation of this blurred demarcation. On the one hand, China considered that Article XVI governed 'all aspects' of the measures described in Article XVI:2(a)-(f), including any respect in which such a measure is potentially discriminatory. They argued that measures described in Article XVI:2 could not simultaneously be subject to Article XVII, which meant that Articles XVI and XVII are 'mutually exclusive' in their respective spheres of application.³⁷⁰

The United States, on the other hand, argued that Article XVI:2 did not extend to discriminatory restrictions. As for Article XX:2, the United States argued that it is this was simply a scheduling rule which did not make Articles XVI and XVII 'mutually exclusive' in their respective spheres of application.³⁷¹

The Panel therefore analysed whether Article XVI and Article XVII were mutually exclusive in their respective spheres of application, and the function of Article XX in solving the overlap. China's specific commitments as regards the 'Unbound' and 'None' inscriptions made this case even more complicated. The following sections will focus on this topic.

2. Summary of key findings concerning the violation of Article XVI and XVII of the GATS in China— *Electronic Payment Services*

First, in respect of the claims of the United States under Article XVI of the GATS, the Panel found that:

- the issuer, terminal equipment, acquirer and Hong Kong/Macao requirements³⁷² are not inconsistent with Article XVI of the GATS, as China

³⁷⁰ *China—Electronic Payment Services*, Panel Report, para. 7. 646.

³⁷¹ *Ibid*, para. 7647.

³⁷² There are five requirements challenged by the United States were identified by the Panel:

- requirements that mandated the use of CUP and/or established CUP as the sole supplier of electronic payment services for all domestic transactions denominated and paid in China's domestic currency, RMB (sole supplier requirements)

has not undertaken a market access commitment under Sector 7.B(d)³⁷³ in mode 1³⁷⁴;

- the United States failed to establish that the issuer, terminal equipment and acquirer requirements are inconsistent with Article XVI:2(a) of the GATS, in respect of China's Sector 7.B(d) mode 3 market access commitment, as these requirements do not impose a limitation that falls within the scope of Article XVI:2(a);
- the Hong Kong/Macao requirements are inconsistent with Article XVI:2(a) of the GATS because, contrary to China's Sector 7.B(d) mode 3 market access commitments, they maintain a limitation on the number of service suppliers in the form of a monopoly;
- the United States failed to present a *prima facie* case that the issuer, terminal equipment or acquirer requirements, considered either individually or jointly, are inconsistent with Article XVI:1 of the GATS in respect of China's Sector 7.B(d) mode 3 market access commitment³⁷⁵

Second, in respect of the United States' claims under Article XVII of the GATS, the Panel found that:

- the issuer, terminal equipment and acquirer requirements are inconsistent with Article XVII:1 of the GATS, because contrary to China's Sector 7.B(d) mode 1 and mode 3 national treatment commitments, these requirements fail to accord to services and service suppliers of any other member treatment no less favourable than China accords to its own like services and service suppliers
- the Hong Kong/Macao requirements are not inconsistent with Article XVII:1 of the GATS, as China has no Sector 7.B(d) mode 1 national treatment obligation in respect of these requirements³⁷⁶

In sum, as regards the market access obligation, none of the four measures were inconsistent with Article XVI under Sector 7.B subsector (d), in mode 1; 3 of 4 measures were not found to be inconsistent with Article XVI of the GATS under Sector 7.B subsector (d) and in mode 3 with the Hong Kong/Macau requirement as an exception. As for the national treatment obligation, 3 out of the 4 measures were found to be inconsistent with Article XVII under Sector 7.B subsector (d) mode 1 and mode 3, with the Hong Kong/Macau requirement is an exception.

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- requirements that payment cards issued in China bear the CUP logo (issuer requirements)
 - requirements that all automated teller machines, merchant card processing equipment, and point-of-sale terminals in China accept CUP cards (terminal equipment requirements)
 - requirements on acquiring institutions to post the CUP logo and be capable of accepting all bank cards bearing the CUP logo (acquirer requirements)
 - requirements pertaining to card-based electronic transactions in Hong Kong and Macao (Hong Kong/Macau requirements)

³⁷³ According to the Panel's analysis, the services at issue fall into Sector 7 Financial Services, sub-sector B Banking and Other Financial Services (d) in China's SSC

³⁷⁴ There are four modes of supply of services as defined in Article I of the GATS, and in China's SSC, there are cross-border supply (mode 1), consumption abroad (mode 2), commercial presence (mode 3) and presence of natural persons (mode 4). Only mode 1 and mode 3 are relevant to this case.

³⁷⁵ See *China—Electronic Payment Services*, Panel Report, para. 8.1.

³⁷⁶ *Ibid.*

In the view of the Panel, therefore, the majority of the measures at issue were not found to be inconsistent with China's market access obligations in this regard, but did breach China's national treatment obligations.

3. The relationship between market access and national treatment under the GATS in general

Before analysing the market access and national treatment issue in this particular dispute, it is necessary to consider the relationship between market access and national treatment under the GATS in general; not least because it is one of the origins of continuing debate with regard to the opacity and ambiguity of the GATS.

a. The overlapping scope of the market access and national treatment obligations under the GATS

As regards the overlap issue; in this case the Panel came to the conclusion that the scope of Article XVI and Article XVII were not mutually exclusive,³⁷⁷ a view also supported by many scholars and by GATS jurisprudence. In any case, the overlap between Article XVI and Article XVII is suggested by Article XX:2 and the Scheduling Guidelines.³⁷⁸ However, to understand the overlap issue, it is first necessary to brief the scope of application of Article XVI and Article XVII separately.

i. The scope and nature of Article XVI

Article XVI of the GATS, entitled Market Access, is included in Part III Specific Commitments of the GATS. One characteristic of the obligations in Part III is that they apply only to the specific service sectors included by a member in its GATS SSC. A member may have inscribed limitations with regard to a listed service sector for measures that are inconsistent with the market access obligations.³⁷⁹

As a general principle, Article XVI:1, obliges a member to accord market access treatment

³⁷⁷ *Ibid*, para. 7.658.

³⁷⁸ Guidelines For The Scheduling on Specific Commitments under The General Agreements on Trade in Services, adopted by the Council for Trade in Services on March 2001, S/L/92, 28 March 2001, available at: https://www.wto.org/english/tratop_e/serv_e/sl92.doc. [10.07.2017]

³⁷⁹ Eric H. Leroux, 'Eleven Years of GATS Case Law: What Have We Learner?', *Journal of International Economic Law*, Vol. 10, No. 4, pp. 749-793, at 767.

based on its SSC. Specifically, Article XVI:2³⁸⁰ list a number of limitation measures on market access which a member should not take unless otherwise specified in its SSC.

A prerequisite issue with respect to the scope of Article XVI is whether or not it prohibits only those six types of limitation described in Article XVI:2. One question that has often been raised in this regard is whether Article XVI:1 has any residual application beyond the specific types of measure prohibited under the second paragraph of that Article.³⁸¹

In *US—Gambling*, the Panel's clear response was that the scope of Article XVI is defined exhaustively in its second paragraph³⁸² and that this is in accordance with the Scheduling Guidelines. Accordingly, market access obligation under the GATS is subject to six limitations, and the scope of application of Article XVI is limited to the six categories of measures defined in paragraph 2.

Moreover, according to GATS jurisprudence on this subject, the six carefully defined categories of measures in Article XVI:2 are of a mainly quantitative nature. As the Appellate Body in *US—Gambling* concluded, the thrust of Article XVI:2(a) is not on the 'form' of a measure, but on its 'numerical, or quantitative nature'.³⁸³ However, measures prescribed as limitations on forms of legal entity under sub-paragraph (e), and on foreign equity participation under sub-paragraph (f), are only applicable to foreign service suppliers, which is of a discriminatory nature. Therefore, the limitations prohibited under Article XVI can either be discriminatory or non-discriminatory.

To conclude, Article XVI:2 focuses on only six measures for restricting market access, and turns a blind eye to other restrictive measures. Therefore, Article XVI bears the sole

³⁸⁰ Article XVI:2 of GATS:

"In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

- (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test; ^[17]_[SEP]
- (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test; ^[17]_[SEP]
- (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
- (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test; ^[17]_[SEP]
- (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and ^[17]_[SEP]
- (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment."

³⁸¹ Leroux, 'Eleven Years of GATS Case Law', at 769.

³⁸² *US—Gambling*, Panel Report, para. 6.318.

³⁸³ *US—Gambling*, Appellate Body Report, para. 230.

regulatory focus for measures imposed on or in connection with quantitative import prohibitions or restrictions,³⁸⁴ regardless of their discriminatory or non-discriminatory nature. It is unambiguous when interpreted separately, however, the problem becomes more complicated when a measure falls into the scope of both Article XVI and Article XVII.

ii. The scope and nature of Article XVII of the GATS

While the market access obligation is meant to cover measures that restrict trade and competition through the application of quantitative limitations, the national treatment obligation prohibits *de jure* and *de facto* discrimination against the services and service suppliers of another member.³⁸⁵ Article XVII of the GATS, entitled 'National Treatment', explicitly incorporates the *de facto* doctrine developed in the context of the GATT, and it may not be enough for the measures of a member to accord the same regulatory treatment. What matters is whether equal competitive conditions are being provided, in other words, discrimination on a *de jure* or *de facto* basis is prohibited. This is designed to ensure that a member will not be able to do indirectly what it cannot do directly.³⁸⁶

From a structural perspective, Article XVII and Article XVI have one characteristic in common: in connection with a listed service sector, a member is permitted to have inscribed limitations for measures that are inconsistent with the national treatment and market access obligations. From a functional perspective, the national treatment and market access disciplines complement each other in ensuring real and effective access to the market of a member in a defined service sector.³⁸⁷

In general, Article XVII:1³⁸⁸ manifests the specific-commitment nature of the national treatment obligation under the GATS. Like market access obligation, national treatment is not applicable to those service sectors not covered by a member's service schedule, so a member may take discriminatory measures against the services and service suppliers of

³⁸⁴ Michelle Q. Zang, The Uncompleted Mission of China—Electronic Payment Services: Policy Equilibrium between Market Access and National Treatment under the GATS, PluriCourts Research Paper No.15-01, 2015, at 5, available at <http://ssrn.com/abstract=2560688>. [10.07.2017]

³⁸⁵ Joost Pauwelyn, 'Rien Ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS', *World Trade Review*, Vol.4, No.2, 2005, pp. 131-170, at 146.

³⁸⁶ Leroux, 'Eleven Years of GATS Case Law', at 778.

³⁸⁷ *Ibid*, at 767.

³⁸⁸ Article XVII:1 of GATS:

"1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers".

any other member in those reserved sectors without violating the national treatment rule embodied in Article XVII of the GATS.³⁸⁹

Paragraph 1 of Article XVII shows how the national treatment obligation applies to 'all measures affecting the supply of services' and may be conditioned by any kind of specified discriminatory measure.

As the Appellate Body in *EC—Bananas III* pointed out, 'the use of term 'affecting' reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word "affecting" implies a measure that has "an effect on", which indicates a broad scope of application'.³⁹⁰ This interpretation was reinforced by the Panel decision in *China—Electronic Payment Services*.

In short, the interpretations regarding the scope of 'measures' in previous GATS jurisprudence have all been in support of a conclusion that the notion of 'measures' in the context of Article XVII is a broad rather than a narrow one. Therefore, the scope of application of Article XVII could include any measures that may affect the supply of services, no matter how or when the service is supplied.³⁹¹

Moreover, as acknowledged by the WTO Committee on Specific Commitments, there are some restrictions with post-entry effect in the six exhaustive categories of market access limitation, such as subparagraph (b) and (c).³⁹² Thus, the extension of market access obligations under the GATS from pre-entry to post-entry reinforces the possibility of overlap between national treatment and market access obligations. Accordingly, a broad national treatment interpretation and an extension of market access application could increase the overlap between the applicable scope of Articles XVII and XVI.

To sum up, the overlap problem arises from the issue of whether the scope of the six categories of measures in Article XVI extends to discriminatory measures in the sense of Article XVII. According to previous analysis, the limitations prohibited under Article XVI may be either discriminatory or non-discriminatory, then the overlap of scope of application covering both post- and pre-entry stages makes the issue even more complicated. Thus, it is reasonable to draw the conclusion that there will be measures

³⁸⁹ Wei Wang, 'On the Relationship Between Market Access and National Treatment Under the GATS', *The International Lawyer*, Vol.46, No.4, Winter 2012, pp. 1045-1065, at 1047.

³⁹⁰ *EC—Bananas III*, Appellate Body Report, para. 220.

³⁹¹ Wang, 'On the Relationship Between Market Access and National Treatment Under the GATS', at 1047.

³⁹² Committee on Specific Commitments, *Note by the Secretariat: Revision of Scheduling Guidelines*, S/CSC/W/19, Mar.5 1999, para. 15.

which fall under the scope of both Articles XVI and XVII. A quantitative-limitation measure could be considered to constitute a *de facto* breach of the national treatment obligation, for example, by limiting the number of banking licenses to ten, even though most or all of them had already been accorded to national banks.³⁹³ Although there may be cases where quantitative-limitation measures would be non-discriminatory, Articles XVII and XVI can be applied to a discriminatory measure simultaneously.

Taking the specific commitments nature into account then, when a measure falls under the scope of both market access and national treatment obligations, it is necessary to check the inscription in a member's SSC under that subsector in both the 'limitation on market access' and 'limitation on national treatment' columns in order to confirm whether the member has made commitments regarding these two obligations. What confuses the issue are the four possible permutations of 'None' and 'Unbound' inscriptions in a member's SSC.

iii. 'None' and 'Unbound' inscription in a member's Schedule of Specific Commitments

A member's inscriptions in its SSC with regard to market access and national treatment play a fundamental role, so it is first necessary to show the four possible options when a member makes an inscription.

Table 3: Four possibilities regarding market access and national treatment commitments

Inscriptions	Limitation on Market Access	Limitation on National Treatment
Scenario 1	None	None
Scenario 2	None	Unbound
Scenario 3	Unbound	None
Scenario 4	Unbound	Unbound

Under Scenarios 1 and 4, things remain quite simple, with a mixed inscription of 'Unbound' and 'None', however, Scenarios 2 and 3 cause the most complicated circumstances, and this is the case in *China—Electronic Payment Services*. According to China's SSC, it made an 'Unbound' inscription in the market access column and a 'None' inscription in the national treatment column in mode 1. Which inscription should prevail

³⁹³ Leroux, 'Eleven Years of GATS Case Law', at 772.

when the measures at issue are discriminatory and inconsistent with market access obligations? The 'None' inscription indicates full national treatment obligation, while the 'Unbound' inscription means the opposite: no market access obligation. So how can it be decided whether the measures at issue are inconsistent with the member's commitments under the GATS? The drafters of the GATS were aware of the overlap between Article XVI and Article XVII, and they created Article XX in an attempt to solve the problem.

b. The interpretation of Article XX of the GATS

Although Articles XVI and XVII themselves are silent on the subject of their interrelationship, Article XX:2 clearly contemplates their overlap.

Paragraph 1 of Article XX requires that, where specific commitments are undertaken, '[...] each Schedule shall specify: (a) terms, limitation and conditions on market access; (b) conditions and qualifications on national treatment'.

However, the problem is confounded by a scheduling convention set out in Article XX:2.³⁹⁴ This provision is intended to deal with situations where discriminatory market-access limitations are scheduled, or in other words where restrictive measures fall within the scope of both Articles XVI and XVII. In such cases, Article XX:2 states that the relevant measures should be inscribed in the market access column of the SSC and would be understood to provide a condition or qualification to Article XVII as well. Thus, the market access column contains measures which are inconsistent with Article XVI only (non-discriminatory market access limitations) and with both Article XVI and XVII, but there is frequently no indication as to whether the measures concerned are non-discriminatory or discriminatory.³⁹⁵

Because of the existence of Article XX, the market access and national treatment columns

³⁹⁴ Article XX of GATS:

"1. Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:

- (a) terms, limitations and conditions on market access;
- (b) conditions and qualifications on national treatment;
- (c) undertakings relating to additional commitments;
- (d) where appropriate the time-frame for implementation of such commitments; and
- (e) the date of entry into force of such commitments.

2. Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.

3. Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof. "

³⁹⁵ Patrick Low and Aaditya Mattoo, 'Is There a Better Way? Alternative Approaches to Liberalization Under the GATS', World Bank Group, October 11, 2001, at 2, available at <http://siteresources.worldbank.org/INTRANETTRA/DE/Resources/BPgats.pdf>. [10.07.2017]

cannot be read in isolation. This language suggests that an inscribed national treatment commitment is conditional on, or limited by, the extent of the corresponding market access commitment for the same sector and mode of supply.³⁹⁶ By simply interpreting Article XX, a solution to the overlap seems clear, however, things become complicated with the specific commitments of members in each column, and in a specific context, as in *China—Electronic Payment Services*.

4. National treatment commitments are subject to market access commitments: in the context of *China—Electronic Payment Services*

Although Article XX:2 was meant to eliminate duplication and confusion, it actually creates a difficult and pressing interpretive problem under some circumstances. The ambiguity between Article XVI and XVII had been noted even before the conclusion of the GATS. During the Uruguay Round of negotiations, the Australian representative stated, when discussing trade in services, that ‘the concepts of market access and national treatment seemed to merge’ and ‘if reservations were allowed on both market access and national treatment, drawing the line between the market access conditions and national treatment conditions might be difficult’.³⁹⁷

To date, existing WTO jurisprudence concerning the GATS has not yet provided an adequate guideline to answer the basic question of whether a domestic measure should be examined under Article XVI, or Article XVII, or both when it is disputed, or how the sectoral inscriptions in the members’ SSCs affect their obligations on market access and national treatment.³⁹⁸

The Panel in *China—Electronic Payment Services* tried to give an answer to the question of the legal effect of the seemingly contradictory market access and national treatment commitments inscribed by China in its SSC.

³⁹⁶ Rachel Block, ‘Market Access and National Treatment in China-Electronic Payment Services: An Illustration of the Structural and Interpretive Problems in GATS’, *Chicago Journal of International Law*, 2014, Vol. 14, No. 2, Article 9, at 667, available at: <http://chicagounbound.uchicago.edu/cjil/vol14/iss2/9>. [10.07.2017]

³⁹⁷ Working Group on Financial Services Including Insurance, *Note on the Meeting of 11-13 June 1990*, MTN.GNS/FIN/1, July 5, 1990, para. 52, available at: [https://www.wto.org/gattdocs/English/SULPDF/9210023 6.pdf](https://www.wto.org/gattdocs/English/SULPDF/9210023%206.pdf). [10.07.2017]

³⁹⁸ Michelle Q. Zang, ‘The Uncompleted Mission of China—Electronic Payment Services: Policy Equilibrium between Market Access and National Treatment under the GATS’, PluriCourts Research Paper No.15-01, at 1, available at <http://ssrn.com/abstract=2560688>. [10.07.2017]

a. The Panel's interpretation regarding the scope of Article XVI and Article XVII

Pursuing the Panel's examination of the scope of Article XVI:2, the wording of the quantitative measures described in sub-paragraphs (a)-(d) contains nothing that would suggest that measures having discriminatory aspects are excluded for this reason. This view finds contextual support in the wording of Article XX:2, which is premised on the existence of measures 'inconsistent with both Articles XVI and XVII', and thus on the potential existence of measures with discriminatory aspects within the scope of Article XVI:2. Since nothing in the generality of the wording of Article XX:2 indicates that it applies only to measures within the scope of subparagraphs (e) and (f), which are expressly or inherently discriminatory in nature, the Panel viewed Article XX:2 as a further indication that measures within the scope of any of the sub-paragraphs of Article XVI:2 may have discriminatory aspects.³⁹⁹

This view is also supported by the Scheduling Guidelines, in which the generality of the discussion on measures inconsistent with both Articles XVI and XVII reflects the view that, overall, Article XVI:2 does extend to measures with discriminatory aspects.⁴⁰⁰

For the above reasons, the Panel found that the obligations in Article XVI:2 may extend to measures that are also within the scope of Article XVII. In *China—Electronic Payment Services*, with respect to China's inscription of 'Unbound' for market access in mode 1,⁴⁰¹ the Panel therefore suggested that China could introduce or maintain any measures falling within Article XVI:2, including those that may be discriminatory within the meaning of Article XVII.

b. The Panel's interpretation regarding the overlap of Articles XVI and XVII

The Panel noted, however, that its analysis of the scopes of Articles XVI and XVII leads to an apparent ambiguity in China's inscriptions in mode 1 for market access and national treatment. According to the Panel, China had made both a full national treatment commitment and a no market access commitment in mode 1 with regard to the services at issue. This unclear demarcation of national treatment and market access obligations,

³⁹⁹ *China—Electronic Payment Services*, Panel Report, para. 7.654.

⁴⁰⁰ Guidelines For The Scheduling on Specific Commitments under The General Agreements on Trade in Services, adopted by the Council for Trade in Services on March 2001, S/L/92, 28 March 2001, para. 18, available at: https://www.wto.org/english/tratop_e/serv_e/sl92.doc. [10.07.2017]

⁴⁰¹ See China's Schedule of Specific Commitments, GATS/SC/135, at 33.

together with China's inscription, led to the following problem.

On the one hand, China's full national treatment commitment under Article XVII extends to 'all measures affecting the supply of a service', which would appear to include measures within the scope of its unbound market access commitment. On the other hand, China's unbound market access commitment under Article XVI would appear to extend to measures that are also discriminatory and within the scope of its full national treatment commitment.⁴⁰²

A conflict then arises between the arguments of complainant and respondent: the United States argued that China's full national treatment commitment implied that measures inconsistent with both Articles XVI and XVII are subject to China's obligations under Article XVII. China, on the other hand, argued that its absence of market access commitment means that such measures are not subject to any obligations it may have under Article XVII.⁴⁰³

In resolving this divergence, the Panel considered that the main issue was not an ambiguity over the scope of Article XVI and the scope of Article XVII, but rather a lack of clarity about the scope of the inscriptions 'Unbound' and 'None', when applied in China's SSC, to measures that conflict with both market access and national treatment obligations.⁴⁰⁴

In order to solve the lack of clarity in China's SSC, the Panel observed that the special scheduling rule in Article XX:2, which was aimed at resolving the question of whether measures inconsistent with both Articles XVI and XVII are subject to Article XVI (no market access commitment) or Article XVII (full national treatment commitment).

c. The Panel's interpretation regarding Article XX

In the Panel's view, the wording of Article XX:2 indicates that it applies when a measure is (a) inconsistent with both Article XVI and Article XVII, and (b) inscribed in the market access column of a member's SSC. As long as these two requirements are met, then the inscription under market access will provide a 'limitation' to Article XVII as well. In other words, the single inscription of a measure conflicting with both Articles XVI and XVII in the market access column of a schedule provides a limitation for both discriminatory and

⁴⁰² *China—Electronic Payment Services*, Panel Report, para. 7.655.

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*, para. 7.656.

non-discriminatory aspects of the measure.⁴⁰⁵

In the Panel's view, the scope of Article XVI and Article XVII are not mutually exclusive. Therefore, a single measure can give rise to two simultaneous inconsistencies, one with respect to a market access obligation, the other with respect to a national treatment obligation. To maintain or introduce such a measure, the normal rule for inscribing commitments in Article XX:1 might suggest that a member would need to enter an explicit limitation in both the market access and national treatment columns. However, the special rule in Article XX:2 provides a simpler requirement: a member need only make a single inscription of the measure under the market access column, which then also represents an implicit limitation under national treatment.⁴⁰⁶

So, in the Panel's view, in the terms of Article XX:2, the inscription of 'Unbound' therefore provides 'a condition or qualification to Article XVII as well', thus permitting China to maintain measures that are inconsistent with both Articles XVI and XVII. With an inscription of 'Unbound' for subsector (d) in mode 1 under Article XVI, and a corresponding 'None' for Article XVII, China has indicated that it is free to maintain the full range of limitations expressed in the six categories of Article XVI:2, whether these are discriminatory or not.⁴⁰⁷

The Panel's findings therefore implied that a measure which is inconsistent with both Articles XVI and XVII, and is inscribed in the market access column of China's SSC, could not be found to be in breach of China's full national treatment commitment. The relevant measure would not be subject to China's full national treatment commitment, as it was covered by the market access limitation.⁴⁰⁸

After interpreting Article XX:2 in this case, the Panel cautiously noted that, as regards the function of Article XX:2, there was nothing in the text of Article XX:2 that would constrain the latitude of a member to inscribe the 'measures' excluded from Article XVI:2, either individually or collectively. The Panel did not narrow the range of options available to WTO members to limit their market access and national treatment commitments, instead it focused solely on how to interpret through scheduling rules – notably Article XX:2 – the

⁴⁰⁵ *Ibid*, para. 7.657.

⁴⁰⁶ *Ibid*, para. 7.658.

⁴⁰⁷ *Ibid*, para. 7.661.

⁴⁰⁸ *Ibid*, para. 7.662.

inscriptions that a WTO member has chosen to enter in its schedule.⁴⁰⁹ Article XX:2, however, only establishes a certain scheduling primacy for entries in the market access column. In other words, Article XX:2 is just a 'book-keeping' convention which would avoid the unnecessary repetition of entries, and at the same time ensure legal certainty and clarity.⁴¹⁰

On examining the Panel's reasoning, it is apparent that the Hong Kong/Macao requirements, which were a limitation on market access within the meaning of Article XVI:2, were not inconsistent with China's obligations under Article XVII:1, because the inscription 'Unbound' in the limitation on market access column of China's SSC took primacy over the notation 'None' in the national treatment column.⁴¹¹

The reason the Hong Kong/Macao requirements for mode 1 were not found to be inconsistent with China's obligations under Article XVII:1 was therefore the scheduling primacy established by Article XX:2 to solve the inherent blurred demarcation between Article XVI and Article XVII, rather than the requirement for measures of a non-discriminatory nature. In other words, if a member inscribes 'Unbound' in the market access column and 'None' in the national treatment column, when it comes to measures which fall under the scope of both Article XVI and Article XVII, the 'Unbound' market access inscription will take primacy over the 'None' inscription in the national treatment column. In these circumstances, a full commitment to national treatment would provide a guarantee of non-discrimination only for measures not falling within the scope of Article XVI.⁴¹²

5. China's implementation of the *China—Electronic Payment Services* Panel Report

As the Panel had supported most of the claims made by the United States, and considered that some measures maintained by China were inconsistent with the GATS, the United States can be seen as having prevailed on key issues with regard to the result of this dispute. However, as the Panel admitted that, as regards the services at issue, China had

⁴⁰⁹ *Ibid*, para. 7.664.

⁴¹⁰ Guojun Li, 'National treatment under the General Agreement on Trade in Services', *Cambridge Student Law Review*, Vol. 6, No. 1, 2010, pp. 74-93, at 85.

⁴¹¹ *China—Electronic Payment Services*, Panel Report, para. 7.669.

⁴¹² Mattoo, 'National Treatment in the GATS?', at 118.

not made a market access commitment in mode 1, and had made only a limited market access commitment in mode 3, the final Panel Report had little negative impact on China's EPS industry, and the fulfilment of its national treatment obligation by China was considered to be 'acceptable' despite the lack of an open market for foreign service suppliers.⁴¹³

In the meeting of the DSB on 31 August 2012, China welcomed the Panel's conclusion that, in the event of any overlap between these two disciplines, the market access obligations of a member under Article XVI:2 of the GATS prevailed over the member's national treatment obligations under Article XVII of the GATS.⁴¹⁴

As neither China nor the United States initiated an appeal procedure, China informed the DSB on 28 September 2012 of its intention to implement the recommendations and rulings of the DSB in connection with this matter.⁴¹⁵

After the adoption of the Panel Report by the DSB, the relevant Chinese government agencies began to work actively on the implementation of the recommendations and rulings of the DSB. On 28 June 2013, five of the measures at issue in this dispute were repealed or invalidated by the PBOC.⁴¹⁶ On 5 July 2013, the PBOC issued a notice on simplifying cross-border RMB business processes and improving the relevant policies.⁴¹⁷ According to the Notice, the relevant articles relating to three of the measures at issue in this dispute were announced to no longer be in force.

Although this dispute concerned a number of Chinese administrative measures on financial services, and was characterised by more complexity and sensitivity than other disputes, China made great efforts, and fully implemented the recommendations and rulings of the DSB within a reasonable period of time.⁴¹⁸

From the United States' perspective, however, these efforts were obviously not enough to challenge the virtual monopoly of the CUP, even though the monopoly position of the CUP had not been supported by the Panel. Since its establishment in 2002, the CUP has enjoyed a virtual monopoly as the sole bank-card organisation in China, indeed, to date it

⁴¹³ Bureau of Foreign Trade in Taiwan, A Brief Analysis of The Latest Development of WTO DS413 *China—Electronic Payment Services*, 2012/09/14, available at <http://www.trade.gov.tw/>. [10.07.2017]

⁴¹⁴ Minutes of Meeting of Dispute Settlement Body on 31 August 2012, WT/DSB/M/321, 7 November 2012, at 18.

⁴¹⁵ *China—Electronic Payment Services*, Status Report by China, Addendum, WT/DS413/9Add.1.

⁴¹⁶ See Announcement No.7 [2013] of the PBOC.

⁴¹⁷ See *Notice of the PBOC on Simplifying the Process of Cross-border RMB Services and Improving Relevant Policies*, PBOC 2013 No. 168, issued on 5 July, 2013.

⁴¹⁸ *China—Electronic Payment Services*, Status Report by China, Addendum, WT/DS413/9Add.1.

is still the only entity allowed to provide clearing services for RMB-denominated bank card payments.⁴¹⁹ Therefore, even though the United States had enjoyed a victory before the WTO regarding China's policies on electronic payment providers and their discrimination against foreign card companies, the Chinese market did not become open to foreign EPS after the case, as China had not made a market access commitment in the relevant subsector. In order to earn more profits from the Chinese market, the United States continued to negotiate with China in the WTO in an attempt to push China to open up its EPS and financial markets. With the effort of the United States and in the wake of the ruling of DS413, the WTO asked China to open its bank-card clearing market to give direct access to other companies (foreign or domestic) by August 2015.⁴²⁰

According to a new decision published by the State Council of China, effective June 1, 2015, foreign companies such as Visa and MasterCard, as well as other domestic companies, were able to obtain bank card clearing licenses. Qualified bank-card clearing institutions could then compete in China's new bank-card clearing market under the regulation of the PBOC and the China Banking Regulatory Commission. Therefore, the long-term monopoly in China's bank-card clearing market held by CUP was set to end. This was not only a positive result for the United States and other foreign EPS, but also an important signal to the Chinese financial system that the reform and opening up of China's financial and capital market was unavoidable. But as of April 2017, China had still not issued these regulations in their final form, and the United States suppliers therefore remained blocked from entering the market. Accordingly, the United States continues to actively press China and is considering additional further steps to ensure that China complies fully with the WTO's rulings.⁴²¹

6. Conclusion regarding China's compliance with national treatment commitment under the GATS

In sum, *China—Electronic Payment Services* is a significant dispute touching upon the openness of China's financial market. According to the Panel Report, the majority of measures at issue were not inconsistent with China's market access obligation in this

⁴¹⁹ Hogan Lovells, 'China opens up the domestic bankcard clearing market to foreign competition: a significant opportunity beckons for foreign investors', May 12 2015, available at: <http://www.lexology.com/library/detail.aspx?g=8b65cd9e-4916-4323-b880-b3fa7868d520>. [10.07.2017]

⁴²⁰ *Ibid.*

⁴²¹ USTR, *2015 Report to Congress on China's WTO Compliance*, at 36.

regard, but did breach China's national treatment obligations. The Hong Kong/Macao requirements were the only measure which was not inconsistent with China's obligations under Article XVII in mode 1, a finding based on the scheduling primacy established by GATS Article XX:2 to solve the inherent blurred demarcation between Article XVI and Article XVII rather than its non-discriminatory nature.

Therefore, according to this dispute, the market access clause prevails over the national treatment clause when certain requirements are met. Thus, as the inscription in the market access column provides a condition or qualification to Article XVII, as long as the market is not fully open to foreign service suppliers, there can be no serious competition from foreign service suppliers despite a full national treatment commitment. This result helps to explain, to some extent, why China abandoned the appeal procedure: although some requirements were found to be inconsistent with national treatment obligations, the Chinese market is still not fully open to foreign EPS suppliers.

This means that to evaluate China's compliance concerning national treatment commitment under the GATS, it is necessary to take the corresponding Chinese market access commitment into consideration.

With regard to the 'limitation on market access' and 'limitation on national treatment' In China's SSC, China has more frequently inscribed 'None' in the 'limitation on national treatment' column, while inscribing more requirements in the 'limitation on market access' column. For instance, in the property services sector, China inscribed 'None' in the 'limitation on national treatment' column, which amounts to a declaration that China will undertake full national treatment commitments in this regard. However, in the 'limitation on market access' column, China inscribed '*None except for the following: Wholly foreign-owned enterprises are not permitted for high standard real estate projects, such as apartments and office buildings, but excluding luxury hotels*'. Therefore, according to the relationship between market access and national treatment, even though China has made a full national treatment commitment in the property services sector, a discriminatory Chinese measure which prohibits wholly foreign-owned enterprises from 'high standard real estate projects' does not violate China's commitment under the GATS, as market access inscriptions prevail.

Therefore, although China has made numerous full national treatment commitments in its SSC, the requirement inscribed in the market access column make it impossible to evaluate

China's national treatment compliance solely based on its national treatment commitments.

China is not the only member which takes advantage of this relationship between national treatment and market access and inscribes limitations in the market access column; the United States and other members also fully utilise this scheduling primacy. However, compared to the United States, China is less open with regard to market access. As it enjoys discretion regarding its commitments in the market access column, restricting its market for foreign services and foreign service suppliers is nevertheless consistent with the GATS.

In conclusion, for discriminatory measures which fall within the scope of both Article XVI and Article XVII of the GATS, the less favourable treatment accorded to foreign service and foreign service suppliers is not inconsistent with a member's full national treatment commitment as long as the relevant discriminatory requirements have been inscribed in the market access column. Therefore, the conclusion of this section also reveals the relative unimportance of the national treatment provision in the GATS, as previously mentioned. As a less liberalised system, the trade in services is subject to the discretion of each member and the commitments listed in their SSC, and China's rather stringent regulations regarding foreign services is not inconsistent with WTO rules. Therefore, any movement by China towards a more open service market should be welcomed.

To sum up, Sections I and II of this chapter analyse China and the WTO from the perspective of the national treatment principle, and include a textual analysis of China's national treatment commitments, as well as case analysis regarding all China's disputes as a respondent where the national treatment clause was cited. These two sections therefore provide a clear picture of China's national treatment compliance from both a textual and a practical perspective.

China's relationship with the WTO is clearly a wide topic which encompasses numerous issues, and it is impossible to cover all of them in a single piece of research, not least because researchers may draw different or even contradictory conclusions from different perspectives. Even when the topic is narrowed down to the compliance of China with WTO rules, it is irrational to draw any conclusion from the fact that China has complied with 10 of its commitments while failing to comply with four, even though this simple mathematical result shows China to be more consistent than inconsistent. As it is hard to quantify the practical influence of every consistent or inconsistent measure, the

quantitative expression that 10 consistent as opposed to four inconsistent measures can not necessarily be said to have delivered a consistently positive result overall. A clearer and more rational approach is therefore to limit the research to a given principle, and then to enumerate all the efforts which China has made in this regard in order to judge whether or not China is moving forward in terms of this principle. The national treatment principle has been chosen to judge China's efforts for the purposes of this dissertation.

Although the WTO is the most important instrument in the international trade regime, it is not the only one. Section III will discuss China's strategy regarding national treatment clause in the numerous FTAs it has signed with its trading partners.

III. China's FTA strategy regarding the national treatment clauses

According to Section II above, China has actively attempted to embrace the multilateral trading system in the last two decades. However, this fact does not change China's preference for bilateralism. Moreover, multilateral treaties and bilateral treaties are both necessary components of the international law infrastructure, even though they promote different goals.⁴²² Therefore, after evaluating China's national treatment commitments and compliance in the WTO, the most significant multilateral treaty body, this section will turn attention to China's approach to the national treatment principle in FTAs, in order to cover as much as possible of the trade regime.

A. China's FTA strategy in general

Following China's WTO accession, although the multilateral setting helped China to establish a reputation as a regional power with global ambitions, much of China's diplomatic energy was focused on bilateral relations. A profusion of BITs with China appeared during the 1990s and 2000s, confirming China's preference for bilateral negotiations. A more recent manifestation of this preference can be seen in the recent spate of FTAs.⁴²³

⁴²² Jun Zhao and Timothy Webster, 'Taking Stock: China's First Decade of Free Trade', *University of Pennsylvania Journal of International Law*, 2011, Vol. 33, No. 1, pp. 65-119, at 83.

⁴²³ *Ibid*, at 68.

A definition of FTAs is necessary before briefing China's FTA strategy. An FTA is a negotiated agreement between two or more countries or economic entities under which they agree to lower tariffs and reduce non-tariff barriers on goods imported from the other member(s). FTAs constitute a major departure from the MFN obligation of WTO members, which requires that all members apply the same tariffs to the products of all other countries.⁴²⁴ Because they lower tariffs, FTAs contribute to trade liberalisation. However, some oppose FTAs because they undermine the development of the multilateral trading system, and strongly advocate that national governments should not pursue FTAs at the expense of multilateral negotiations.⁴²⁵ FTAs are flourishing, nonetheless, and are increasingly preferred as a result of the provision in the WTO: according to Article XXIV⁴²⁶ of the GATT, WTO members can justifiably treat products originating in some WTO member countries (those with whom they have formed a preferential trade agreement) better than like products originating in the remaining WTO members.⁴²⁷

Because FTAs give countries more room to customise their arrangements to the specific needs and circumstances of particular relationships,⁴²⁸ this bilateral approach has been adopted by many major trading powers, including the United States and the EU, as well as China.

As of June 2017, China entered into 14 FTAs (11 FTAs have actually been signed with other countries) with countries as geographically and developmentally diverse as Australia, Chile, Costa Rica, South Korea, Iceland, New Zealand, Pakistan, Peru, Singapore and Switzerland, as well as with regional bodies such as the Association of Southeast Asian Nations (ASEAN).⁴²⁹ There are also a further 8 FTAs currently under negotiation between China and its trading partners: China-Gulf Cooperation Council FTA, China-Norway FTA,

⁴²⁴ John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (MIT Press, 1997, second edition), at 160-162.

⁴²⁵ Zhao and Webster, 'Taking Stock', at 76.

⁴²⁶ Article XXIV of the GATT:

"1. *The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party; Provided that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application by a single contracting party.*"

⁴²⁷ Matsushita, Schoenbaum and Mavroidis, *The World Trade Organization*, at 507.

⁴²⁸ Gabriella Blum, 'Bilateralism, multilateralism, and the Architecture of International Law', *Harvard International Law Journal*, Vol. 49, No.2, 2008, pp. 323-329, at 339.

⁴²⁹ Apart from FTAs with these 11 countries, China signed the Closer Economic Partnership Arrangement with Hong Kong and Macau, and the Economic Cooperation Framework Agreement with Taiwan. Official website of MOFCOM, China FTA Network, available at: <http://fta.mofcom.gov.cn/english/>. [10.07.2017]

China-Japan-South Korea FTA, China-Sri Lanka FTA, China-Maldives FTA, China-Georgia FTA, Regional Comprehensive Economic Partnership (RCEP)⁴³⁰ and China-ASEAN FTA Upgrade Negotiations.⁴³¹

Historically, however, despite its preference for bilateralism, China did not display much interest in pursuing FTAs with its trade partners.⁴³² When China first opened up to the outside world in 1978, its leadership definitely did not have any FTA strategy in mind. Indeed, even at a global level, FTAs were largely an emerging phenomenon.⁴³³ Therefore, at least during the first decade of China's reform, China was simply not aware of the possibility of entering into FTAs. At the time – in the 1990s – the top priority for China was resuming its contracting-party status in the GATT. With most of its resources devoted to the most complicated accession process in the history of the GATT and WTO, China did not have the luxury of engaging in FTA talks.⁴³⁴ Since the WTO accession, however, China has become more active at the bilateral and regional levels. Starting with the ASEAN-China FTA,⁴³⁵ China set off resolutely down the road towards FTAs, and went on a sort of FTA shopping spree.⁴³⁶ To conclude; although initially reluctant to engage in FTA negotiations, China has gradually become an active player in the global rush to FTAs.

As to China's FTA approach; traditionally, China would start with an agreement on the trade in goods alone, and would only expand to trade in services and investment after the commitments on goods had been substantially implemented. Taking the FTA with Pakistan as an example: although the liberalisation of trade in goods dates back to the signing of the Agreement on the Early Harvest Program of April 2005, the Agreement on Trade in Services was only signed in February 2009. Similarly, in the FTA with ASEAN, the agreement on trade in goods was signed in November 2004, while the agreement on services was only signed in January 2007. However, a reverse example is the FTA negotiation with Australia, which languished for years partly due to the fact that Australia insisted on dealing with the liberalisation of services first, while China wished to proceed

⁴³⁰ The RCEP is a regional trade agreement plan put forward and driven by ASEAN in 2011, with its members including 10 ASEAN countries and China, Japan, Republic Of Korea, Australia, New Zealand and India which have signed Free Trade Agreement with ASEAN.

⁴³¹ Official website of MOFCOM, China FTA Network, available at: <http://fta.mofcom.gov.cn/english/>. [10.07.2017]

⁴³² Henry Gao, 'The RTA Strategy of China: A Critical Visit' in Asia-Pacific Economic Cooperation, *APEC Report on Capacity Building for The New International Architecture in Trade and Investment*, March 2007, at 5.

⁴³³ Gao, 'The RTA Strategy of China', at 1.

⁴³⁴ *Ibid.*

⁴³⁵ As the two Closer Economic Partnership Arrangements with Hong Kong and Macau are not international agreements between countries, China used the term Arrangement instead of Agreement. These two Arrangements will therefore not be included when speaking of FTAs between countries.

⁴³⁶ Gao, 'China's Participation in the WTO', at 71.

with the usual order of goods and then services.⁴³⁷ Actually, the most recent FTA negotiations conducted by China seem to be more inclined to adopt the one-package negotiation, in which negotiations concerning trade in goods, services and investment, as well as IPR, are all conducted together.

As regards issues which are not traditionally trade-related, such as environmental protection, competition policy, and labour standards, China has been reluctant to include these as part of the FTA package, although it has more recently shown some willingness to do so. Nonetheless, in line with its cautious approach, China has largely chosen not to include these issues in the main agreement of its FTAs, but has preferred to address them in stand-alone side agreements or MOUs.⁴³⁸ Some exceptions to this are the recent FTAs signed by China, such as the China-South Korea FTA and the China-Australia FTA. In both of these, a comprehensive FTA was signed which covered a wide range of goods, services, investments and IPR, as well as the movement of natural persons.

Accordingly, although it is more likely to adopt a narrower approach concerning the conclusion of FTAs, China does not use a standardised textual model of FTA. Because its partners have been at varying levels of economic development and in various domestic situations, China has tended to design its FTAs on an individually-tailored basis in order to address the varied demands of the participating countries.⁴³⁹ For China, these differential arrangement in each FTA negotiation, though complicated, have not only accelerated negotiations, but have been fairer and more responsive to the economic and trade situations of the different parties.⁴⁴⁰

Moreover, China's individually tailored FTAs contain special and flexible arrangements, including some which can be considered exceptional. For instance, in the early stages of the China-ASEAN FTA, the Philippines refused to participate in the Early Harvest Program⁴⁴¹ because it was worried that this programme was disadvantageous to the

⁴³⁷ Henry Gao, 'China's Strategy for Free Trade Agreements: Political Battle in the Name of Trade', in *East Asian Economic Integration: Law, Trade and Finance*, edited by Ross P. Buckley, Richard Weixing Hu and Douglas W. Arner (Edward Elgar Publishing: 2011), pp. 104-120, at 111.

⁴³⁸ *Ibid.*

⁴³⁹ Guiguo Wang, 'China's FTAs: Legal Characteristics and Implications', *The American Journal of International Law*, Vol. 105, No. 477, 2011, pp. 493-516, at 498.

⁴⁴⁰ *Ibid.*, at 499.

⁴⁴¹ The Early Harvest Program was endorsed by the ASEAN and Chinese commerce ministers during meetings in September 2002 and was incorporated into the Framework Agreement on Comprehensive Economic Cooperation Between the Association of South East Asian Nations and the PRC two months later. Given that it is basically a framework for tariff reduction (which is a necessary part of any FTA), the Early Harvest Program is an integral part of the China-ASEAN FTA.

domestic agricultural sector in the Philippines, and that the 'overall threat to general agriculture outweighs whatever potential gain there might be from participating in such a mechanism'.⁴⁴² Such opposition, unless resolved in a timely manner, could potentially have compromised the general goals of the overarching FTA (of which the Early Harvest Program was just a part) and would be also have been unfair to the other participants in the programme. Nonetheless, in consideration of its long-term goals, China accepted the Philippines as an exception, and agreed that both countries would eliminate the tariffs on all farm products except vegetables on 27 April 2005.⁴⁴³ China has made similar special arrangements in its other FTAs, reflecting the country's tolerance of a high degree of flexibility in the making of FTAs.⁴⁴⁴

In sum, China adopts a step-by-step and flexible approach to FTA negotiations and has no standardised textual model. With regard to the coverage of China's FTAs, in general, the earlier ones usually dealt only with the trade in goods, and focused on such traditional trade issues as the reduction of tariffs, elimination of barriers, remedies, and other trade-facilitation measures. The more recent FTAs have gradually also encompassed the trade in services and investments. Some of China's latest FTAs have tried to move beyond traditional items to step into new areas such as transparency, dispute settlement, environmental protection, the movement of natural persons, and IPR protections. Therefore, China's evolving FTA coverage manifests the more liberal and broad approach adopted by China during FTA negotiations. In total, each of the 11 FTAs concluded by China with other countries amount to more than a dozen agreements, and analysing each one (as well as their numerous annexes and follow-up agreements) would be impractical. In any case, for the purposes of this dissertation, only the national treatment clauses in China's 11 FTAs will be analysed in the section which follows.

B. China's FTA strategy regarding the national treatment clauses

After a brief of China's FTA strategy in general, this section will focus on the national

⁴⁴² See Erlinda M. Medalla and Jenny D. Balboa, 'The Impact of ASEAN-China FTA Early Harvest Program: The Case of the Philippines with Focus on Short-Run Effects on the Agriculture Sector', Research Paper Series No. 2007-01, Philippine Institute for Development Studies, 2007, available at <http://dirp3.pids.gov.ph/ris/rps/pidsrp0701.pdf>. [10.07.2017]

⁴⁴³ Under the China-Philippines Early Harvest Program, which took effect on January 1, 2006, 214 tariff lines were granted zero tariffs. *Ibid*, at 10.

⁴⁴⁴ Wang, 'China's FTAs', at 499.

treatment clauses in China's 11 FTAs.⁴⁴⁵

The incorporation of a national treatment clause in an FTA involves a consensus of opinion between the contracting countries, as well as compliance with WTO rules. For this reason, the national treatment clause has been incorporated into all of the 11 FTAs concluded by China with other countries. However, the content and coverage of the national treatment clauses in these FTAs do vary. The national treatment clause in China's 11 FTAs with other countries will be categorised into two categories, according to the content they cover.

1. National treatment clauses covering goods, services and investment sectors

a. The China-ASEAN FTA

As described in the previous section, the Agreement on Trade in Goods of the China-ASEAN FTA was signed in November 2004, and entered into force in July 2005. In January 2007, the Agreement on Trade in Services was signed between China and ASEAN members, and this entered into effect in July of the same year. In August 2009, the two parties signed the Agreement on Investment.⁴⁴⁶

The FTAs signed between China and ASEAN were therefore a set of agreements which covered goods, services and investments respectively; the national treatment clause was included in each of these separate agreements.

In the Agreement on Trade in Goods of the China-ASEAN FTA, the national treatment principle is included in Article 2 National Treatment on Internal Taxation and Regulation. According to Article 2 of the Agreement on Trade in Goods of the China-ASEAN FTA:

Each Party shall accord national treatment to the products of all the other Parties covered by this Agreement and the Framework Agreement in accordance with Article III of the GATT 1994. To this end, the provisions of Article III of the GATT 1994 shall, *mutatis mutandis*, be incorporated into and form an integral part of this Agreement.

Incorporating Article III of the GATT (without mention of the interpretative notes) into the national treatment clause of an FTA is a method commonly adopted by countries when

⁴⁴⁵ Although China has signed 14 FTAs, three of them were signed with Hong Kong, Macau and Taiwan. Because of the complex political relationship between those regions and China, this dissertation will not regard them as foreign, and the analysis regarding China's national treatment provisions in FTAs will therefore not include the three FTAs signed with Hong Kong, Macau and Taiwan.

⁴⁴⁶ The official website of MOFCOM, China FTA network, available at: <http://fta.mofcom.gov.cn/topic/chinaasean.shtml>. [10.07.2017]

negotiating FTAs. As the national treatment clause in the GATT is well developed and widely acknowledged, it is both efficient and WTO-consistent to follow this pattern, and China also adopts this common practice.

In the Agreement on Trade in Services of the China-ASEAN FTA, the national treatment principle is included in Article 19 National Treatment in Part III Specific Commitments, according to Article 19:

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Party shall accord to services and service suppliers of any other Party, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.
2. A Party may meet the requirement of paragraph 1 of this Article by according to services and service suppliers of any other Party, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Party compared to like services or service suppliers of any other Party.

This national treatment clause is apparently exactly the same, in structure and text, as Article XVII of the GATS, (for the same reason as described for the trade agreement above).

In the Agreement on Investment of the China-ASEAN FTA, the national treatment principle is included in Article 4 National Treatment, according to Article 4:

Each Party shall, in its territory, accord to investors of another Party and their investments treatment no less favourable than it accords, in like circumstances, to its own investors and their investments with respect to management, conduct, operation, maintenance, use, sale, liquidation, or other forms of disposal of such investments.

Apart from the omission of national treatment of the investment of another party, this national treatment clause is very similar to that of China's new generation of BITs, which will be discussed in Chapter 3.

In a nutshell, the national treatment clauses in the China-ASEAN FTA are not innovative, as they closely follow the patterns adopted in the WTO and BITs.

b. The China-Pakistan FTA

The China-Pakistan FTA was concluded in 2006 and entered into effect in July 2007, It was followed by the Agreement on Trade in Services, signed between China and Pakistan in 2009 as a supplement to the agreement on trade in goods.

In the China-Pakistan FTA, national treatment for trade in goods is included in Article 7 National Treatment:

Each Party shall accord national treatment to the goods of the other Party in accordance with Article III of the GATT 1994, including its interpretative notes, and to this end Article III of GATT 1994, and its interpretative notes, are incorporated into and made part of this Agreement, *mutatis mutandis*.

Here we see a slight difference to the national treatment in the Agreement on Trade in Goods of the China-ASEAN FTA. The national treatment clause concerning trade in goods in the China-Pakistan FTA has been widely adopted and copied by subsequent Chinese FTAs, and this clause is hereinafter referred to as the China-Pakistan model.

The China-Pakistan FTA also includes an investment chapter (Chapter IX) which contains ten articles, with national treatment included as part of Article 48 Treatment of Investment.

2. Without prejudice to its laws and regulations, each Party shall accord to investments and activities associated with such investments by the investors of the other Party treatment not less favorable than that accorded to the investments and associated activities by its own investors.

This seemingly innovative method is based on the fact that China had signed a BIT with Pakistan in 1989, and the investment chapter in the China-Pakistan FTA therefore invokes the China-Pakistan BIT, with slight modification to take account of more recent bilateral investment developments, for instance, there was no national treatment clause in the China-Pakistan BIT.

In the Agreement on Trade in Services between China and Pakistan, the national treatment principle is included in Article 15 National Treatment. Article 15 is identical to Article XVII of the GATS from paragraphs 1 to 3. In addition, Article 15 incorporates paragraph 4 as follows:

4. Commitments assumed under this Article shall not be construed to require either Party to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

However, this paragraph makes no provision for compensation for inherent competitive disadvantage resulting from foreign character, and is found only in the China-Pakistan

FTA. It is a result of China's strong bargaining power vis-a-vis Pakistan and also reflects the traditional friendship between China and Pakistan.

In a nutshell, in the China-Pakistan FTA, the national treatment clause in trade in goods is a model which was subsequently widely adopted, while the national treatment clause for trade in services is exceptional in terms of the GATS, having no compensation requirement, and the national treatment clause in the investment chapter is an updated version of the China-Pakistan BIT.

c. The China-Chile FTA

The China-Chile FTA was signed in November 2005 and entered into force in October 2006. The Supplementary Agreement on Trade in Services of the China-Chile FTA and the Supplementary Agreement on Investment of the China-Chile FTA were signed in April 2008 and September 2012 respectively.

For trade in goods, the national treatment clause in the China-Chile FTA adopts the China-Pakistan model, thus no further explanation is necessary.

For trade in services, the national treatment clause in the Supplementary Agreement on Trade in Services of the China-Chile FTA adopts the GATS national treatment model, thus no further explanation is necessary.

For investments, Article 3 in the Supplementary Agreement on Investment of the China-Chile FTA is National Treatment:

1. Subject to its laws and regulations at the time the investment is made, each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the operation, management, maintenance, use, enjoyment, or disposal of investment.
2. Subject to its laws and regulations at the time the investment is made, each Party shall accord to investment of investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the operation, management, maintenance, use, enjoyment, or disposal of investment.

Accordingly, this national treatment clause covers both investors and investments from the other party. As signed in 2012, this provision adopts the format of the new generation of Chinese BITs, which will be mentioned in Chapter 3.

d. The China-New Zealand FTA

The China-New Zealand FTA was signed in April 2008 and entered into force on 1 October 2008. Covering such areas as trade in goods, trade in services and investments, the China-New Zealand FTA was the first comprehensive FTA that China had ever signed, as well as the first FTA that China had signed with a developed country.⁴⁴⁷

In the China-New Zealand FTA, the national treatment clause is included in the trade in goods chapter, trade in services chapter and investment chapter, and the China-New Zealand FTA adopts the China-Pakistan model in the trade in goods chapter, and adopts the GATS national treatment model in the trade in services chapter, therefore no further explanation is necessary concerning the national treatment clause in those two chapters.

For the investment chapter, the national treatment principle is included in Article 138 as follows:

Each Party shall accord to investments and activities associated with such investments, with respect to management, conduct, operation, maintenance, use, enjoyment or disposal, by the investors of the other Party treatment no less favourable than that accorded, in like circumstances, to the investments and associated activities by its own investors.

As there is no national treatment clause in the China-New Zealand BIT signed in 1988, the national treatment clause in the China-New Zealand FTA is a supplementary provision to the outdated China-New Zealand BIT, and it adopts the national treatment model used in the new generation of Chinese BITs.

e. The China-Singapore FTA

China and Singapore signed the China-Singapore FTA in October 2008. Under this FTA, the two countries agreed to accelerate the liberalisation of trade in goods on the basis of the Agreement on Trade in Goods of the China-ASEAN FTA and to further liberalise the trade in services.⁴⁴⁸

With regard to national treatment clauses, the China-Singapore FTA adopts the China-Pakistan model in its trade in goods chapter, and adopts the GATS national treatment model

⁴⁴⁷ The official website of MOFCOM, China FTA network, available at: <http://fta.mofcom.gov.cn/topic/ennewzealand.shtml>. [10.07.2017]

⁴⁴⁸ *Ibid.*

in the trade in services chapter, therefore no further explanation is necessary concerning the national treatment clauses in these two chapters.

Although it has an investment chapter, Chapter 10 only contains one article.⁴⁴⁹ According to this article, the national treatment clause in the Agreement on Investments of the China-ASEAN is incorporated into and forms an integral part of the China-Singapore FTA. It is understandable and efficient that Singapore, as a member of ASEAN, reached such an arrangement with China.

f. The China-Costa Rica FTA

The China-Costa Rica FTA was signed in April 2010 and entered into force on 1 August 2011.

For trade in goods, Article 8 (National Treatment) in the China-Costa Rica FTA adopted the China-Pakistan model in its first paragraph, with an exception to paragraph 1 in paragraph 2:

Paragraph 1 shall not apply to the measures set out in Annex 1 (National Treatment and Import and Export Restrictions).

Annex 1 contains a list of measures which shall not be subject to the national treatment clause. This model is identical with the national treatment clause in the FTAs signed between the United States and the Dominican Republic Central America, without the incorporation of national treatment at a regional level⁴⁵⁰ in the China-Costa Rica FTA.

⁴⁴⁹ Investment Chapter in the China-Singapore FTA:

“1. Upon the conclusion of the investment agreement between ASEAN and China pursuant to Article 5 of the Framework Agreement on Comprehensive Economic Co-operation between ASEAN and the People's Republic of China (the “ASEAN-China Investment Agreement”), the provisions of that agreement shall, *mutatis mutandis*, be incorporated into and form an integral part of this Agreement unless the context otherwise requires.

2. Recognising that negotiations on the ASEAN-China Investment Agreement are ongoing, the Parties agree to co-operate to facilitate the early conclusion of that agreement.

3. For greater certainty, any rights, obligations, restrictions or exceptions contained in the ASEAN-China Investment Agreement that do not relate to either Party shall accordingly be inapplicable under this Agreement. Notwithstanding Article 112 (Relation to Other Agreements), in the event of any inconsistency between the ASEAN-China Investment Agreement and this Agreement, the provisions of this Agreement shall prevail.”

4. At any time after the entry into force of this Agreement, upon request by either Party, the Parties shall consult with a view to further encouraging or facilitating the flow of investments between the Parties.

⁴⁵⁰ The paragraph 2 in the national treatment clause in FTA signed between the United States and Dominican Republic Central America is as following:

“The treatment to be accorded by a Party under paragraph 1 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment that regional level of government accords to any like, directly competitive, or substitutable goods, as the case may be, of the Party of which it forms a part.”

As for investment, although Chapter 9 of the China-Costa Rica FTA is entitled 'Investment, Trade in Services and Temporary Entry of Business Persons', according to Article 89, China and Costa Rica reaffirm their commitments under the China-Costa Rica BIT signed in October 2007. It was therefore not necessary to negotiate a new investment chapter in the China-Costa Rica FTA, as a BIT between the two countries had been signed just three years before.

For trade in services, the China-Costa Rica FTA adopts the GATS national treatment model, therefore no further explanation is necessary.

g. The China-Peru FTA

The China-Peru FTA was signed in April 2009 and entered into effect in March 2010.

For trade in goods, the China-Peru FTA is similar to the China-Costa Rica model, which is a combination of the China-Pakistan model with a list of exceptions in an Annex.

For trade in services, Article 106 National Treatment in Chapter 8 Trade in Services is as follows:

In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Party shall accord to services and service suppliers of the other Party treatment no less favourable than that it accords, in like circumstances, to its own services and service suppliers.

This is the only national treatment clause concerning services in China's FTAs that does not exactly adopt the GATS three-paragraph model; it is, nevertheless, identical in nature.

For trade in investment, as there was no national treatment clause in the China-Peru BIT signed in 1994, Article 129 of the China-Peru FTA provides the following:

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to investments of investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the management, conduct, operation, and sale or other disposition of investments.

This national treatment clause is similar to that of China's new generation of BITs, which will be analysed in Chapter 3.

h. The China-Iceland FTA

The China-Iceland FTA was signed in April 2013 and entered into effect in July 2014.

With regard to a national treatment clause, the China-Iceland FTA adopts the China-Pakistan model for its trade in goods chapter, and incorporates Article XVII of the GATS into the China-Iceland FTA, therefore no further explanation is necessary concerning the national treatment clauses in those chapters.

For the investment chapter, Chapter 8 contains only three articles, and does not incorporate a national treatment clause, however, Article 92 Bilateral Investment Treaty emphasises the China-Iceland BIT signed in 1994, as China and Iceland recognised the importance of the BIT in creating favourable conditions for investments between the two countries, and thus its contribution to the creation of the free-trade area established by the China-Iceland FTA.

To summarise, the national treatment clauses in the aforementioned eight FTAs cover goods, services and the investment sector. These FTAs follow the GATT and GATS national treatment clauses for trade in goods and services, with the China-Costa Rica and China-Peru FTAs incorporating an exception to the national treatment clauses as an Annex and with a tiny deviation from Article XVII of the GATS in the China-Pakistan and China-Peru FTAs. For the investment sector, these FTAs follow the national treatment clauses in previously concluded BITs, or even refer to the corresponding BIT in its entirety.

In general, China's first generation of FTAs – China-ASEAN, China-Chile and China-Pakistan – are best understood as a series of agreements, rather than the type of 'big bang' pact favoured by developed countries like the United States, Japan and Australia.⁴⁵¹ Since negotiating the China-New Zealand FTA in 2008, however, China has started to follow the method used by the United States, Japan and Australia, and has concluded single-agreement FTAs. Although the coverage of China's second generation of FTAs is not as comprehensive as those of other developed countries, China was well on its way towards agreeing more comprehensive FTAs.

⁴⁵¹ Zhao and Webster, 'Taking Stock', at 102.

2. Comprehensive national treatment clauses cover more than goods, services and the investment sector

a. The China-Switzerland FTA

The China-Switzerland FTA was signed in July 2013 and entered into effect in July 2014. It was the first time that an FTA signed by China included national treatment with regard to IPR.

For national treatment in trade in goods and services, The China-Switzerland FTA adopted the China-Pakistan model in Article 2.2 and the GATS model in Article 8.5, therefore no further explanation is necessary.

For the investment chapter, as the China-Switzerland BIT was upgraded and signed in 2009, there is only a general article in the form of an Investment Promotion and Review Clause in the investment chapter of the China-Switzerland FTA. These provisions supplement the China-Switzerland BIT on the promotion and mutual protection of investments. As the BIT remains in force, the clauses of the FTA are confined to the promotion of investments.

As a breakthrough, Article 11.1 provides national treatment regarding IPR as follows:

2. The Parties shall accord to each others' nationals treatment no less favourable than that accorded to their own nationals with regard to the protection of intellectual property. Exemptions from this obligation must be in accordance with the substantive provisions of Articles 3 and 5 of the TRIPS Agreement.

This article adopts the national treatment rule in the TRIPS. Although it is not the first FTA to include IPR protection, it is the first time that an FTA signed by China has included national treatment regarding IPR protection. The China-Switzerland FTA contains substantial clauses on the protection of IPR, and China and Switzerland committed to the application of the highest international standards in accordance with the principles of MFN and national treatment concerning the protection of IPR.

b. The China-South Korea FTA

The China- South Korea FTA was signed in June 2015 and entered into force in December 2015. After three years of negotiation, it was seen as a great event, along with the development of Chinese/South Korean trade and economic relations.

For national treatment in trade in goods and services, the China-South Korea FTA adopted the China-Pakistan model in Article 2.3 and the GATS model in Article 8.4, therefore no further explanation is necessary.

For national treatment in investment, as well as the 'no less favourable' treatment of investors, the China- South Korea FTA includes non-conforming measures as exceptions to the national treatment. As the China- South Korea BIT was upgraded in 2007, the national treatment provision in the China- South Korea FTA is based on the investment treatment clause in the China- South Korea BIT. However, the more recent China- South Korea FTA provides that both parties are allowed to maintain non-conforming measures as an exception to the national treatment principle, while in the China- South Korea BIT, it is only existing non-conforming measures maintained within Chinese territory that are not subject to the national treatment principle.

Another breakthrough in the China- South Korea FTA is the national treatment in the financial services chapter. It is the first time in a Chinese FTA that financial services have been mentioned in an independent chapter. Previously, financial services were covered in both parties' SSCs as an Annex, together with other services about which both parties had decided to make commitments.

In the China- South Korea FTA, however, financial services are covered in Chapter 9, an independent chapter which follows the Trade in Service Chapter. With regard to national treatment in financial services, it follows the GATS national treatment clause and is subject to the positive list in Annex 8-A.

With regard to national treatment in IPR protection, the China- South Korea FTA follows the China-Switzerland model, and so no further explanation is necessary.

In short, the China- South Korea FTA includes national treatment with regard to goods, services, investments, financial services and IPR protection, covering more sectors than earlier Chinese FTAs.

c. The China-Australia FTA

The China-Australia FTA was signed in June 2015, at the same time as the China-South Korea FTA, and entered into force in December 2015. The China-Australia FTA has the highest standards and is the most comprehensive FTA signed by China to date.

For national treatment in trade in goods, the China-Australia FTA adopts the China-Pakistan model in Article 2.3, therefore no further explanation is necessary.

With regard to national treatment in services, investments and IPR, there are differences in the China-Australia FTA as follows.

The China-Australia FTA represented a breakthrough as regards national treatment in trade in services, as each party made a commitment on national treatment, market access and MFN in accordance with either a positive listing approach or a negative listing approach.

However, closer analysis of the national treatment clause in the services chapter of the China-Australia FTA reveals the fact that Australia uses a negative listing approach regarding commitments in services, while China adheres to the positive listing approach. In short, the significance of this China-Australia FTA is to serve as a demonstration that positive and negative listing approaches can co-exist in a single FTA. More specifically, China did not adopt the more liberal approach of Australia by adhering to the positive-list method of the GATS. Australia is also the first country to adopt a negative-list approach to trade in services with China.⁴⁵²

For national treatment in investment, as the China-Australia BIT had been signed in 1988, the national treatment clause in the China-Australia FTA adopted the characteristics of China's new generation of BITs.

Although including 4 paragraphs, the national treatment clause in the investment chapter of the China-Australia FTA can be categorised in two paragraphs, the first paragraph provides that Australia shall accord national treatment with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investment to investors from China and covered investment, while the second paragraph provides that China shall accord national treatment with respect to the expansion, management, conduct, operation and sale or other disposition of investment to investors from Australia and covered investment.

Lacking, as it does, both 'establishment' and 'acquisition', the scope of application of China's national treatment obligation is less strict than that of Australia in the same national treatment clause. However, it is the same as the scope of application adopted by

⁴⁵² Longyue Zhao, 'China Trade Strategy: FTAs, Mega-Regionals, and the WTO', European University Institute Robert Schuman Centre for Advanced Studies, Global Governance Programme, RSCAS Policy Paper 2015/11, at 2.

China in its BIT or of the investment chapter in its FTAs, as China has only agreed to extend national treatment to the pre-establishment stage very recently, something which will be further analysed in Chapter 3.

With regard to national treatment in IPR protection, in the China-Australia FTA this has evolved from only one paragraph in the General Principles Article in the China-South Korea FTA to become a separate article (Article 11.5 National Treatment)⁴⁵³ with four paragraphs specifying the protection of IPR and the conditions necessary for parties to derogate from national treatment.

In short, the China-Australia FTA has the highest s and is the most comprehensive FTA so far signed by China. However, for its national treatment standard, the China-Australia FTA still adheres to the general pattern of Chinese FTAs, with no substantial improvement.

C. Concluding remarks concerning national treatment clauses in China's FTAs

In conclusion, with regard to China's FTAs, every FTA signed by China contains a national treatment clause in the goods, services and investment sectors, while some recent FTAs signed by China also contain national treatment provisions concerning IPR protection.

For trade in goods and services, Chinese FTAs adhere to the GATT national treatment clause and the GATS positive list commitments. For the investment sector, they follow the national treatment clause in Chinese BITs, or even refer to the entire corresponding BIT. For IPR protection, the national treatment clauses in China's FTAs do not derogate from the TRIPS.

⁴⁵³ Article 11.5 of the China-Australia FTA:

"1. In respect of intellectual property rights covered in this Chapter, each Party shall accord to nationals of the other Party treatment no less favourable than it accords to its own nationals with regard to the protection of such intellectual property rights, subject to the exceptions provided under the TRIPS Agreement and those multilateral agreements concluded under the auspices of WIPO to which the Parties are party.

2. For the purposes of this Article, "protection" includes matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights, as well as those matters affecting the use of intellectual property rights covered by this Chapter.

3. A Party may derogate from paragraph 1 in relation to its judicial and administrative procedures, including requiring a national of the other Party to designate an address for service in its territory, or to appoint an agent in its territory, provided that such derogation is:

(a) necessary to secure compliance with laws and regulations that are not inconsistent with this Chapter; and ^[1]_[SEP]

(b) not applied in a manner that would constitute a disguised restriction on trade. ^[1]_[SEP]

4. Paragraph 1 shall not apply to procedures provided in multilateral agreements to which either Party is a party concluded under the auspices of the WIPO in relation to the acquisition or maintenance of intellectual property rights."

Although there have been breakthroughs in other content, there has been no substantial change in China's FTAs concerning the national treatment standard, as the majority of content is based on WTO rules. Article III of the GATT is the fundamental provision in every Chinese FTA, while there are slight modifications in the service sector according to the specific circumstance of each contracting party.

Almost every Chinese FTA adheres to the content in Article XVII of the GATS. But differences are obvious in the SSCs which are included in every Chinese FTA as an annex. Based on China's GATS SSCs, China's FTA SSCs adjust the length of the positive list with regard to national treatment commitments depending on the particular circumstance of each contracting party. One point they all have in common is that in every Chinese SSC in FTAs, fewer restrictions are inscribed in the national treatment column, but more restrictions are inscribed in the market access column. This is similar to the approach adopted by China in the GATS SSC.

It can be said that the national treatment clauses in the IPR chapter of Chinese FTAs are more general and reliant on the TRIPS.

Although lacking national treatment clauses covering a wide range of issues such as environment and the labour sector, there has been some improvement in FTAs as regards traditional goods, service and investment sectors, as well as in IPR protection. In addition, the national treatment standard in investment chapters has also been enhanced as compared to the practices in Chinese BITs, something which will be further analysed in Chapter 3.

In general, compared to the liberalisation in the overall content and formal processes of Chinese FTAs, the liberalisation process has been sluggish with regard to national treatment clauses. China has so far used FTAs as a tool to attain goals which would have been difficult to achieve in a multilateral framework. It has had more bargaining power vis a vis its 11 counterparts in the bilateral negotiation processes because it has a much larger trade volume compared with any of those 11 FTA contracting parties. China has therefore been ready to concede preferential tariffs or simplified procedural requirements with regard to trade to these contracting parties, but when it comes to the national treatment standard, China is sticking to its bottom line, and the improvement of the national treatment standard is not a priority in China's FTA strategy.

IV. Conclusion regarding China's national treatment in the trade regime

In this chapter, both China's national treatment standard in the WTO and FTAs are analysed, although the progress is clear, there are improvements need to be done and China has not reach the highest standard.

In this chapter, China's national treatment standards in both the WTO and in FTAs have been discussed. Accordingly, a brief of the conclusions on each section is as follows.

First, following China's WTO accession and with regard to the national treatment standard, China has been obliged to comply with the national treatment clauses in all WTO Agreements, as well as with particular articles in the China Protocol concerning the obligation to comply with national treatment principles in specific issues. With regard to national treatment commitments in the China Protocol, some merely confirm the existing WTO obligations in Article III of the GATT, while others prescribe national treatment obligations that are not contained in the WTO agreements. More specifically, China's national treatment obligations exceed the existing national treatment requirements of the WTO Agreements in according national treatment to foreign individuals and enterprises and foreign-funded enterprises with respect to the conditions affecting their production of goods in China and the marketing and sales of such products; according national treatment to foreign individuals and enterprises and foreign-funded enterprises concerning the distribution of import and export licenses and quotas; and according equal treatment to Chinese and foreign nationals. China can therefore be seen as having undertaken several WTO-plus obligations regarding the national treatment principle, which demonstrates China's determination to solve the issues of most concern to other members, and to embrace a more liberal approach with regard to the national treatment principle.

Second, in order to comply with its WTO national treatment commitments, China has renewed and modified its legal system, with a) an emphasis on national treatment consistency, among other things, as a fundamental principle in the CPC's guiding document; b) a revised *Foreign Trade Law* which opens foreign trading rights to both foreign and national individuals and removes some differential treatment between foreign-funded enterprises and Chinese enterprises; c) new regulations concerning the import and export of goods, granting foreign individuals and FIEs the same rights as nationals as

regards the free importation and exportation of goods in general, followed by relevant measures on these issues by local governments; d) the *Enterprise Income Tax Law*, which has unified the income tax rates for foreign and domestic enterprises; e) the promulgation of several regulations in the service sector in accordance with China's inscription in the national treatment and market access columns in the SSC of the GATS; f) a revised *Patent Law*, which makes foreigners subject to the same procedure regarding the assignment of patents as nationals, followed by regulations issued by local IPR authorities correspondently; g) the modification of three laws concerning foreign enterprises and foreign investments. This is not an exclusive list of measures, however, the legislative activities undertaken by China demonstrate its intention to comply with national treatment commitments in the WTO, therefore, in general, China can be said to have lived up to its commitments regarding the national treatment principle since its WTO accession.

Third, as regards the 17 national treatment-related disputes brought before the WTO DSB, Chinese measures inconsistent with the national treatment principle have been found in various industries. On average, since China's WTO accession, there has been a dispute against China concerning violation of national treatment commitments annually, moreover, China has not won every single dispute regarding claims of national treatment violation. In the overwhelming majority of disputes under the Panel or Appellate Body procedure, all those measures identified by the Panel and challenged by the complainants were found to be inconsistent with China's national treatment obligations. In those other disputes which were settled after consultation by MOUs, China revised or repealed the measures alleged to be inconsistent with its national treatment obligations. In addition, according to these disputes, the Chinese measures alleged to be in violation constituted *de jure* discrimination, as the differential treatments in Chinese laws and regulations were based exclusively on the origin of products or services, and a formal difference in treatment of foreign and domestic products and services was obvious. Chinese measures still stagnate in the first level of national treatment violation, and no attempt was made to disguise the obvious discriminatory purpose of its national treatment inconsistencies. This fact demonstrates the less positive national treatment practices in China, however, in the aftermath of the 17 disputes regarding national treatment violations, China has brought some of its tax, internal charge, and export subsidy measures, as well as IPR measures and financial service measures, into national treatment consistency.

Four, with regard to national treatment clauses in China's FTAs, every FTA signed by

China contains a national treatment clause in the goods, services and investment sectors, while some more recent FTAs signed by China also contain national treatment provision concerning IPR protection. For trade in goods and services, Chinese FTAs adhere to the GATT national treatment clause and the GATS positive list commitments. For the investment sector, these FTAs follow the national treatment clause in Chinese BITs or even refer to the entire corresponding BIT. For IPR protection, China FTAs do not derogate from the TRIPS. Although there have been breakthroughs in other content, there has been no substantial change in China's FTAs as regards the national treatment standard, as the majority of content is based on WTO rules.

In general, this chapter has focused on national treatment in both China's WTO and FTAs practices. More attention has been paid to China's WTO practices, as the national treatment clauses in China's FTAs are, for the most part, based on the national treatment clauses in the WTO, and the improvement of national treatment standards is not a priority in China's FTAs strategy.

Frankly speaking, even given the less positive impression of national treatment consistency according to China's WTO disputes, China has to date made great, and sometimes painful, efforts to implement its WTO obligations and the unfavourable rulings of the WTO in this regard. As previously mentioned, a positive method adopted by this dissertation is to enumerate the efforts made by China to bring its measures into national treatment consistency, thus offering a worthwhile opinion regarding the question of whether China has indeed adopted a more liberal approach.

According to the preceding analysis, China has made numerous legislative modifications since its WTO accession. These modifications cover a wide range of sectors, and national treatment compliance has been one of the priorities in these legislative modifications. Therefore, China has actively brought its domestic laws, regulations and other legal documents into national treatment consistency according to its WTO commitments; actions which manifest China's positive attitude towards a more liberal international trade approach.

Although the conclusion is positive in this regard, it may be more ambiguous when China's national treatment inconsistency disputes before WTO DSB are taken into consideration. As the overwhelming majority of China's alleged measures were found to constitute *de jure* discrimination under the national treatment principle, this confirms that

numerous measures inconsistent with the national treatment principle have been adopted by China in various sectors. Some of them proved to be consistent with China's inscription in the market access column for service sectors, while others simply breached China's national treatment obligations, either in WTO Agreements or in the China Protocol, for various reasons. One positive result in this regard has been that China has repealed or modified the vast majority of the allegedly inconsistent measures, leaving only a tiny portion of them still under negotiation with complainants.

China voluntarily put itself into the WTO legal framework, and its practices since its WTO accession have not fundamentally deviated from WTO principles in general. Therefore, regardless of its internal intentions and willingness – some measures were repealed spontaneously, whereas others were repealed under external pressure – China is making progress with regard to national treatment consistency, and the approaches adopted by China concerning the regulation of goods, services and IPR, as well as in the dispute-settlement procedure, have in general been liberalising.

However, this positive conclusion does not mean that China has complied with every single national treatment commitment it has made, nor has it accordingly revised its laws and regulations perfectly. There are undoubtedly gaps between China's commitments and practices; for example, China continues to discriminate against foreign enterprises and nationals in certain industries. As previously mentioned, it is what China has done to adopt a more liberal approach in international trade that must be analysed in order to demonstrate China's evolving approach in this regard, not the inconsistent measures which continue to exist.

Therefore, in sum, China is adopting a more liberal approach in international trade, and China's accession to the WTO augurs well for the country's full integration into the world economy. By becoming a WTO member, China has committed itself to complying with the principles and rules of the international trading system. With regard to national treatment standards, China has voluntarily repealed and modified numerous laws, regulations and other legal documents in order to be consistent with its WTO commitments, and has been forced to repeal and modify some relevant measures as a result of the dispute settlement mechanism. China's FTAs are also evolving towards the high standard of the NAFTA model, with current coverage of national treatment requirements in goods, service, investment and IPR sectors.

China's place in the international trade regime is a broad topic which covers a wide range of issues, and it is therefore impossible to cover all of them in a single piece of research. In any case, different researchers may reach different or even contradictory conclusions from different perspectives. The intention of this dissertation is to be neutral in its enumeration of the efforts that have been made by China, as well as its disputes. Therefore, as regards China's national treatment standard in trade regimes, this dissertation concludes that China has made numerous efforts regarding the evolution of its national treatment standards, but that improvement is still needed, and China has not yet reached the highest standard.

Chapter Three China's National Treatment Standard in the Investment Regime

National treatment is an important standard, providing a clear criterion for the manner in which foreign investors should be treated. By allowing foreign investors to enjoy the same treatment as local investors, foreign investors can not only enjoy the same benefits as local entities, but can also feel more 'at home' when investing abroad.⁴⁵⁴ According to the analysis in Chapter 1, the national treatment standard in treaty practice has been widely used in trade agreements. More recently, through its adoption in bilateral, regional, plurilateral and multilateral investment-related instruments, the standard has been extended to the sphere of FDI.⁴⁵⁵

This chapter will therefore discuss national treatment in investment regimes, with a specific focus on China. In general, the national treatment standard applied in investment regimes is reflected in national and international law. For example, developed countries generally include the principle of national treatment in their constitution or basic laws.⁴⁵⁶ Equally, according to a World Bank survey of 51 investment codes adopted by developing countries, the overwhelming majority of these countries have adopted provisions that aim at avoiding differences in treatment between foreign and local investors.⁴⁵⁷ How is the application of national treatment handled in Chinese investment law? Starting with Chinese municipal investment law, section I of this chapter is also connected to China's accession to the WTO.

I. The evolving national treatment standard in Chinese foreign investment law

⁴⁵⁴ Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policy and Practice* (Oxford University Press 2009), at 173.

⁴⁵⁵ An FDI has been defined as an investment in which an investor based in one country acquires an asset in another country with the intention of managing that asset. WTO Secretariat, *Trade and Foreign Direct Investment*, PRESS/57, at 6 (Oct. 9, 1996).

⁴⁵⁶ UNCTAD, 'World Investment Report 1994: Transnational Corporations, Employment and the Workplace', New York and Geneva: United Nations, United Nations publication, Sales No.E.94.II.A.14. 1994, at 303, available at: http://unctad.org/en/Docs/wir1994_en.pdf. [10.07.2017]

⁴⁵⁷ UNCTAD, *International Investment Agreements: Key Issues*, at 165.

A. The old generation of foreign investment law in China: the national treatment accorded to foreign investment/investors is nonexistent in nature

1. The foreign investment regime before China's accession to the WTO

Although the PRC was established in 1949, FDI was not welcomed by the country until 1978, when the 'reform and opening' policy was adopted.⁴⁵⁸ Because of its planned economy, China had formerly been reluctant to adopt the national treatment standard,⁴⁵⁹ so the discussion of the national treatment standard and the 'old generation' of foreign investment law in China in this section covers the period from 1979 to 2001, as China's accession to the WTO can be seen as a watershed. This is not, however, a strict chorological study of the foreign investment regime in China as a whole,⁴⁶⁰ as it is only intended to provide a background for the further discussion of the national treatment standard in this period.

Without a unified foreign investment law, China enacted its first foreign investment law in the form of the *Law of the PRC on Chinese-Foreign Equity Joint Ventures* in July 1979, following the 'reform and opening' decision. Under authorisation, the State Council accordingly promulgated the *Regulations on Implementation of Chinese-Foreign Equity Joint Ventures Law* in 1983. Three years later, in response to the needs of 'opening up', China enacted the *Law of the PRC on Wholly Foreign-Owned Enterprises*. In 1988, China enacted the *Law of the PRC on Chinese-Foreign Contractual Joint Ventures* and, in 1990, the *Law of the PRC on Chinese-Foreign Contractual Joint Ventures* was revised and *Detailed Rules for Implementation of the Law of the PRC on Wholly Foreign-Owned Enterprises* was promulgated.⁴⁶¹

The *Law of the PRC on Chinese-Foreign Equity Joint Ventures*, the *Law of the PRC on*

⁴⁵⁸ Gallagher and Shan, *Chinese Investment Treaties*, at 4.

⁴⁵⁹ Wenhua Shan, Norah Gallagher and Sheng Zhang, 'National Treatment for Foreign Investment in China: A Changing Landscape', *ICSID Review*, Vol. 27, No. 1, 2012, pp. 120-144, at 121.

⁴⁶⁰ According to some scholars, the major stages of China's FDI policy before its WTO accession can be identified:

- gradual and limited opening up (late 1970s early 1980s)
- active promotion through preferential treatment (1986-1995)
- promoting FDI in accordance with domestic industrial objectives (1995-2001).

See Françoise Nicolas, 'China and Foreign Investors: The End of a Beautiful Friendship?', *Institut Français des Relations Internationales, Asie Visions* 4, April 2008, at 4.

⁴⁶¹ Rungen Qiu, 'Retrospection and Perspective of Foreign Investment Legislation in China (1979-2009)', *Front Law China* 2011, Vol. 6, No. 1, pp. 131-160, at 132.

Wholly Foreign-Owned Enterprises, and the *Law of the PRC on Chinese-Foreign Contractual Joint Ventures* therefore formed the backbone of the foreign investment regime in China, and they are also deemed to be the three basic laws in this regard. Throughout the 1980s and 90s, the foreign investment regime in China was supplemented by a series of specific regulations concerning approval, registration, land use, taxation, finance and accountancy, labour, export and import, etc. Without a unified legal system concerning FDI, however, some conflict and overlap of different legal sources was unavoidable.

In sum, the structure of the FDI framework in China during the 1980s and 90s was categorised into three parts: the first part was at a constitutional level, as permission for foreign investment and, consequently, its protection were stipulated in the new text of the *PRC Constitution*.⁴⁶² The second part was made up of the aforementioned three basic foreign investment laws, plus the *Income Tax Law for Foreign Investment Enterprises and Foreign Enterprises*. FDI-related administrative regulations formed the third part of the framework. These regulations were promulgated either by the State Council or its subordinate Ministry of Foreign Trade and Economic Co-operation (MOFTEC).⁴⁶³ Of these, the *Catalogue of Industries for Guiding Foreign Investment* was the most significant instrument in the FDI-related administrative regulations.⁴⁶⁴ In addition, other general laws and regulations, if appropriate, could be applied to FDI issues if there was no other specific regulation.

Based on this legal framework for FDI, China set up a two-tier legal system, which applied different rules and requirements to FIEs and domestic Chinese investment enterprises (CIEs). As China was not a member of the WTO and had not otherwise undertaken relevant international obligations, the two-tier legal system it applied to nationals and foreign investors did not breach international law.

In 1993, the *PRC Constitution* was revised, and the development of a socialist market

⁴⁶² See Article 18 of the PRC Constitution:

“The People’s Republic of China permits foreign enterprises, other foreign economic organisations and individual foreigners to invest in China and to enter into various forms of economic co-operation with Chinese enterprises and other Chinese economic organisations; in accordance with the law of the People’s Republic of China. All foreign enterprises, other foreign economic organisations as well as Chinese-foreign joint ventures within Chinese territory shall abide by the law of the People’s Republic of China. Their lawful rights and interests are protected by the law of the People’s Republic of China.”

⁴⁶³ Ministry of Foreign Trade and Economic Co-operation is the predecessor of the MOFCOM.

⁴⁶⁴ Qingjiang Kong, ‘The Foreign Direct Investment Regime in China’, *Heidelberg Journal of International Law*, Vol. 57, No. 4, 1997, pp. 869-897, at 877.

economy became a fundamental policy goal for China.⁴⁶⁵ Accordingly, with the determination to evolve towards a standard under-market economy, the Chinese government decided in the same year to gradually implement the principle of national treatment for FIEs.⁴⁶⁶ As a result, a number of laws and regulations were modified and new ones introduced in order to provide a level playing field for both foreign and domestic investors in China.

However, although it was indisputable that China was moving towards a more open society,⁴⁶⁷ after China began opening up to foreign investment in 1979, the government continued to maintain control over the entry of foreign capital through an elaborate examination and approval system,⁴⁶⁸ and foreign investors in China during the 1980s and 90s experienced a wide range of arbitrary administrative interference, discriminatory regulatory processes, lack of transparency, and other policies which either limited their participation in the Chinese market or unfairly affected their investments.

The real liberalisation with regard to FDI and foreign investors came only after China's accession to the WTO, which will be discussed in section I.B of this chapter.

2. Did national treatment exist in the Chinese foreign investment regime before its WTO accession?

As described in the preceding section, at the end of 1993 China declared, as a policy statement, that it would create the conditions for granting national treatment to FIEs step by step. So what was the treatment accorded to foreign investors during the pre-WTO accession period in China?

a. Conditional preferential treatment for foreign investors

According to the 'reform and opening' policy, in order to promote and encourage foreign investment, Chinese authorities conditionally embarked on a less aggressive policy vis-à-vis foreign investors. For example, according to the *Interim Regulation of Income Tax of Enterprises*, CIEs should pay income tax at the rate of 33%, while some FIEs paid income

⁴⁶⁵ Gallagher and Shan, *Chinese Investment Treaties*, at 8.

⁴⁶⁶ See 'The Central Committee of the Chinese Communist Party Decision on Some Issues Related to the Establishment of the Socialist Market Economy', published on the People's Daily, 7 November 1993, at 1.

⁴⁶⁷ Qingjiang Kong, 'China's WTO Accession: Commitments and Implications', *Journal of International Economic Law*, 2000, pp. 655-690, at 664.

⁴⁶⁸ Qin, 'Trade, Investment and Beyond', at 729.

tax only at the rate of 15%.⁴⁶⁹

However, the preferential treatment granted to FIEs was not unconditional, and was only granted under certain circumstances to FIEs in specific regions and industries. Through the enactment of the *Provisions of the State Council of the PRC for the Encouragement of Foreign Investment*,⁴⁷⁰ more favourable regulations were applied to foreign investors, especially export-oriented joint ventures (JVs) and JVs using advanced technology.⁴⁷¹ In general, this preferential treatment covered a wide range of content, including exemption from various internal taxes and charges, priority in receiving commercial loans, freedom to import, simpler licensing procedures, privileged access to supplies of water, electricity and transportation, etc.⁴⁷²

Many Chinese scholars used the term 'super-national treatment' to refer to the more favourable treatment granted to FIEs in the 1980s and 90s,⁴⁷³ however, from the author's point of view, 'super-national treatment' is not a legal term within the common understanding of the national treatment standard. On the other hand, 'treatment no less favourable than' is one of the substantive principles of the national treatment standard, so any treatment accorded to foreign investors and investments which falls within a range between identical treatment and *more* favourable treatment falls within the scope of national treatment as generally defined. It is not, therefore, necessary to specify 'super-national treatment', as any preferential treatment accorded to foreign investors and investments is covered by the national treatment standard. In any case, this so-called 'super-national treatment' does not by any means describe all the treatment granted by China to foreign investors, as the differential treatment which discriminated against foreign investors is also apparent and obvious. It is not, therefore, accurate to describe the Chinese treatment accorded to foreign investors and investment in the pre-WTO period as national treatment, while the so-called super-national treatment is a misconception.

b. The co-existence of differential treatment for FIEs

As previously discussed, China had set up a two-tier legal system which applied different

⁴⁶⁹ Wei Wang, 'Super-National Treatment: A Misconception or a Creation with Chinese Characteristics?', *Front Law China*, 2010, Vol. 5, No. 3, pp. 376-396, at 378.

⁴⁷⁰ *Provisions of the State Council of the PRC for the Encouragement of Foreign Investment*, promulgated by the State Council on October 11, 1986.

⁴⁷¹ Nicolas, 'China and Foreign Investors', at 5.

⁴⁷² See *Provisions of the State Council of the PRC for the Encouragement of Foreign Investment* (1986).

⁴⁷³ Wang, 'Super-National Treatment', at 379.

regulations and requirements to FIEs and national enterprises. In order to attract FDI inflow, the Chinese government offered incentives to foreign investors in the 1980s and early 1990s, and Chinese municipal law concerning the regulation of foreign investment constituted an incentive-based FDI regime in which most of the measures were tax-related.

However, by the late 1990s, many international investors observed that China had begun to rescind or phase-out some of these incentive policies. Typical of this trend was the abolition of the regulations concerning the duty-free importation of capital goods, formerly generally applied to FIEs.⁴⁷⁴ The *Provisional Regulations on the Guidelines of Foreign Investment and Catalogue of Projects in Which Foreign Investment is Encouraged* were among those regulations that had caused much concern regarding China's FDI policy, as China's perception was that incentives should be used to direct FDI towards particular sectors rather than to attract FDI *per se.*, so in the late 1990s, there were various differential treatments of foreign investments and investors as well.

In general, FDI vehicles in China were limited to equity joint ventures (EJV), contractual joint ventures (CJV), and wholly foreign-owned enterprises (WFE) according to the three laws regulating FIEs. Moreover, within those three laws, there were shareholder percentage requirements and local content requirements. For example, according to the *Law of the PRC on Wholly Foreign-Owned Enterprises* (1986), enterprises with foreign capital had to be established in such a manner as to help the development of China's national economy, and they had to use advanced technology and equipment, or market all or most of their products outside China.⁴⁷⁵ In addition, within the scope of the approved operations, enterprises with foreign capital could purchase, either in China or from the world market, raw and semi-processed materials, fuels and other materials they needed. When these materials were available from both sources on similar terms, first priority should be given to purchases in China.⁴⁷⁶

Apart from the three laws regulating FIEs in general, when it comes to specific issues concerning FIEs, there was a separate regulation or notice with regard to differential registration procedural requirements,⁴⁷⁷ differential labour management requirements,⁴⁷⁸

⁴⁷⁴ Kong, 'The Foreign Direct Investment Regime in China', at 874.

⁴⁷⁵ Article 3 of the *Law of the PRC on Wholly Foreign-Owned Enterprises* (1986).

⁴⁷⁶ Article 15 of the *Law of the PRC on Wholly Foreign-Owned Enterprises* (1986).

⁴⁷⁷ See *Administrative Regulation of the People's Republic of China on Governing the Registration of Foreign Invested Enterprises*.

⁴⁷⁸ See *Regulations of the People's Republic of China on Labour Management in Joint Ventures Using Chinese and*

differential management concerning import substitution treatment,⁴⁷⁹ differential investment contributions requirements,⁴⁸⁰ etc. which applied only to FIEs. Some of the content was more favourable than that accorded to domestic investors or enterprises, but the overwhelming majority of the content was less favourable than that applying to domestic investors or enterprises.

In addition, since 1995, China had begun to regulate foreign investment according to the *Catalogue of Industries for Guiding Foreign Investment (Guiding Catalogue)*.⁴⁸¹ The *Guiding Catalogue* is a nationwide directory for foreign investments. It set up three categories of industry: encouraged, permitted, and restricted, which allowed foreign investors to participate according to the principles of the market economy,⁴⁸² and those not included in the catalogue fell into a default fourth category of prohibited industries. (The *Guiding Catalogue* has been revised frequently: in the years 1997, 2002, 2004, 2007, 2011 and 2015.)

According to the *Guiding Catalogue*, foreign investment projects in encouraged industries enjoyed certain special incentives, such as tax incentives. Foreign investment projects in the restricted industries were, conversely, subject to certain restrictions. Some of these were linked to the modes of investment,⁴⁸³ while some foreign investment projects were subject to more stringent conditions requiring the equity control of Chinese partners.

The opening of a domestic market to FDI is entirely a matter for the sovereign state concerned: a state enjoys full sovereignty to regulate the FDIs and FIEs within its jurisdiction as long as any measures it takes are consistent with its international obligations arising from international treaties. China therefore enjoyed full sovereignty to divide FDI into the four categories of 'encouraged', 'permitted', 'restricted' and 'prohibited'. According to the *Guiding Catalogue*, the preferential treatments granted to foreign investors were thus limited to 'encouraged' industries, while many examples of differential treatment were to be found in the 'restricted' industries.

Foreign Investment.

⁴⁷⁹ See *Measures of the State Planning Commission Relating to the Import Substitution by Products Manufactured by Sino-Foreign Equity and Contractual Joint Ventures*.

⁴⁸⁰ See *Certain Regulations on the Subscription of Capital by the Parties to Sino-Foreign Joint Equity Enterprises*.

⁴⁸¹ *Catalogue of Industries for Guiding Foreign Investment*, promulgated by MOFTEC in 1995 and revised in 1997, 2002, 2004, 2007, 2011 and 2015.

⁴⁸² Xiang Gao and Huiqin Jiang, 'Foreign Investment Laws and Policies in China: Historical views and current issues', in Ross Garnaut, Cai Fang and Ligang Song (eds) *Deepening Reform for China's Long-term Growth and Development* (Australian National University Press: 2014), pp. 531-552, at 535.

⁴⁸³ Gallagher and Shan, *Chinese Investment Treaties*, at 27.

Nor was there any provision in relation to the right of entry or establishment for foreign investors, so foreign investors were not entitled to unconditional entry or establishment. Measures relating to admission and establishment under the FDI framework included screening, authorisation and registration requirements, the closing of certain sectors or industries to FDI, minimum capital requirements, quantitative restrictions on the number of areas open to foreign investment in specific sectors or industries, entry conditional upon investment meeting certain criteria, restrictive forms of establishment for foreign investment and security, as well as public interest requirements.⁴⁸⁴

In addition, each foreign investment initiative was subjected to the screening requirements stipulated in the FDI laws. The screening procedures, namely review and approval procedures, included approval from the MOFTEC and the provincial/municipal commissions for foreign trade and economic relations, and the separate approval of the environmental protection administration, land administration, urban planning administration and state-assets administration agencies. All the screening procedures applied to FIEs were obviously stricter than those applied to CIEs. Therefore, it is clear that there was hardly any national treatment when it came to procedural requirements for FIEs.

In a nutshell, the differential treatment accorded to foreign investments and investors included, among other things, the limitation of FDI vehicles, shareholder percentage requirements and local content requirements,⁴⁸⁵ export requirements, trade-balance requirements, local procurements, restrictions on employment, restrictions on access to foreign exchange, special requirements on FIEs in certain sectors or industries, four industry categories concerning FDI, and stricter procedural requirements for FIEs.

c. The treatment granted to foreign investors in Chinese the ‘old generation’ Chinese foreign investment regime did not qualify as national treatment

With regard to the treatment accorded to foreign investors in general, the preferential treatment and differential treatment must be taken into consideration in combination.

As the term ‘national treatment’ cannot be found in any single basic law of the time

⁴⁸⁴ *Ibid.*

⁴⁸⁵ During this period, local content requirements were imposed either on an industry-by-industry basis or on a project-by-project basis.

relating to foreign investment in China, the analysis of the treatment accorded to foreign investments will be discussed step by step.

First of all, a distinction was made between the pre-establishment phase and the post-establishment phase, as defined in Chapter 1. On one hand, with regard to the pre-establishment phase, it is apparent that no national treatment was granted in the period pre-WTO accession. Some sectors, for example, were not accessible to foreign investment, while others were only conditionally accessible. Although driven by the strong intention of gaining WTO accession, and while the differences between foreign investment enterprises and domestic enterprises were being lessened, the Chinese FDI framework did not provide national treatment to foreign investors and investments in the pre-establishment phase.

On the other hand, in the post-establishment phase, while some foreign investors still complained that they were not treated as well as domestic enterprises, others were often able to assume more privileges than domestic enterprises in terms of, among other things, the import and export of goods, purchase of raw materials, sale of products, procurement of land and foreign exchange, corporate governance, recruitment and dismissal of personnel, and taxation.⁴⁸⁶ In order to appease the complaints from both foreign investors and domestic enterprises, the Chinese government began to remove any discriminatory treatment, however, the legal framework governing FDI in China was not inherently liberalising, and the discrimination against foreign investors and investment was therefore basically unavoidable.

Looking at this comparison of the treatment accorded to FIEs and CIEs in the post-establishment phase, the fact that preferential and differential treatment to FIEs coexisted does not lead to the conclusion that China accorded national treatment to FIEs in the pre-WTO accession period. Even using two substantive concepts of the national treatment standard in international investment law, namely '*likeness*' and 'treatment no less favourable than', it is impossible and meaningless to compare the treatment received by FIEs and CIEs in every industrial sector. So how are we to reach a conclusion regarding the standard of treatment accorded by China to foreign investments and investors in the pre-WTO period?

The opinion of the author is that it is the intention and purpose behind the treatment which are critical in determining the standard of treatment. There was no incorporation of a

⁴⁸⁶ Kong, 'The Foreign Direct Investment Regime in China', at 890.

national treatment clause or similar description in the *PRC Constitution*, it merely mentioned that foreign investment was permitted in China and that lawful rights and interests were protected by Chinese law.⁴⁸⁷ It Obviously indicates a change in attitude, in that foreigners and foreign enterprises were allowed to invest in China and to enter into various forms of economic cooperation and enjoy legal protection,⁴⁸⁸ it did not, however, specify what kind of protection would be accorded to foreigners and foreign enterprises, neither did it mention the exact standard of treatment, thereby demonstrating a reluctance to categorise such provision into the scope of a national treatment standard at a constitutional level.

Further analysis of other parts of the FDI framework in China reveals the fact that there was no obvious description of a national treatment standard for foreign investors and investments, something which was demonstrated by the existence of a two-tier legal system which applied different regulations and requirements to FIEs and CIEs. Although the *Company Law* of 1993 provided that both foreign-invested and locally-invested limited liability companies were subject to the *Company Law*,⁴⁸⁹ the long-established and relatively well-developed distinct legal regime for FIEs retained a dominant position, and generally prevailed over the *Company Law*. To make the situation even worse, FDI in China were governed not only by laws, but also by policies, including some internal governmental documents. Foreign investors could not predict the future of their investments, as they were not privy to such information. For a long time, the Chinese government did not accept the concept of national treatment for FDI, and the basic laws and regulations relating to FDI mostly concerned either special preferential or restrictive measures.⁴⁹⁰

As we can see from the situation described above, the Chinese government was inclined to hold a rather conservative attitude when it came to the granting of national treatment to foreign investments and investors in the pre-WTO accession period. Although China's economic and commercial laws entered an important stage in the early 1990s, and a clear legislative trend in this regard was the granting of national treatment to FDI and foreign investors,⁴⁹¹ objectively the conclusion must be reached that in the pre-WTO accession

⁴⁸⁷ See *supra* note 478.

⁴⁸⁸ Shan, Gallagher and Zhang, 'National Treatment for Foreign Investment in China', at 127.

⁴⁸⁹ See Article 18 of the *PRC Company Law* in 1993.

⁴⁹⁰ Gallagher and Shan, *Chinese Investment Treaties*, at 165.

⁴⁹¹ Huaqun Zeng, *Chinese Foreign Investment Laws: Recent Developments Towards A Market Economy*, East Asian

period, the treatment granted to foreign investors under the Chinese FDI framework did not qualify as national treatment.

However, the Chinese FDI framework is a changing landscape, and China's accession to the WTO played a significant role in this evolving process.

B. The second generation of foreign investment law in China: the impact of WTO accession on China's national treatment standard

Although the WTO regime is by definition a 'trade' regime, it has a major influence on international investment flows. Historically, investment was not part of the GATT agenda, but beginning with the 1958 Treaty of Rome, free investment became a cornerstone of the movement towards free trade and market access.⁴⁹² Since then, free FDI admission and multiple FDI vehicles have reflected the principle of trade liberalisation, and national treatment for FDI is one of the two major aspects of the principle of non-discrimination in the WTO.⁴⁹³

Among all the WTO Agreements, the GATS is regarded as the agreement for 'investment and growth' because it helps to improve market access and operational conditions for FDI in the service industries. Another agreement, the TRIMs, also helps to liberalise international investment, as it eliminates certain restrictive investment measures.⁴⁹⁴ In order to meet the requirements imposed by the WTO, as well as the special commitments in its accession protocol, China has massively modified its municipal investment laws and regulations since its WTO accession, including removing many non-compliant investment measures. As China's WTO national treatment commitment and compliance concerning the GATS are discussed in Chapter 2, this chapter only discusses China's national treatment commitments and compliance concerning the TRIMs.

The current WTO framework does not concern itself with government measures restricting cross-border investment, apart from those that are considered to directly affect the trade in goods under TRIMs and those that affect services subject to the GATS. Under the TRIMs, a WTO member may not apply any investment measure that has the effect of

Institute, Contemporary China Series No. 23, Singapore University Press, 1999, at 26.

⁴⁹² Wallace and Bailey, 'The Inevitability of National Treatment of Foreign Direct Investment with Increasingly Few and Narrow Exceptions', at 616.

⁴⁹³ Zeng, *Chinese Foreign Investment Laws*, at 5.

⁴⁹⁴ Gallagher and Shan, *Chinese Investment Treaties*, at 9.

discriminating against imported goods (inconsistent with Article III of the GATT) or restrict imports and exports (inconsistent with Article XI of the GATT). More specifically, the Illustrative List annexed to the TRIMs sets out two categories of measure which are inconsistent with Article III:4 of the GATT: local content requirements, and the link between the right to import goods and export performance.⁴⁹⁵

Before describing the changes made by China after its accession to the WTO, and in order to cover the wider background of China's TRIMs commitment and compliance, this section will begin with China's WTO-plus commitments concerning investment-related trade measures.

1. China's WTO-plus commitments concerning the investment-related trade measures

First of all, the China Protocol explicitly confirms China's obligations under the TRIMs, including China's obligation to comply with the national treatment clause. In addition, Section 7(3) of the China Protocol sets forth a special undertaking by China.⁴⁹⁶ This undertaking is further elaborated in Paragraph 203 of the WPR, which was incorporated into the China Protocol.⁴⁹⁷

Couched in the language of these provisions is a sweeping commitment by China to provide market access to foreign investment.⁴⁹⁸ Pursuant to this commitment, China may not impose 'performance requirements of any kind' as a condition for the approval of foreign investment in China, nor shall it restrict foreign investment to protect competing domestic industries. Such a general obligation to liberalise market access for foreign

⁴⁹⁵ Matsushita, Schoenbaum, Mavroidis *The World Trade Organization*, at 778.

⁴⁹⁶ Section 7(3) of the China Protocol:

"Without prejudice to the relevant provisions of this Protocol, China shall ensure that ... any other means of approval for ... investment by national and sub-national authorities, is not conditioned on: whether competing domestic suppliers of such products exist; or performance requirements of any kind, such as local content, offsets, the transfer of technology, export performance or the conduct of research and development in China."

⁴⁹⁷ Paragraph 203 of the China WPR:

"The allocation, permission or rights for ... investment would not be conditional upon performance requirements set by national or sub-national authorities, or subject to secondary conditions covering, for example, the conduct of research, the provision of offsets or other forms of industrial compensation including specified types or volumes of business opportunities, the use of local inputs or the transfer of technology. Permission to invest ... would be granted without regard to the existence of competing Chinese domestic suppliers. Consistent with its obligations under the WTO Agreement and the Draft Protocol, the freedom of contract of enterprises would be respected by China."

⁴⁹⁸ The China WPR also contains a number of market access commitments by China on foreign investment in the automobile industries, which were incorporated into the Protocol. See WPR paras 204–208. It appears that because such market access commitments on investment did not fit into the existing WTO framework for market access obligations (the Goods and Services Schedules annexed to GATT and GATS), they were set out in the Working Party Report on an ad hoc basis.

investment far exceeds the scope of TRIMs.⁴⁹⁹

In short, in order to join the WTO, China made substantial commitments relating to the admission and operation of foreign investment. With regard to admission, China's commitments cover nearly all major sectors and it undertook to eliminate most foreign equity restrictions in nearly all sectors within reasonable time periods (ranging from immediately upon accession to within five years after accession).⁵⁰⁰ With regard to the operational environment of FIEs, China made commitments to comply fully with the TRIMs upon accession to the WTO, without recourse to Article 5 thereof.⁵⁰¹ This meant that China agreed to only impose, apply or enforce law, regulations or measures relating to the production processes or other proprietary knowledge to an individual or enterprise in its territory that were not inconsistent with the TRIMs.

2. The impact of China's WTO accession on the national treatment standard in China

a. The impact of China's WTO accession on China's FDI framework in general

As has been mentioned above, China's accession to the WTO was a watershed for the transformation of China's entire FDI framework. Given that WTO agreements provide only limited disciplines on investment activities, the impact of the WTO on foreign investment in China stems mostly from the country's accession commitments, particularly its extensive market access commitments in service sectors, unique rule commitments on the treatment of FIEs, and special pledges on market economy practices and domestic governance.⁵⁰²

In general, to demonstrate its sincerity and determination to join the WTO, China made significant modifications to its basic foreign investment laws, such as the amendments to the *Law of the PRC on Wholly Foreign-Owned Enterprises* in 2000, the *Law of the PRC on Chinese-Foreign Equity Joint Ventures* and the *Law of the PRC on Chinese-Foreign Contractual Joint Ventures* in 2001 and 2002. In addition to these, many rules and

⁴⁹⁹ Qin, "'WTO-Plus' Obligations and Their Implications for the World Trade Organization Legal System', at 503.

⁵⁰⁰ Qingjiang Kong, 'Towards WTO Compliance: China's Foreign Investment Regime in Transition', *The Journal of World Investment*, October 2002, Vol. 3, No. 5, pp. 859-878, at 870.

⁵⁰¹ Article 5 of the TRIMs allows transitional arrangements to eliminate all trade-related investment measure: a two-year transitional period for developed country members, a five-year period for developing country members and a seven-year period for least-developed country members. See Kong, 'Towards WTO Compliance', at 871.

⁵⁰² Qin, 'Trade, Investment and Beyond', at 729.

regulations were passed concerning foreign investments in China,⁵⁰³ and the most significant revision can be found in China's FDI-related administrative regulations, which form the third part of China's FDI framework, as previously mentioned.

The *Guiding Catalogue* was also substantially revised after China's WTO accession. Since its publication in 1995, the first revision of the *Guiding Catalogue* in 1997 had added 15 industries to the 'encouraged' category. In 2002, in order to fulfil its WTO commitments, the Chinese government revised the *Guiding Catalogue* for a second time, and 75 industries were added to the 'encouraged' category, while 36 industries were removed from the 'restricted' category. In 2004, the *Guiding Catalogue* was amended for the third time. This time a number of industries were removed from the 'encouraged' list, including scrap-steel processing and aluminium production with a capacity of 300,000 tonnes and over per annum. In 2007, the *Guiding Catalogue* was amended for the fourth time, with further opening-up of the services sectors, encouragement of foreign investment enterprises in the recycling and renewable energy industries and environmental protection, and the promotion of the comprehensive utilisation of resources. In addition, the separate appendix to the *Guiding Catalogue* was integrated into each specific industry. In 2011, ten years after China's accession to the WTO, the *Guiding Catalogue* was amended for the fifth time to further expand the opening-up process. For example, financial leases and medical institutions were moved from the 'restricted' into the 'encouraged' category and areas that had been subject to equity ratio limitations for foreign investment were removed. In the 2015 revision of the *Guiding Catalogue*, industries in the 'restricted' category were reduced from 79 to 38, and the limitation on foreign capital was relaxed.

In short, comparison of these different revisions of the *Guiding Catalogue* demonstrate that the number of restricted industries has tended to be reduced while the list of encouraged industries has tended to increase. This suggests a trend towards the encouragement of

⁵⁰³ These rules and regulations include *Interim Provisions on the Administration of Foreign-Funded Rare Earth Industry*, *Provisions on the Administration of Foreign Investment in Construction of Enterprises*, *Trial Measures for the Administration of Securities Investment outside the Territory of China by Qualified Domestic Institutional Investors*, *Rules on the Establishment of Foreign-Shared Fund Management Companies*, *Rules on the Establishment of Securities Firms with Foreign Equity Participation*, *Administration of Foreign-Funded Insurance Companies Regulations*, *Regulations in Governing Financial Institutions with Foreign Capital*, and *Measures for Foreign Investment in the International Freight Forwarding Industry*. In addition, China promulgated *Interim Provisions on the Takeover of Domestic Enterprises by Foreign Investors* in 2003, *Measures for the Administration on Foreign Investment in Commercial Fields*, *Provisions on the Administration of Foreign-Funded Advertising Enterprises* and *Interim Provisions on the Establishment of Foreign-Invested Conference and Exhibition Companies* in 2004.

foreign investment in China.⁵⁰⁴

b. Evolving towards a national treatment for foreign investments

A more liberal approach to the national treatment standard has been taken by China, especially since its accession to the WTO. Needless to say, China's membership of the WTO has most certainly facilitated the implementation of national treatment in both municipal and international investment laws.

In the area of investment, the national treatment principles of the GATT and TRIMs require the elimination of import substitution rules, as well as the reform of disparate regulatory treatment of foreign and domestic companies in the areas of tax law, environmental protection, labour standards, foreign exchange, investment ratios and minimum investment requirements, as well as other areas.⁵⁰⁵

Since its WTO accession, China has improved in the following aspects, and this improvement has contributed to a more equal treatment of foreign and domestic investment.

i. Revising foreign investment laws and regulations so as to comply with the national treatment standard

To further implement its WTO accession commitments, China has revised foreign investment laws. These revisions include amendments to the *Law of the PRC on Wholly Foreign-Owned Enterprises* in 2000, and the *Law of the PRC on Chinese-Foreign Contractual Joint Ventures* in 2002. Among these amendments, the abolition of direct performance requirements, such as local purchase priority requirements, foreign exchange balance requirements, export performance and domestic sales restrictions, were the most notable. This type of performance requirement had previously often been criticised by foreign investors as an indication of the discrimination imposed on them.⁵⁰⁶

More specifically, according to the 2,300 legal documents which have been revised according to the WTO principles – TRIMs in particular – China's national treatment compliance is clear in the following aspects: the removal of the local content requirement;

⁵⁰⁴ Gao and Jiang, 'Foreign Investment Laws and Policies in China', at 538.

⁵⁰⁵ See World Trade Organization, *Guide to the Uruguay Round Agreements* (The Hague: Kluwer, 1999), pp. 77–80. See also Jeffrey S. Thomas and Michael A. Meyer, *The New Rules of Global Trade: A Guide to the World Trade Organization* (Scarborough, Ont.: Carswell, 1998), pp. 196–202.

⁵⁰⁶ Shan, Gallagher and Zhang, 'National Treatment for Foreign Investment in China', at 129.

the removal of the trade balancing requirement; the removal of the export performance requirement and the expansion of the autonomous right of FIEs.

ii. Removing preferential treatment for FIEs, especially in the tax regime

Under the national treatment clauses of the WTO, China is obliged only to accord treatment 'no less favourable' to foreign interests than that accorded to domestic interests, and is therefore not prohibited from providing preferential treatment for foreign interests.⁵⁰⁷ However, preferential treatment for foreign investors can distort competition in the domestic market, and is not fully compliant with the spirit of the national treatment standard, which is an inherent element of a market economy.⁵⁰⁸ In recent years, the national treatment principle has been used to cut certain incentives previously enjoyed only by foreign investors.

One of the most obvious changes was the promulgation of the *Enterprise Income Tax Law* in 2007, which repealed the *FIEs Income Tax Law* of 1991. As mentioned in Chapter 2, this new tax law, which was designed to equalise the enterprise income tax imposed on local and foreign enterprises, put an end to the preferential rate which had been enjoyed by foreign enterprises for about 30 years.⁵⁰⁹ Indeed, the beginning of national tax treatment for foreign and Chinese enterprises can be traced back to 2006, when for the first time the State Council levied the urban and town land-use tax,⁵¹⁰ and the vehicle and vessel usage tax,⁵¹¹ on foreign enterprises. In 2007 and 2009, China also separately unified the urban real estate tax,⁵¹² and the farmland occupation tax.⁵¹³ Notably, in December 2010, China started to levy the urban maintenance and construction tax and educational surcharges on foreign invested enterprises, a move widely regarded as signalling the end of the so-called 'super-national treatment' for foreign investments in China.⁵¹⁴ These changes in 2010 were

⁵⁰⁷ While preferential treatment of FIEs is well within the perimeter of the WTO national treatment clauses, FDI incentives provided by China have been challenged as inconsistent with the WTO subsidy rules.

⁵⁰⁸ Shan, Gallagher and Zhang, 'National Treatment for Foreign Investment in China', at 126.

⁵⁰⁹ *Ibid.*, at 121.

⁵¹⁰ *Decision of the State Council on Amending the Interim Regulations of the PRC on Urban and Town Land Use Tax*, promulgated by the State Council (31 December 2006, entered into effect 1 January 2007).

⁵¹¹ *Interim Regulations of the PRC on Vehicle and Vessel Tax*, promulgated by the State Council (29 December 2006, entered into effect 1 January 2007, repealed by Law of the PRC on Vehicle and Vessel Tax, promulgated by the NPC 25 February 2011, entered into effect 1 January 2012).

⁵¹² Notice of the Ministry of Finance and the State Administration of Taxation on Issues Concerning the Collection of the Real Estate Tax from Foreign Invested Enterprises and Foreign Individuals, promulgated by the Ministry of Finance and State Administration (12 January 2009, entered into effect 12 January 2009).

⁵¹³ *Interim Regulations of the PRC on Farmland Occupation Tax*, promulgated by the State Council (1 December 2007, entered into effect 1 January 2008).

⁵¹⁴ Shan, Gallagher and Zhang, 'National Treatment for Foreign Investment in China', at 121.

the last reforming effort to unify the tax system in China.⁵¹⁵

In sum, China's unification of the tax system has been aimed at creating an investment environment which will encourage fair competition without increasing the burden on FIEs.⁵¹⁶ It demonstrates the non-discrimination principle and thus shows an evolution towards extending national treatment to FIEs.

iii. Reducing the differential treatment of FIEs

Before China's accession to the WTO, the Chinese government applied some differential and preferential treatments to foreign-invested entities. For example, higher requirements for capital and local content were imposed on foreign-invested entities. The former required that the capital of foreign investment by shares should be higher than the required amount specified in the *Company Law*; and the latter required that the foreign-invested entities give first priority to purchasing material (such as required raw and processed material, fuel, parts and auxiliary equipment) in China.⁵¹⁷ After China's accession to the WTO, the aforementioned provisions were gradually eliminated in order to fulfil China's WTO commitments.

iv. Increasing the organisational forms of FIEs

From the organizational forms perspective, there is a multiplication concerning the revised in 2009 so as to comply with the *Anti-Monopoly Law*.

From the perspective of organisational forms, there has been a multiplication of the permitted vehicles for FDI in China. Since its WTO accession, the types of business permitted by the Chinese government concerning foreign investment have included but not been limited to: Chinese-foreign EJVs, WFEs, Chinese-foreign CJVs, branches of foreign companies, companies limited by shares with foreign investment, investment companies by foreign investment, and foreign-funded partnership enterprises. In addition, foreign investors may now invest in China by way of mergers and acquisitions (M&A).⁵¹⁸

More specifically, in 2002, the *Issues Related to Transferring State-Owned Shares and*

⁵¹⁵ *Circular on Unifying the System for Urban Maintenance and Construction Tax and Educational Surcharge on Chinese and Foreign Investment Enterprises and Individuals*, promulgated by the State Council (18 October 2010, entered into effect 1 December 2010).

⁵¹⁶ Shan, Gallagher and Zhang, 'National Treatment for Foreign Investment in China', at 130.

⁵¹⁷ Gao and Jiang, 'Foreign Investment Laws and Policies in China', at 540.

⁵¹⁸ *Ibid.*

*Institutional Shares of Listed Corporations to Foreign Investors*⁵¹⁹ was released. This allows the transfer of the state-owned shares and institutional shares of listed companies to foreign investors subject to the requirements of the *Guiding Catalogue*. In the same year, the *Interim Provisions on Introducing Foreign Investment to Reorganise State-Owned Enterprises*⁵²⁰ was issued. This allows the introduction of foreign investment to reorganise state-owned enterprises (SOEs) and corporate enterprises with state-owned equities, or turn them into corporations with foreign investment. Moreover, foreign investment may be introduced to reorganise SOEs into foreign-invested enterprises by transferring equity to foreign investors, increasing shares, and selling either all or the major assets of the SOE to foreign investors.⁵²¹ In 2006, the *Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* was released by the MOFCOM and revised in 2009 so as to comply with the *Anti-Monopoly Law*.

v. Weakening the monopoly of SOEs

With respect to SOEs, another unavoidable issue in the investment regime was the monopoly position of SOEs in China. SOEs traditionally enjoyed more favourable treatment than FIEs and privately owned domestic enterprises with regard to market access, performance requirements, supply of production input and state bank credits. With China's entry into the WTO, FIEs gained national treatment in new areas, whereas SOEs lost many of their privileges, and domestic private enterprises, which were growing fast in number, continued to receive less favourable treatment than either FIEs or SOEs in terms of market access, bank finance and access to capital markets.⁵²²

vi. Unifying Chinese economic and commercial laws

In order to better implement the national treatment standard in foreign investment law, China also developed its laws and regulations to form a systematic and comprehensive regulatory framework to facilitate and regulate FDI. For example, the *Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors*,⁵²³ issued in

⁵¹⁹ Issued by China Securities Regulatory Commission, Ministry of Finance and State Economic and Trade Commission jointly, promulgated on 1 November 2002, expired.

⁵²⁰ Issued by State Economic and Trade Commission, Ministry of Finance, State Administration for Industry and Commerce and the State Administration of Foreign Exchange jointly, promulgated on 8 November 2002.

⁵²¹ See Article 3 of the *Interim Provisions on Introducing Foreign Investment to Reorganise State-Owned Enterprises*.

⁵²² Qin, 'Trade, Investment and Beyond', at 732.

⁵²³ *Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors*, jointly promulgated by the MOFTEC, the State Tax Bureau, the State Industry and Commerce Bureau and the State Foreign Exchange Bureau (January 2003, entered into effect 12 April 2003, amended 8 August 2006).

2003, was the first comprehensive set of regulations on cross-border M&A in China. The Chinese government also promulgated the *Guidance on the Direction of Foreign Investment* in 2002.⁵²⁴ Together, this Guidance and the periodically revised *Guiding Catalogue*⁵²⁵ comprise the two most important instruments governing the admission of foreign investment in China.

Another effort made by China to follow the international trend of foreign investment law was the establishment of the security review system to monitor M&A activities by foreign investors. Alongside the anti-monopoly review provided in the *Provisions of Merger and Acquisition of Domestic Enterprises by Foreign Investors*, China adopted the *Anti-monopoly Law* in 2007.⁵²⁶ Accompanied by this law, *Provisions on the Criteria for Reporting Concentration of Undertakings* was issued by the State Council on August 2008. In February 2011, the State Council issued the *Circular of the General Office of the State Council concerning Security Review of Mergers and Acquisitions of Domestic Enterprises by Foreign Investors*, which adopts a rather broad definition of the sectors covered.⁵²⁷ Accordingly, the MOFCOM issued its *Provisions on Implementing a Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors to implement the Notice*. After the entry into force of the above-mentioned regulations of the MOFCOM in September 2011, China formally established its security system to systematically review the M&A activities of foreign investors.

At the same time, the extent of national treatment for foreign investment was being further expanded. For example, the *Property Law*, adopted in 2007, provides that 'equal legal status and the right to development of all market subjects shall be protected'.⁵²⁸ The above-mentioned *Anti-Monopoly Law* also makes no distinction between foreign and domestic investors.⁵²⁹

⁵²⁴ *Guidance on the Direction of Foreign investment*, promulgated by the State Council, Decree No 346 (21 February 2002, entered into effect 1 April 2002).

⁵²⁵ *Guiding Catalogue of Industries for Foreign Investment* (promulgated 1995, revised most recently 24 December 2011 by Decree No 12 of the State Development and Reform Commission and the Ministry of Commerce of the PRC, entered into effect 30 January 2012). In addition to this catalogue, China has also adopted a *Catalogue of Encouraged Industries for Foreign Investment in the Middle and Western Area* (published June 2000, revised July 2004 and 2008) and a *Catalogue of Encouraged High-Tech Products for Foreign Investments* (published July 2003, revised 31 December 2006).

⁵²⁶ The *Anti-Monopoly Law of the PRC*, promulgated by the NPC (30 August 2007, entered into effect 1 August 2008).

⁵²⁷ Shan, Gallagher and Zhang, 'National Treatment for Foreign Investment in China', at 131.

⁵²⁸ See Article 6 of the *Property Law of the PRC*, promulgated by the NPC (16 March 2007, entered into effect 1 October 2007).

⁵²⁹ Before the *Anti-Monopoly Law*, some legislation regulating the cross-border M&A activities by foreign investors already existed. See *Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* and

Despite these reforms, however, in practice China has not eliminated all performance requirements, and legal documents inconsistent with the national treatment principle have frequently been published since China's WTO accession. For example, in 2005, the State Administration of Taxation issued the *Notice of the State Administration of Taxation on Some Issues Regarding the Credit of Enterprise Income Tax Against the Investment of Foreign-funded Enterprises and Foreign Enterprises in Purchasing Home Made Products*, which advocated the use of domestically manufactured production lines and integrated equipment by enterprises so as to enjoy credits against enterprise income tax. If the equipment purchased by an enterprise was assembled from parts imported from abroad, such equipment was not eligible for credit against the enterprise income tax.⁵³⁰ Although this notice was invalidated by another legal document in 2011, the six-year validation period granted domestic products a more favourable position than foreign products, which clearly violated the national treatment standard in the TRIMs. This notice is only a random instance among others, and although part of the investment regime, it did raise concerns regarding China's national treatment inconsistency.

In general, however, these small inconsistencies cannot obscure China's great efforts to comply with the national treatment standard in the foreign investment regime. Therefore, in short, since China's accession to the WTO, it has notably evolved towards the application of national treatment to foreign investors and investments.

3. Conclusion concerning China's national treatment standard since its WTO accession

According to the previous analysis, WTO accession significantly expanded China's obligations concerning the accordancy of national treatment to foreign investment.

China revised its foreign investment laws and regulations in order to comply with the national treatment standard in the TRIMs. The China Protocol, however, did not require China to extend all-round national treatment to foreign investors, China enlarged the scope of national treatment considerably by revising its foreign investment laws and regulations,

accompanying text. In 2009, after the enactment of the *Anti-Monopoly Law*, the Chinese government amended the Provisions to ensure compliance with the *Anti-Monopoly Law*. See Shan, Gallagher and Zhang, 'National Treatment for Foreign Investment in China', at 131.

⁵³⁰ See Article 1 and 2 of the *Notice of the State Administration of Taxation on Some Issues Regarding the Credit of Enterprise Income Tax Against the Investment of Foreign-funded Enterprises and Foreign Enterprises in Purchasing Home Made Products*.

removing preferential treatment for FIEs, reducing differential treatment for FIEs, increasing the permitted organisational forms of FIE, weakening the monopoly of SOEs, and unifying its economic and commercial laws.

However, with regard to investment, a bitter fact is that there is still a huge gap between Chinese practice and WTO investment rules. For example, China forbids foreign investment in some industries and requires local partnerships in others.⁵³¹ These measures are in clear violation of the WTO's national treatment principle. By imposing performance requirements, such as minimum local content requirements,⁵³² on foreign investment and requiring minimum export commitments,⁵³³ China appears to be jeopardising the TRIMs.⁵³⁴

FDI in China is regulated by the three investment laws and their regulations, together with the *Company Law* and hundreds of administrative regulations. The three investment laws each cover one type of foreign investment entity respectively, making the legal system very complicated. Moreover, certain provisions in the three investment laws are in conflict with the *Company Law*. Therefore, considering the huge gap between Chinese practice and the WTO investment rules, as well as the drawbacks of the current FDI framework, it is necessary and indispensable for China to reform its current FDI framework, including the development of a more rigorous national treatment standard.

To sum up, China's membership of the WTO has had a positive impact on its FDI framework, particularly when it comes to the application of the national treatment standard. However, the necessity to reform the Chinese FDI framework and upgrade its national treatment standard is urgent and crucial.

⁵³¹ The *Interim Provisions on Guidance for Foreign Investment* and the *Catalogue for the Guidance of Foreign Investment Industries* are the regulations to this end. The *Interim Provisions* classify projects involving foreign investment into four categories: projects in which foreign investment shall be encouraged, permitted, restricted, or prohibited. They provide, for example, that broadcasting and television stations are closed to foreign investment, and broadcast and television transmitting systems are only partially open to foreign participation. For the latter, majority Chinese participation is a must.

⁵³² The practice often differs from the law in this respect. For example, Article 37 of the *Detailed Rules for the Implementation of the Law of the People's Republic of China on Chinese-Foreign Co-operative Joint Ventures* provides: a co-operative joint venture may decide, on its own, to purchase either within the territory of China or from foreign countries machines and equipment, raw materials, fuels, parts and components, accessories, transportation tools, and office articles, etc. But in practice the partners are 'encouraged' by the local government to make a commitment on the local content rate. Failure to set a local content rate may sometimes result in a refusal to approve the contract.

⁵³³ Article 12(8) of the above-cited *Detailed Rules* is a similar provision in relation to the minimum export rate which reads: "The contract of a co-operative joint venture shall bear the following items: arrangement for sales of products in and outside China. A minimum export rate of the sales is not referred to directly but has the same effect." Article 38 further confirms that: "The State encourages co-operative joint ventures to sell their products on international markets."

⁵³⁴ Kong, 'China's WTO Accession', at 674.

C. The third generation of foreign investment law in China: a unified foreign investment law with pre-establishment national treatment

1. A unified foreign investment law in China

In January 2015, the MOFCOM released a discussion draft of the proposed *Foreign Investment Law*, soliciting comments from the public. The plan is for the discussion draft of the *Foreign Investment Law*, upon its enactment, to replace the existing laws regulating foreign investments in China with a uniform law, and this is expected to affect a wide range of foreign entities and investments in China. The discussion draft of the *Foreign Investment Law* is generally seen as a welcome change to China's existing legal system, and embodies an expected trend towards the rationalisation of China's regulatory regime for foreign investment in line with prevailing international practice.

In general, the discussion draft of the *Foreign Investment Law* intends to consolidate the existing laws regulating foreign investments into one uniform statutory regime, and unify the corporate legal requirements for both foreign and domestic investments in China. This discussion draft is seen as a solution to the current cumbersome and inconsistent legislation concerning foreign investment.

In the terms of this discussion draft, all foreign investment will use one of the general statutory vehicles for business associations allowed under Chinese *Company Law*, such as a limited liability company. The current corporate forms permitted for foreign investments, including EJV, CJV and WFE, will no longer be used.

Among others, one notable change proposed by this discussion draft is the mention of pre-establishment national treatment with a negative list approach, which will be further discussed in the next section.

2. Pre-establishment national treatment with a negative list approach

a. Pre-establishment national treatment with a negative list approach in Chinese foreign investment law

Notably, the discussion draft of the *Foreign Investment Law* proposes a default norm of national treatment for foreign investment, which will allow foreign investors to make

investments on the same terms as Chinese investors without additional approvals or sector restrictions except as otherwise required by law.⁵³⁵ It is the first time ever that a Chinese foreign investment law has incorporated the term 'national treatment' and specified that the treatment to be accorded to foreign investors is a national treatment.

However, Article 6 of this discussion draft does not lead to full national treatment for foreign investors without any limitation or exception. Article 22 of the discussion draft stipulates that:

where foreign investors and their investments are to be granted a treatment less favourable than that granted to Chinese investors and their investments, or are to be subject to additional restrictions, such treatment or restrictions shall be provided in the form of laws. Administrative regulations or decisions of the State Council, and shall be included into the Catalogue of Special Administrative Measures.

Therefore, if the underlying business of a FIE falls within the *Catalogue of Special Administrative Measures*, market entry clearance by the MOFCOM or its local counterparts will be required.

Articles 6 and 22 of the discussion draft do however fundamentally change the national treatment standard in the Chinese foreign investment regime. Before these articles were proposed, existing regulations required all foreign investors who intended to set up or acquire a company in China to first obtain approval from the MOFCOM or its local counterparts before the business could be registered with the Administration of Industry and Commerce. The discussion draft changes this requirement by limiting the need for approval to those foreign investments listed on the *Catalogue of Special Administrative Measures*, also known as the 'negative list', to be released by the State Council.

Therefore, China plans to adopt the prevailing international standard of pre-establishment national treatment with a negative list approach in its foreign investment law for the first time. But this is not the first time that Chinese law as a whole has incorporated 'pre-establishment national treatment'. Previously, in 2013, pre-establishment national treatment with a negative list approach was adopted by the China (Shanghai) Pilot Free Trade Zone (SPFTZ). Indeed, the initial adoption of the pre-establishment national treatment concept by China appeared during the Fifth Round of the U.S-China S&ED,

⁵³⁵ See Article 6 National Treatment of the discussion draft of the *Foreign Investment Law*:

"Foreign investors are entitled to national treatment when making investments within the territory of China, unless otherwise provided in the *Catalogue of Special Administrative Measures for Foreign Investments* formulated in accordance with Article 23 hereof."

which dates back to July 2013. Under external negotiation pressure, China agreed to negotiate market access commitments using a 'negative list' approach, rather than apply its former practice of using a 'positive list',⁵³⁶ and the two countries agreed to negotiate the China-US BIT on the basis of pre-establishment national treatment with a negative list approach.⁵³⁷ It was the first time that China, either internationally or domestically, had made an official commitment regarding the adoption of pre-establishment national treatment with a negative list approach.

According to the discussion draft of the *Foreign Investment Law*, the Chinese 'negative list' is expected to set forth 'restricted' and 'prohibited' investments, and will be issued separately by the State Council. Investors with restricted investments will have to apply for foreign investment approval by submitting the required materials, while prohibited investments will have little chance of obtaining market entry approval. Foreign investments outside the negative list will be offered national treatment, and will be able to register directly with the Administration of Industry and Commerce in the same way as domestic investors. This will reduce the time line required for foreign investment projects and offer parties greater flexibility in structuring their investments, as the MOFCOM approval of relevant contracts will be no longer required.⁵³⁸

b. Pre-establishment national treatment with a negative list approach in the SPFTZ

Although the abovementioned commitment represents a breakthrough concerning the national treatment standard in China, the pre-establishment national treatment and negative list model incorporated in the *Framework Plan for China (Shanghai) Pilot Free Trade Zone*⁵³⁹ in September 2013 was the first incorporation of this more rigorous national treatment standard in Chinese legal system.

In the *Framework Plan for China (Shanghai) Pilot Free Trade Zone*, the SPFTZ shall explore and establish a 'negative list' administrative mode, according to the generally accepted international rules, provide pre-establishment national treatment for foreign investment on a trial basis, and research and develop a negative list for foreign investment

⁵³⁶ Wang, 'Super-National Treatment', at 379.

⁵³⁷ Kong, 'The Foreign Direct Investment Regime in China', at 874.

⁵³⁸ Mayer Brown JSM, 'Draft Foreign Investment Law: Fundamental Changes to Foreign Investment Regime in China', Legal Update, Corporate & Securities, Mainland China, 28 January 2015, available at: <https://www.mayerbrown.com/files/Publication/c7e56576-38b5-4ed3-8e2c-4b07e1df01bb/Presentation/PublicationAttachment/aa023dbe-b0c0-4244-ba86-538b3e6647e1/150128-PRC-Draft-ForeignInvestmentLaw.pdf>. [10.07.2017]

⁵³⁹ Issued by the State Council on September 18, 2013, No .38 [2013] of the State Council.

in the SPFTZ which is inconsistent with national treatment principle. For investment sectors outside the negative list, the policy for foreign and national investors shall be consistent, and the approval requirement for foreign-invested projects shall be replaced with a filing system.⁵⁴⁰

Accordingly, the government of the Shanghai Municipality promulgated the *Special Administrative Measures of China (Shanghai) Pilot Free Trade Zone for Admittance of Foreign Investments* (Negative List 2013)⁵⁴¹, which covers 1,069 sub-categories in 18 industry categories in the national economy, and sets out 190 special administrative measures, as well as temporarily adjusting 11 administrative examination and approval items regulated by the three investment laws, including the *Law of the PRC on Wholly Foreign-owned Enterprise*, and 32 administrative examination and approval items or special administrative measures for the admittance of foreign investment, regulated by 15 administrative regulations and three administrative measures issued by the State Council within the free trade zone.

So China explored the management model of 'pre-establishment national treatment with a negative list' as authorised by the 4th Session of the Standing Committee of the 12th NPC and determined by the State Council. Therefore, the foreign investment projects which are not covered in the negative list will, according to the principle of treating domestic and foreign investors on an equal basis, be subject to a filing system instead of verification (except for the verifications retained for domestically invested projects as stipulated by the State Council), and the contracts and articles of association of foreign invested enterprises are subject to filing instead of examination and approval. By March 2014, newly established and changed foreign investments not covered in the negative list were subject to a filing administration, and those investments amounted to 93% of all applications for foreign investment, thus a filing-based foreign investment administration system has initially taken shape.⁵⁴²

The improvement of the negative list currently continues, and the SPFTZ negative list is revised annually; something which has demonstrated significant progress in shortening the

⁵⁴⁰ See Article 2.3 of the *Framework Plan for China (Shanghai) Pilot Free Trade Zone*.

⁵⁴¹ *Special Administrative Measures of China (Shanghai) Pilot Free Trade Zone for Admittance of Foreign Investments* (Negative List 2013) is issued by the government of Shanghai Municipality and revised annually afterwards, the Chinese version is available at: <http://www.shanghai.gov.cn/nw2/nw2314/nw2319/nw11494/nw12331/nw12343/nw31886/u26aw37036.html>. [10.07.2017]

⁵⁴² Trade Policy Review Report by China, WT/TPR/G/300, 27 May 2014, at 21, available at: https://www.wto.org/english/tratop_e/tpr_e/g300_e.pdf. [10.07.2017]

list, which was reduced from 190 special administrative measures in the 2013 version to 122 special administrative measures in the 2015 version. The SPFTZ negative list has also been shared by three other free-trade zones in Guangdong, Tianjin and Fujian since 2015.

After a three-year trial of the negative list model, the Chinese central government decided to apply the negative list model nationwide, so in September 2016, the Standing Committee of the NPC was authorised to make a decision concerning the revision of the *Law of the PRC on Wholly Foreign-Owned Enterprises*, *Law of the PRC on Chinese-Foreign Equity Joint Ventures*, *Law of the PRC on Chinese-Foreign Contractual Joint Ventures* and *Law of the PRC on the Protection of Investments by Taiwan Compatriots*.⁵⁴³ According to this decision, one article with similar content respectively was added to each of those four, requiring any FIE whose formation does not involve the implementation of special administrative measures as prescribed by the state to be subject to a filing system concerning certain approval items. These new amendments to those four laws, together with a negative list based on the SPFTZ negative list of 2015, have been applied nationwide since October 2016. It is also clear that the Chinese government is ready to modify relevant regulations and policies so as to better implement a pre-establishment national treatment standard with a negative list approach.

Externally, the adoption of pre-establishment national treatment with a negative list approach was pressed for by the United States during the China-US BIT negotiation. Although the internal demands for China to reform its domestic economic and legal system was negligible, China's determination to adopt the prevailing, more rigorous national treatment standard originated partly from its inconsistency with the United States in this regard, and this issue will be further discussed in Chapter 4.

D. Conclusion concerning the change in the national treatment standard in Chinese municipal law governing the investment regime

This section discusses the evolving national treatment standard in Chinese foreign investment law, including the evolution from non-existent national treatment for foreign investments in pre-WTO accession period, through the adoption of WTO national

⁵⁴³ *Decision of the Standing Committee of the NPC on Amending Four Laws including the Law of the PRC on Wholly Foreign-Owned Enterprises*, issued by the Standing Committee of the NPC on September, 3, 2016, Order No. 51 of the President of the PRC.

treatment concerning trade-related investment measures after China's WTO accession, to the final upgrading into the prevailing pre-establishment national treatment with a negative list. The clear improvement with regard to the national treatment standard applied to foreign investment in Chinese municipal law is indisputable.

Although there was a degree of national treatment in China's pre-WTO accession period, especially in the late 1990s, when China was ready to embrace the international trade regime and reform its domestic legal system, the author does not consider that, as a whole, the combination of preferential and differential treatment – with some separate provisions according national treatment – could truly be qualified as national treatment. This is also proof of the author's disagreement with the prevailing Chinese description of 'super/sub-national treatment'.

Since its accession to the WTO, China's determination with regard to the pursuit of a more rigorous national treatment standard has been obvious. It can be seen from the fact that China made WTO-plus commitments with regard to the TRIMs and conducted thorough revisions concerning the treatment accorded to foreign investment so as to provide equal treatment to both domestic and foreign investors, as far as possible. More recently, the commencement of pre-establishment national treatment is further supporting evidence of the more liberalised approach adopted by China in its foreign investment regime.

Therefore, from a municipal law perspective, China can be seen to be evolving towards a more rigorous national treatment standard, and the next section will focus on China's national treatment standard in international investment law.

II. China's BIT strategy regarding the national treatment clause

When discussing the FDI framework of a country, it is reasonable to include that country's participation in international agreements; namely BITs and multilateral investment agreements. Up to June 2017, China had signed 104 BITs with other countries and acceded to two multilateral investment agreements: the Convention Establishing the Multilateral Investment Guarantee Agency (ratified by China in 1988) and the Convention on Settlement of Investment Disputes between States and Nationals of Other States (acceded to in 1992).

Following the discussion of the national treatment standard in the Chinese foreign

investment regime, this section will focus on the national treatment standard in China's international investment law, especially on China's BIT practice. But before a detailed analysis is undertaken of China's national treatment clauses in individual BITs, a brief concerning China and BITs in general is necessary.

A. China and BITs in general

It is generally acknowledged that the first modern BIT was the Germany-Pakistan BIT, which was signed on 25 November 1959 and entered into force in 1961.⁵⁴⁴ Germany was the first country to develop a programme of negotiating BITs, however, it was far from the last. In subsequent years, other developed countries have begun their own programmes of BIT negotiation, including France (1960), Switzerland (1960), the Netherlands (1963), Italy (1964), the Belgo-Luxembourg Economic Union (1964), Sweden (1965), Denmark (1965), Norway (1966), the United Kingdom (1975), Austria (1976), Japan (1977), and the United States (1977).⁵⁴⁵ Within a reasonably short time, these traditionally capital-exporting countries have built up significant BIT networks.

As a prevailing international investment law approach, the purpose of BITs is to provide for the promotion and protection of foreign investments by nationals of one country in the territory of another country. To this end, they set out certain obligations with which both countries agree to comply regarding the treatment of investment or investors of the other country's nationality.⁵⁴⁶ Thus, BITs were seen as working both ways, on the one hand, developing countries were provided with a means of attracting much-needed foreign investment, and BITs also enable developing countries to attract investment, as foreign investors feel more comfortable investing in a country if they know that there is a BIT in place which will cover and protect their investment. On the other hand, developed countries likewise gained the comfort of knowing that their nationals would benefit from the protection provided by BITs. Consequently, BITs were negotiated with great interest by both developed and developing countries.⁵⁴⁷ China, as both a trend-follower and latecomer

⁵⁴⁴ Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investment, signed 25 November 1959, Bundesgesetzblatt II, No. 33 793 (entered into force 6 July 1961).

⁵⁴⁵ Kenneth Vandavelde, *Bilateral Investment Treaties: History, Policy and Interpretation* (Oxford: Oxford University Press, 2010), at 55.

⁵⁴⁶ Chester Brown, 'The Development by States of Model Bilateral Investment Treaties', in Wenhua Shan, Jinyuan Su (ed), *China and International Investment Law: Twenty Years of ICSID Membership* (Boninklijke Brill NV, Leiden 2015), at 119.

⁵⁴⁷ Vandavelde, *Bilateral Investment Treaties*, at 57-58.

to international investment treaty negotiation, started to build up a network of BITs after 1980.

In the past three decades since the first Chinese BIT was signed with Sweden in 1982, China has signed 104 BITs.⁵⁴⁸ UNCTAD statistics show that China ranks second in the league table on the number of its BITs, second only to Germany, and it appears that China is set to become the state which has entered into the most BITs.

Initially, as a result of the 'reform and opening' policy, China began to sign BITs with a number of developed countries in 1980s in order to attract FDI. During the 1980s, China signed 24 BITs, 14 of these with European countries. It is therefore unsurprising that the Chinese BITs of the 1980s generally follow the BIT model favoured by European countries, as China had only just begun to learn how to regulate FDI via BITs.

In the 1990s, China signed 53 BITs, and most of these were signed with developing countries. During this decade, not only did the number of Chinese BITs grow rapidly, the quality also improved, as more concrete provisions were incorporated into the treaties. Currently, in the 2000s and 2010s, China has shifted to a slower tempo when it comes to the conclusion of BITs, with only 17 newly signed BITs and 16 renegotiated BITs. Most of these renegotiated BITs were with the European countries that had signed BITs with China in the early years and wanted to update them.⁵⁴⁹ Although there has been a reduction in the number of Chinese BITs in the 2000s and 2010s, the improvement in the quality during this period has been obvious.

Therefore, in general, China has signed BITs with both developed and developing countries around the world. However, interestingly, China has not yet signed a BIT with the United States. This is mainly due to the peculiar approach of the United States of combining investment protection and liberalisation.⁵⁵⁰ The issue of the negotiation of a China-US BIT will be discussed in section II.D.1 of this chapter.

As previously mentioned, BITs are the biggest source of the host's investment protection obligations. While each bilateral treaty is drafted to take into account the particular context of the relationship between the two parties, most BITs share some common characteristics in form and basic content. Therefore, according to some scholars, with regard to the

⁵⁴⁸ See MOFCOM website: <http://tfs.mofcom.gov.cn/article/Nocategory/201111/20111107819474.shtml>. [10.07.2017]

⁵⁴⁹ Gallagher and Shan, *Chinese Investment Treaties*, at 32.

⁵⁵⁰ Axel Berger, 'Investment Rules in Chinese Preferential Trade and Investment Agreements: Is China following the global trend towards comprehensive agreements?', German Development Institute, Discussion paper, July 2013, at 7.

'strength' of investment protection, Chinese BITs can be divided into three generations as shown in Table 4.⁵⁵¹

Table 4. Three generations of Chinese-BITs

Generation	Approach	Period	Character
1st	Restrictive approach	1980s-1998	Modelled on the European BIT approach. No, or restricted, national treatment. Investor/state dispute settlement only concerning the amount of compensation for expropriation.
2nd	Legalised approach	1998-2007	Modelled on the European BIT approach. National treatment subject to national law or non-conforming measures. Full investor/state dispute settlement.
3rd	NAFTA-like approach	2007-Present day	(Partly) modelled on the NAFTA approach. Fair and equitable treatment in accordance with customary international law. MFN and national treatment 'in like circumstances'. MFN treatment not extended to investor/state dispute settlement. Pre-establishment MFN treatment. Free transfer of funds with exceptions in the case of financial crisis.

Although the table above is the most commonly used categorisation of Chinese BITs, there exist various kinds of categories according to different standards and different perspectives. For the particular topic of this dissertation, the following categories will be based on the evolution of the national treatment clause in Chinese BITs, as this dissertation only focuses on the issue of national treatment.

⁵⁵¹ *Ibid.*

B. Three generations of Chinese-BITs: based on the evolution of national treatment clauses

In general, the essential content of BITs is that they provide standards of investment protection, which each contracting country promises to accord to investors of the other contracting country within its territory. Many BITs follow a fairly typical format, and provide for several well-known standards of investment protection, including the obligations of full protection and security, non-arbitrariness, non-discrimination (MFN and national treatment), fair and equitable treatment, expropriation only with compensation, and free transfers of payments.⁵⁵² Among them, the national treatment standard is perhaps one of the most difficult standards to achieve, as it touches upon economically and politically sensitive issues.

Within the international investment regime, the national treatment standard is generally considered to be the obligation to accord investors and their investments treatment which is no less favourable than that accorded to domestic investors, namely national treatment.⁵⁵³ Of the 104 Chinese BITs, not all of them include a national treatment clause, and those BITs will be divided into the following three categories.

1. The first generation of Chinese-BITs based on the evolution of the national treatment clause: no national treatment clause or similar formulation

Initially, in the 1980s, China's national investors, particularly those involved in 'infant industries', were initially in an economically disadvantageous position as compared to foreign investors. Although BITs were signed to attract foreign investors, because of a strong inclination to protect national investors and domestic industries Chinese BITs did not initially grant national treatment to foreign investors. This unusual approach, with no national treatment in a BIT, is exemplified by the BITs concluded between China and 71 other countries.⁵⁵⁴ This means that more than half of the existing Chinese BITs do not

⁵⁵² Brown, 'The Development by States of Model Bilateral Investment Treaties', at 120-121.

⁵⁵³ Schefer, *International Investment Law*, at 36.

⁵⁵⁴ Those countries include Sweden, France, Belgian-Luxembourg Economic Union, Finland, Norway, Italy, the Netherlands, Switzerland, Poland, Bulgaria, Hungary, Portugal, Spain, Greece, Ukraine, Moldova, Belarus, Albania, Croatia, Estonia, Lithuania, Romania, Thailand, Singapore, Kuwait, Sri Lanka, Malaysia, Pakistan, Turkey, Mongolia, Uzbekistan, Kyrgyzstan, Armenia, Philippines, Kazakhstan, the United Arab Emirates, Oman, Turkmenistan, Vietnam, Laos, Israel, Tajikistan, Georgia, Azerbaijan, Indonesia, Cambodia, Syria, Qatar, the Lebanon, Bahrain, New Zealand, Papua New Guinea, Australia, Ghana, Mauritius, Tunis, Zimbabwe, Algeria, Sudan, Cape Verde, Ethiopia, Bolivia,

contain a national treatment clause or similar formulation. In fact, until the end of the 1990s, China did not agree to incorporate the national treatment standard in its BITs as a matter of principle, although non-discriminatory measures were incorporated in a few Chinese BITs as a result of the insistence of the other contracting countries.

The omission of the national treatment standard can be explained on the grounds that China did not wish to extend the preferential treatment enjoyed by its domestic enterprises to foreign enterprises. For example, granting national treatment to FIEs was difficult to achieve, as China provided price subsidies for SOEs. At that time, many firms were still state-owned, and granting the same price subsidies to foreign investors was seen as problematic, as the private sector in China was still extremely weak.

Traditionally, the scope of the national treatment clause in Chinese BITs was typically limited to the protection of investments from expropriation or nationalisation. China also preferred the 'fair and just treatment' standard to the 'national treatment' standard in dealing with foreign interests.

In sum, the first generation of Chinese BITs is the most restrictive in terms of investors' rights and the most respectful in terms of host country discretion. In general, BITs enshrining this approach are not common,⁵⁵⁵ and over the years China has changed its policy towards national treatment in BITs.

2. The second generation of Chinese-BITs based on the evolution of the national treatment clause: various formulations with non-standard national treatment clauses

Although the Chinese BITs concluded during the 1980s and 90s do not, in general, contain a national treatment clause, there are exceptions which incorporate variations on a non-standard national treatment clause. As a general principle in international law, there is no universal definition of national treatment in either the trade or the investment regime. With the treaty-based nature of international law, the definition of national treatment must be interpreted in the context of specific situations, especially for specific treaties.⁵⁵⁶ Therefore, the following formulations of the national treatment clause in Chinese BITs

Uruguay, Ecuador, Chile, Peru, Argentina, Jamaica, Cuba, South Africa and Barbados.

⁵⁵⁵ UNCTAD, *International Investment Agreements: Key Issues*, at 184.

⁵⁵⁶ Wang, 'Super-National Treatment', at 393.

should be considered as non-standard formulations with a non-discriminatory nature.

a. 'Not to take discriminatory measures'

As the first step towards national treatment, the China-Germany BIT signed in 1983 and the China-Austria BIT, signed in 1985 incorporate the following clause in Article 3.

4. Without prejudice to the legislation on the joint venture with foreign equity participation and foreign wholly-owned enterprises, either Contracting Party shall guarantee *not to take discriminatory measures* against the joint ventures in which the investors of the other Contracting Party participates and investments the investors of the other Contracting Party have made.

Moreover, the China-Denmark BIT signed in 1985 made this more specific in Article 3 Protection of Investment:

(4) Each Contracting Party guarantees that without prejudice to its laws and regulations it shall *not adopt any discriminatory measures* against any joint venture with participation by share-holding nationals or companies of the other Contracting Party, or against investments made by nationals or companies of the other Contracting Party, including the management, maintenance, use, enjoyment or disposal of such investments.

Although missing the incorporation of 'in like circumstance' and 'treatment no less favourable than', the aforementioned clauses were starting to evolve towards a non-discriminatory national treatment standard with the emphasis on not taking discriminatory measures against certain foreign investors. This formulation is undeniably better than no incorporation of a national treatment standard at all.

b. 'The same as its own nationals'

Alongside the formulation of '*not to take discriminatory measures*', more Sino-BITs began to incorporate the phrase: '*the same as that accorded to its own nationals*' in the national treatment clause.

In the China-UK BIT, signed in 1986, Article 3, Treatment of Investment, incorporates the following:

(3) In addition to the provisions of paragraphs (1) and (2) of this Article either Contracting Party shall to the extent possible, accord treatment in accordance with the stipulations of its laws and regulations to the investments of nationals or companies of the other Contracting Party *the same as that accorded to its own nationals or companies*.

Furthermore, the China-Slovenia BIT signed in 1993, the China-Iceland BIT signed in

1994, the China-Yugoslavia BIT signed in 1995 and the China-Macedonia BIT signed in 1997 also incorporate '*the same as that accorded to its own investors*'.⁵⁵⁷

The formulation '*the same as its own nationals*' is non-discriminatory in nature, although its scope is narrower than the 'no less favourable than' formulation. According to the analysis of the national treatment principle in Chapter 1, extending the same treatment to foreign and national investors is within the scope of the national treatment principle. Therefore, the incorporation of '*the same as its own nationals*' is a formulation of the national treatment principle, although not a standard one.

c. 'Whichever is more favourable'

In the China-Cyprus BIT, signed in 2001, an innovation appeared in Article 3.3 as follows:

Each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment *not less favourable than* that accorded to the investments and associated activities by its own investors or by investor of any third state, *whichever is more favourable to the investor concerned*.

The China-Yemen BIT signed in 1998, the China-Gabon BIT signed in 1997 and the China-Madagascar BIT signed in 2005 also incorporate the same formulation in their 'Treatment/Protection of Investment' clause.

In these aforementioned clauses, the 'no less favourable than' formulation does exist, although the whole clause requires a choice between national treatment and MFN, whichever is more favourable to the foreign investor. With the existence of 'no less favourable than', the aforementioned formulation is a special form of the national treatment clause which incorporates the MFN principle, the result, however, is to the benefit of the foreign investors.

⁵⁵⁷ See Article 3.2 in China-Slovenia BIT:

'Either contracting Party shall to the extent possible, accord treatment in accordance with the stipulations of its laws and regulations to the investments of investors of the other Contracting Party the same as that accorded to its own investors.'

See Article 3.3 in China-Iceland BIT:

'In addition to the provision of paragraphs 1 and 2 of this Article either Contracting Party shall, to the extent possible, accord treatment in accordance with the stipulations of its laws and regulations to the investments of investors of the other Contracting Party the same as that accorded to its own investors.'

See Article 3.2 in China-Yugoslavia BIT:

'In addition to the provisions of paragraph 1 of this Article either Contracting Party shall, to the extent possible, accord treatment in accordance with the stipulations of its laws and regulations to the investments of investors of the other Contracting Party, the same as that accorded to its own investors.'

See Article 3.3 in China-Macedonia BIT:

'In addition to provisions of paragraphs 1 and 2 of this Article, either Contracting Party shall, to the extent possible, accord treatment in accordance with the stipulations of its laws and regulations to the investments of investors of the other Contracting Party the same as that accorded to its own investors.'

3. The third generation of Sino-BITs based on the evolution of the national treatment clause: a separate national treatment clause

a. A national treatment principle which limited to 'returns and business activities in connection with the investment'

The China-Japan BIT signed in 1988 was a breakthrough, as it was the first Chinese BIT to adopt the '*no less favourable than*' formulation and the MFN standard in Article 3.⁵⁵⁸

2. The treatment accorded by either Contracting Party within its territory to nationals and companies of the other Contracting Party with respect to investments, returns and business activities in connection with the investment shall *not be less favourable than that accorded to nationals and companies of the former Contracting Party*.

Subsequently, the China-Czech and Slovak BIT signed in 1991,⁵⁵⁹ the China-South Korea BIT signed in 1992, the China-Morocco BIT signed in 1995, the China-Saudi Arabia BIT signed in 1996, the China-Trinidad and Tobago BIT signed in 2002 and the China-Guyana BIT signed in 2003 also incorporate a similar national treatment clause in Article 3. However, the scope of those national treatment clauses is limited to returns and business activities, and are rather narrow compared to the current national treatment clause.

b. A broader national treatment standard in a separate clause

Since 2000, China has been more active in the incorporation of a broader national treatment clause as compared to its previous rather hostile attitude, and most of the BITs signed by China since 2000 have been broader as regards the scope of the national treatment principle.

For example, the China-Congo BIT signed in 2000 regulates as follows:⁵⁶⁰

Without prejudice to its laws and regulations, each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less favourable than that accorded to the investments and associated activities by its own investors.

⁵⁵⁸ See Article 3.2 in China-Japan BIT.

⁵⁵⁹ Slovakia succeeded the China-Czech and Slovakia BIT after its independence. See Article 3.2 of the China-Czech and Slovakia BIT:

'2. The treatment and protection accorded by either contracting Party within its territory to investors, the other Contracting Party with respect to investments, returns and business activities in connection with the investment shall not be less favourable than that accorded to its own investors.'

⁵⁶⁰ See Article 3.2 of the China-Congo BIT.

Similar national treatment clauses were incorporated into all the Chinese BITs which followed: China-Iran, signed in 2000, China-Myanmar, signed in 2001, the renegotiated China-Nigeria BIT signed in 2001, the renegotiated China-Germany BIT signed in 2003, the renegotiated China-Netherlands BIT signed in 2004, the China-Equatorial Guinea BIT signed in 2005, the China-North Korea BIT signed in 2005, the renegotiated China-Spain BIT signed in 2005, the renegotiated China-Portugal BIT signed in 2005, the renegotiated China-Belgian-Luxembourg Economic Union BIT signed in 2005, the China-Russia BIT signed in 2006, the China-India BIT signed in 2006, the renegotiated China-France BIT signed in 2007, the China-Malta BIT signed in 2009, and the China-Mali BIT signed in 2009.

The core element of national treatment, the 'no less favourable treatment', is included and organised in a standardised way in the aforementioned BITs. Thus, although different countries have different demands concerning the treatment of investment, China's approach to national treatment in this period was quite positive, and evolved towards a more liberal and comprehensive standard.

c. A comprehensive national treatment clause

After 2010, the national treatment clauses in Chinese BITs evolved into a third stage, with national treatment as a separate clause incorporating more comprehensive content. This evolution is exemplified by the following Sino-BITs: the renegotiated China-Finland BIT, signed in 2004; the renegotiated China-South Korea BIT, signed in 2007; the renegotiated China-Uzbekistan BIT, signed in 2011; the China-Japan-South Korea BIT, signed in 2012; the China-Canada BIT, signed in 2012, and the China-Tanzania BIT, signed in 2013.

Of these, the national treatment clause in the China-Canada BIT represents the highest level of national treatment standards in Chinese BITs to date. Article 6 of the China-Canada BIT regulates as follows:

1. Each Contracting Party shall accord to investors of the other Contracting Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the expansion, management, conduct, operation and sale or other disposition of investments in its territory.
2. Each Contracting Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the expansion, management, conduct, operation and sale or other disposition of investments in its territory.
3. The concept of "expansion" in this Article applies only with respect to sectors not subject to a prior approval process under the relevant sectoral guidelines and

applicable laws, regulations and rules in force at the time of expansion. The expansion may be subject to prescribed formalities and other information requirements.

One of the most evident developments in this BIT is the incorporation of '*in like circumstance*'. This means that where an investor wishes to challenge a measure on the basis of its being discriminatory, its position will have to be compared to that of a national company working in the same sector. Thus, the two substantial contents of the national treatment principle discussed in Chapter 1 are both incorporated here. This model is also the most commonly used formulation of the national treatment standard in both BITs and the Investment Chapters of FTAs worldwide.

However, the establishment stage of a foreign investment is excluded from the national treatment clause, which means that the scope of national treatment in the current Chinese BITs does not include the pre-establishment stage, something which falls short of the NAFTA national treatment standard. The gap between Chinese BITs and the NAFTA will be discussed more specifically in Chapter 4.

Both foreign investors and their investments are included in the national treatment clause above, and it also explicitly defines the stages of a foreign investment in the host under expansion, management, conduct, operation and sale or other disposition of investments. Due to the treaty-based nature of the international law, and without a universal definition of national treatment in the investment regime, the definition of national treatment has to be interpreted in the context of specific treaties, therefore, the more explicit a national treatment clause, the more practical and predictable the outcomes will be for both the foreign investors and the host. Thus, except for the omission of an establishment stage, the China-Canada BIT is similar to the prevailing international formulation of the national treatment clause. Despite the gaps still to be filled, the developments evident in the more recent Chinese BITs have been welcomed by other countries.

4. Conclusion concerning the evolution of the national treatment clause in Chinese-BITs

As can be seen above, with regard to the evolution of the national treatment clause, the three generations of Chinese BITs are as follows:

There was initially no incorporation of national treatment or any similar formulation throughout the 1980s and 90s. Although China's market had been opening up to foreign

investment in accordance with the 'reform and opening' policy, China was reluctant to treat foreigners equally, and still demonstrated a strong inclination to protect domestic enterprises and industries, particularly SOEs and other sensitive sectors. As for political concerns, China was concerned that the huge inflow of foreign capital might distort the fragile Chinese economy, so national treatment clauses were not generally incorporated in the earlier BITs.

From the early 1990s, as China pursued its economic reforms and continued to open up to the outside world, and with a view to attracting more FDI, it began to include national treatment in BITs, but with certain qualifications. While there is one example in the China-Japan BIT, signed in 1988, which includes national treatment in Article 3, it is not until the 1990s that the national treatment clause is incorporated more often. However, the author finds that the national treatment clauses incorporated into Chinese BITs in the 1990s exhibit various formulations of non-standard national treatment clause, without the inclusion of 'in like circumstance' and 'no less favourable than'. What those BITs all have in common is some qualification of the national treatment standard, namely that national treatment shall be limited by national laws and regulations, or verbatim: 'in accordance with the stipulations of its laws and regulations'.⁵⁶¹ Despite these qualifications and non-standard forms such as '*not to take discriminatory measures*', '*the same as its own nationals*' and '*whichever is favourable*', the author feels that this second generation of BITs do embrace the non-discriminatory core of the national treatment standard. Therefore, despite various non-standard formulations of the national treatment clause, the second generation Chinese BITs were evolving towards a more liberalised national treatment principle, and though gradual, the evolutionary process was evident.

Since 2000, the third generation of Chinese BITs have finally included a more standard version of the national treatment clause, although it took more than a decade for China to conclude a truly comprehensive national treatment clause in the China-Canada BIT. In this third generation of BITs, the scope of national treatment has been enlarged from '*returns and business activities in connection with the investment*' to '*investors and investment of investors*', and the formulation of the national treatment clause has been completed with the inclusion of '*in like circumstance*' and '*no less favourable than*'. The use of more explicit expressions, such as '*expansion, management, conduct, operation and sale or*

⁵⁶¹ See Article 3.2 of the China-Slovenia BIT signed in 1993.

other disposition of investments' has also been evident. From a standardisation perspective, the separate national treatment clauses in the latest Chinese BITs, together with their formulation, conform to the internationally prevailing formulation of the national treatment principle for BITs. However, what still lags behind the NAFTA standard is the omission of a pre-establishment stage. China did, however, make an official commitment regarding the adoption of pre-establishment treatment in the China-US BIT negotiations in July 2013, so perhaps it is not unreasonable to expect a NAFTA-like national treatment clause in the China-US BIT.

Looking at the three generations of Chinese BITs from the point of view of the evolution of national treatment, it is obvious that China has evolved from the total omission of national treatment to the incorporation of an internationally standardised form of national treatment. Although the evolution process has been time-consuming and is not yet complete, the positive results are irrefutable, and China is now adopting a more liberal approach in the international investment regime when it comes to the national treatment standard.

C. Are the national treatment clauses in China' BITs arbitratable?

According to the previous analysis, the evolution of national treatment in China's BITs is irrefutable, however, one question that pervades from a pragmatic perspective is whether the national treatment provision in Chinese BITs is arbitratable.

With regard to the arbitrability of national treatment clauses, there is no need to include the first generation of BITs discussed in the previous section, as they contained no national treatment.

As regards national treatment in the second generation of BITs, most of these were signed after China's accession to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) , therefore, China's accession to the ICSID will shed light on this question.

China became a state party to the ICSID on 6 February 1993. Once China had signed the ICSID Convention, the BITs it negotiated also changed. One clear example is the move towards accepting international arbitration for all investment disputes arising under a

treaty, which demonstrates China's move towards a more liberal approach.⁵⁶² However, China notified the Centre when ratifying the Convention that it would only consider submitting to ICSID jurisdiction for disputes over compensation resulting from expropriation and nationalisation.⁵⁶³

In general, once China had ratified the ICSID Convention, it started to make unconditional references to the ICSID in its BIT practice. The China-Lithuania BIT, signed in November 1993, was probably the first BIT that included a reference to the ICSID. It stipulates that the amount of compensation for an expropriation dispute may be submitted to the ICSID for arbitration if it cannot be settled within six months by negotiation.⁵⁶⁴ Therefore, after China's ICSID accession, it was initially only the amount of compensation for an expropriation dispute that was arbitrable; the national treatment clause itself was not arbitrable.

Despite China's reservation to the ICSID Convention, since 1998, Chinese BITs have granted access to international arbitration, including ICSID arbitration for all investor-state disputes,⁵⁶⁵ which is an obvious move in the direction of a more liberal approach to international investment arbitration.

In this regard, the first BIT was the China-Barbados BIT, which entered into force on 20 July 1998, and in which, for the first time, China implemented access for all investor-state disputes to ICSID arbitration.⁵⁶⁶

⁵⁶² Norah Gallagher, 'China's BIT's and Arbitration Practice: Progress and Problems', in Wenhua Shan, Jinyuan Su (ed), *China and International Investment Law: Twenty Years of ICSID Membership* (Boninklijke Brill NV, Leiden 2015), at 181.

⁵⁶³ This reservation can be found at the Centre website: <https://icsid.worldbank.org/en/Pages/about/MembershipStateDetails.aspx?state=ST30>. [10.07.2017]

⁵⁶⁴ See Article 8.2 of the China-Lithuania BIT.

⁵⁶⁵ Gallagher and Shan, *Chinese Investment Treaties*, at 39.

⁵⁶⁶ See Article 9 of the China-Barbados BIT:

"1. Any dispute concerning an investment between an investor of one Contracting Party and the other Contracting party shall, as far as possible, be settled amicably through negotiations between the investor and the other Contracting Party.

2. If any dispute referred to in paragraph 1 of this Article cannot be settled within six months following the date on which the written notification of the dispute has been received by one party from the other party to the dispute, the investor shall have the right to choose to submit the dispute for resolution by international arbitration to one of the following for a:

(a) the International Centre for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done at Washington, March 18 1965; or

(b) an arbitral tribunal to be set up under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The appointing authority under the said rules shall be the Secretary-General of ICSID;

3. Notwithstanding paragraph 2, the Contracting Party may require the investor to exhaust the local administrative review procedure before the submission of the dispute to international arbitration. The provision of this paragraph shall not apply if the investor has resorted to the procedure specified in paragraph 10 of this Article.

4. The arbitral tribunal referred to in paragraph 2(b) of this Article shall, with respect to the procedure, follow the Arbitration Rules of UNCITRAL.

Since the China-Barbados BIT, China has entered into 31 BITs (twelve of which were re-negotiations) and most of these followed the new prototype and include full access to ICSID jurisdiction. However, this does not mean that there have been no exceptions; for example, the China-Qatar BIT, signed in April 1999, contains an investor-state dispute-resolution provision which only provides access to *ad hoc* arbitration for amounts in compensation disputes, and no access at all to the ICSID.⁵⁶⁷

More recently, in the China-Canada BIT, this trend towards access for all investor-state disputes to ICSID arbitration continues; according to Article 20.1 of the China-Canada BIT:

An investor of a Contracting Party may submit to arbitration under this Part a claim that the other Contracting Party has breached an obligation:

(a) under Articles 2 to 7(2), 9, 10 to 13, 14(4) or 16, if the breach is with respect to investors or covered investments of investors to which sub-paragraph (b) does not apply, or

(b) under Article 10 or 12 if the breach is with respect to investors of a Contracting Party in financial institutions in the other Contracting Party's territory or covered investments of such investors in financial institutions in the other Contracting Party's territory,

and that the investor or a covered investment of the investor has incurred loss or damage by reason of, or arising out of, that breach.

This means that the national treatment clause in Article 6 of the China-Canada BIT is arbitrable, and accordingly, it is fair to conclude that from China's perspective, the national treatment clauses in their BITs have generally been arbitrable since 1998 (China-Barbados BIT) and this trend seems set to become a general principle in future BIT negotiations, unless the other negotiating party shows a strong opposition in this regard.

5. Any arbitration under paragraph 2 shall be held in a State that is a party to the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958.

6. The arbitral tribunal shall decide the issues in dispute in accordance with the provisions of this Agreement, the law of the Contracting Party accepting the investment and applicable rules of international law.

7. Any arbitral awards rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Contracting Party shall carry out without delay the provisions of the award and provide in its territory for the enforcement of the award.

8. In any proceeding involving an investment dispute, a Contracting party shall not assert as a defence, counterclaim, right of set-off or for any other reason that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an insurance or guarantee contract; but the Contracting Party may require written consent that the insurer or guarantor who has paid or will pay the compensation to the investor agrees that the investor exercise the right of claim for compensation under the procedure specified by the provisions of this Article.

9. Each party to the dispute shall bear the cost of its appointed member of the tribunal and of its representation in the proceedings. The cost of the appointed Chairman and the remaining costs shall be borne in equal parts by the parties to the dispute.

10. The investors of each Contracting Party shall have a right of access to the competent courts of the other Contracting Party for exercising adjudicatory authority in any dispute. If the investor has resorted to the procedure specified in this paragraph, paragraph 2 of this Article shall not apply, unless the court refers the matter to international arbitration."

⁵⁶⁷ Gallagher and Shan, *Chinese Investment Treaties*, at 42.

D. Pre-establishment national treatment in the China-US and China-EU investment agreements negotiations

China has yet to sign BITs with two of the world's major economic powers, the United States and the EU, but negotiations with both of these have already begun. This section will therefore focus on the China-US and China-EU investment treaty negotiations, especially with regard to the standard of national treatment.

1. Negotiation of the China-US BIT on a 'pre-establishment' basis

As the United States has been a supporter and advocate of high-standard BITs, the China-US BIT negotiation is proving arduous, as the US BIT model covers a wide range of investment protection and liberalisation topics, as well as certain issues that have not been previously addressed in the Chinese negotiation of BITs. Pre-establishment national treatment is one of these problem areas.

Early in the 1980s, China and the United States explored the possibility of concluding a BIT, but these talks were unsuccessful. After more than two decades, on 18 June 2008, China and the United States agreed to re-launch BIT negotiations. It has been suggested that this BIT will be 'the most difficult in history', but it may also prove to be 'the most worthwhile' for the two countries.⁵⁶⁸ Progress in the negotiations has been slow, but in July 2013, the United States and China finally reached agreement at the 5th China-US S&ED.

In July 2013, China agreed to drop its original position and accepted that a further treaty would include market access on a 'pre-establishment' basis, as well as negotiations using a 'negative list' approach. This was a significant breakthrough, and the first time China had agreed to such a course of action with another country.⁵⁶⁹ The US and China further agreed to intensify the negotiation and exchange of improved negative list offers, reflecting the shared commitment of the two sides to open up investment environments.⁵⁷⁰

Building on China's commitment at the July 2013 S&ED meeting to negotiate a BIT that would provide national treatment at all phases of investment, including market access (i.e., the 'pre-establishment' phase of investment), and would also employ a negative list

⁵⁶⁸ Jie Huang, 'Challenges and Solutions for the China-US BIT Negotiations: Insights from the Recent Development of FTZs in China', *Journal of International Economic Law*, 2015, Vol. 18, pp. 307-339, at 307.

⁵⁶⁹ Gallagher, 'China's BIT's and Arbitration Practice', at 187.

⁵⁷⁰ USTR, *2015 Report to Congress on China's WTO Compliance*, at 31.

approach to identifying exceptions (meaning that all investments are permitted except for those explicitly excluded), the United States and China exchanged initial negative list offers in June 2015. Subsequently, as agreed at the June 2015 S&ED meeting, the two sides exchanged revised and improved negative list offers in September 2015. Based on the progress made in the negotiations and the improved negative list offers, the two sides also committed to intensifying their negotiations and to working expeditiously to conclude the negotiation of a mutually beneficial, high-standard treaty.⁵⁷¹ In June 2016, the second exchange round of negative list offers took place, and both parties considered that this round of exchanges represented further progress in the China-US BIT negotiations. An analysis of China's negative list offer and the gap which exists between it and the US list will be discussed in Chapter 4.

In sum, one of the most significant compromises made by China in the China-US BIT negotiation has been the acceptance of 'pre-establishment national treatment'. In addition, in order to conduct an effective negotiation with the United States, China has accordingly piloted pre-establishment national treatment in its municipal law, and all FTZs in China also serve as pilot projects to investigate how best to update current Chinese trade and investment law, boost China's economy, and prepare China for high-standard BIT negotiations.⁵⁷² Therefore, as previously discussed, with a pre-establishment national treatment and negative list approach in its FTZs, China is ready for a higher standard of national treatment clause in the China-US BIT.

2. The national treatment issue in the EU-China Comprehensive Agreement on Investment negotiation

a. Negotiation of the EU-China CAI

According to EU officials, European investors have reported significant market access barriers, discriminatory treatment and legal uncertainty in China, which could be best addressed through a comprehensive investment agreement. Since Chinese investors believe that there could well be good commercial opportunities for them in the aftermath of the economic and financial crisis in European countries, China is also motivated to conclude

⁵⁷¹ *Ibid.*, at 95.

⁵⁷² Huang, 'Challenges and Solutions for the China-US BIT Negotiations', at 308.

an investment treaty with the EU. Both parties were therefore driven by the interests of their investors to initiate the negotiation of an investment treaty.

Up to June 2017, China had signed 26 BITs⁵⁷³ with EU Member States. However, those 26 BITs do not follow a standard model, as the bargaining power of each Member State vis-à-vis China has been different. As there is no BIT between China and the EU as a whole, this fragmented legal framework lacks coordination and coherence and has resulted in an uneven playing field for the protection of both EU and Chinese investors.⁵⁷⁴ However, the entry into force of the Lisbon Treaty in December 2009 shifted responsibility in the field of FDI from individual Member States to the EU as a whole, and this shift of responsibility within the EU has given rise to a number of substantive and procedural questions about future EU investment policymaking at an international level.⁵⁷⁵ The Council of the European Union authorised the European Commission to initiate negotiations for a CAI with China on 18 October 2013.⁵⁷⁶ The EU-China CAI will be the EU's most important investment agreement since FDI came under its exclusive competence with the Lisbon Treaty.⁵⁷⁷

Accordingly, negotiations for an EU-China CAI were formally launched following the 25th meeting of a joint economic and trade commission between China and the EU, held in 2011.⁵⁷⁸ The aim of the agreement is to remove market-access barriers to investment and provide a high level of protection to investors and investments in EU and Chinese markets. It will replace the 26 existing BITs between individual EU Member States and China with a single comprehensive investment agreement.⁵⁷⁹ Negotiations have continued until very recently, and the 12th round of the EU-China investment negotiations took place in Brussels in September 2016. At the beginning of 2017, negotiators from the EU and China reached a clear conclusion on the ambitious and comprehensive scope of the EU-China

⁵⁷³ China has not signed BITs with Ireland or Latvia. At the time of writing the UK is still a member of the EU.

⁵⁷⁴ Wenhua Shan and Sheng Zhang, 'The potential EU-China BIT: Issues and Implication', in Marc Bungenberg, August Reinisch, Christian Tietje ed. *EU and Investment Agreements: Open Questions and Remaining Challenges* (Nomos Verlagsgesellschaft mbH & Co. KG: 2013), pp. 87-119, at 88.

⁵⁷⁵ UNCTAD, UNCTAD World Investment Report 2011, at Box III.5, available at: http://unctad.org/en/PublicationsLibrary/wir2011_en.pdf. [10.07.2017]

⁵⁷⁶ European Commission, Overview of FTA and Other Trade Negotiations, available at: http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf. [10.07.2017]

⁵⁷⁷ Fraser Cameron, 'The EU-China Comprehensive Agreement on Investment', *World Commerce Review*, September 2015, pp. 110-111, at 110.

⁵⁷⁸ Xinhua News Agency, China-EU to seek bilateral investment treaty, 15 July 2011, available at: <http://english.people.com.cn/90001/90776/90883/7440924.html>. [10.07.2017]

⁵⁷⁹ European Council the President Press, Brussels, 19 November 2013, EUCO 238/13, PRESS 489, PR PCE 213, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/139637.pdf. [10.07.2017]

CAI, and established a joint negotiating text.⁵⁸⁰

According to an intermediary report by scholars in the Asia FDI Forum of 2016, fair and equitable treatment, taxation and transparency will be the focus of the negotiation of the EU-China CAI.⁵⁸¹ However, for the purposes of this research, the following sections will only concentrate on national treatment aspects of the EU-China CAI negotiations.

b. The national treatment standard in the EU-China CAI negotiation

With this CAI, the EU and China intend, among other things, to expand the existing standards for the protection of investments. As national treatment constitutes a cornerstone of non-discrimination principles, the national treatment clause in the EU-China CAI will be designed to ensure equal competitive opportunities to foreign investors by extending to foreign investors treatment as favourable as that accorded to national investors in like circumstances. The national treatment clause in the EU-China CAI is also likely to cover the pre-establishment phase of investment by conferring rights on the investor both at the moment when the investment is effectively materialised and also prior to that stage.⁵⁸²

National treatment obligations are expected to apply to all sectors and sub-sectors, which will mean that no existing or future measures may be taken to discriminate against foreign investors unless either China or the EU introduce specific reservations with regard to market access.⁵⁸³

The EU-China CAI will also provide for market access in certain sectors. The more open attitude towards foreign investments shown by the Chinese government may lead to the acceptance of enhanced market access on the basis of a 'negative list' approach. Such a negative list involves a general obligation, from which a country may be permitted to 'opt-out' certain sectors or sub-sectors from the application of some of the clauses or principles found in the agreement, such as national treatment.⁵⁸⁴

As a result of such an agreement, China and the EU would be legally bound to open their

⁵⁸⁰ *Supra* note 591.

⁵⁸¹ Qian Wang, Drivers and Issues of EU-China Negotiations for an Investment Agreement, Asia FDI Forum 2016, Dec 2016, available at <http://blogs.adelaide.edu.au/eucentre/files/2016/12/Drivers-and-Issues-of-EU-China-Negotiations-for-an-Investment-Agreement-Marisi-and-Wang.pdf>. [10.07.2017]

⁵⁸² Ramón García-Gallardo and Xiao Jin, EU-China Bilateral Investment Treaty, King & Wood Mallesons, Insights, 24 April 2015, available at: <http://www.kwm.com/en/knowledge/insights/eu-china-bilateral-investment-treaty-20150414>. [10.07.2017]

⁵⁸³ *Ibid.*

⁵⁸⁴ *Ibid.*

markets, unless they listed the sectors considered to be sensitive. Thus, in principle, all sectors would be open to foreign investment, except for those specifically mentioned in the agreement. For example, the audiovisual sector is one of the sectors which is expected to be excluded from any provisions granting access to the EU and Chinese markets.

As China accepted the pre-establishment national treatment standard with a negative list approach in 2013, it is to be expected that China will maintain this approach in the EU-China CAI negotiation.

Undoubtedly the EU will also emphasise the significance of national treatment, as national treatment plays a central role in the legal order of the EU itself, particularly as regards entry and establishment. In addition, EU law applies a wider concept of non-discrimination between the nationals of its Member States to specific policy areas, thereby helping to harmonise national standards and to develop an integrated single market for trade and investment.⁵⁸⁵

A higher standard of national treatment clause in the EU-China CAI is therefore in accordance with the internal demands of the EU and should also be acceptable to China. Once the EU-China CAI is concluded, the uneven situation of the national treatment standard in the BITs between China and 26 of the 28 EU Member States will disappear.

For example, the China-Sweden BIT was signed in 1982, and did not incorporate a national treatment clause, and neither do some of the Chinese BITs with Member States in Eastern Europe.⁵⁸⁶ These BITs belong to the first generation of Chinese BITs, which have not yet been updated. However, some EU Member States renegotiated their BITs with China in the early 2000s, and those belong to the third generation of Chinese BITs which contain comprehensive national treatment clauses. Accordingly, the 26 BITs signed between EU Member States and China currently present an uneven picture, which is not an ideal situation in light of the Lisbon Treaty. From this perspective, the signing of an EU-China CAI will regularise this uneven situation among EU Member States.

III. Concluding China's national treatment standards in the investment regime

⁵⁸⁵ UNCTAD, *International Investment Agreements: Key Issues*, at 165.

⁵⁸⁶ For instance, China-Poland BIT, China-Bulgaria BIT, China-Greece BIT, China-Croatia.

Following on from the discussion in Chapter 2 concerning national treatment in the trade regime, this chapter has concentrated on the national treatment standard of China in both municipal and international investment law.

As there is a conclusion concerning the changes to the national treatment standard in the investment regime of Chinese municipal law in section I.D of this chapter, no further conclusion is necessary here in this regard. The conclusion concerning the national treatment standard in China's international investment law is as follows.

As can be seen from the previous discussion, the evolving history of China's approach to national treatment in BITs can be divided into three stages. At first, China rejected the national treatment standard almost completely in the 1980s and 90s, and there was accordingly no national treatment clause or similar formulation in Chinese BITs during that period. Second, there was some conditional acknowledgment of post-establishment national treatment from 2000-2010, and the BITs concluded during that time contained various non-standard formulations of a national treatment clause. Third, after 2010, Chinese BITs incorporated a comprehensive national treatment provision; furthermore, the acceptance of pre-establishment national treatment with a negative list in the 2013 China-US BIT negotiations represented a milestone.

From a more practical perspective, Chinese BITs since 1998 have granted access to international arbitration, including ICSID arbitration, for all investor-state disputes,⁵⁸⁷ which is an obvious move towards a more liberal approach in international investment arbitration.

In sum, it has taken China more than three decades to evolve from nothing to the more commonly used approach with regard to national treatment clauses in BITs. Although there are still some inconsistencies with internationally prevailing national treatment standards, China's efforts in this regard cannot and should not be ignored. Furthermore, The recent acceptance of pre-establishment national treatment on the basis of a 'negative list' by the Chinese government in the context of the China-US BIT negotiations marked a tremendous breakthrough, and heralds the beginning of a new generation of Chinese investment treaties.

This new generation of Chinese investment treaties includes the China-US BIT and the

⁵⁸⁷ Gallagher and Shan, *Chinese Investment Treaties*, at 39.

EU-China CAI; in other words, having signed investment treaties with most other countries around the world, it is time for China to finally negotiate with and challenge these two trading giants. China has emerged in recent decades as a prominent actor in the development of international investment law. It has concluded BITs with many traditionally capital-exporting states, as well as with a large number of developing and transition economies in Africa, Asia, Eastern Europe and South America.⁵⁸⁸ More recently, China has grown from a capital-importing state to one with two-way investment. The confrontation with these last two giants is therefore becoming unavoidable, and China is equipping itself to gain the advantage in this oncoming encounter.

The conclusion regarding China's national treatment standard in both municipal and international law must be that both share a similar evolutionary path: from no incorporation of national treatment standards to a comprehensive national treatment with a pre-establishment stage. This fundamental change of position has taken China three decades to accomplish, and it is not surprising that the evolutionary period for municipal and international law have been combined. In other words, during the evolution process, municipal and international law have interacted with each other, although in most cases, municipal law has been forced to reform as a result of external international pressure.

In fact, external pressure for the liberalisation of China's approach to national treatment has been greater than internal pressure. Under the influence of WTO accession and the requirements of the other contracting parties in BITs, China has been forced to adopt a more liberal approach towards foreign investment. However, research is generally more objective if it ignores the motivation for progress, and although China has been forced to make progress, objectively, China's achievement in this regard should still be praised.

Given that China has adopted a more liberal route in the last few years, and considering its fast-growing outward investment, it seems realistic to expect China to continue with this liberal trend rather than reverting to a more conservative approach.⁵⁸⁹

In short, the domestic regulation of foreign investment and the national treatment clause, as well as the role of China in the international investment regime, has undergone changes in the last decade. The significant change in the way in which China has participated in the

⁵⁸⁸ Martin Endicott, 'Chinese and International Investment Law: An Evolving Relationship', in Wenhua Shan, Jinyuan Su (ed), *China and International Investment Law: Twenty Years of ICSID Membership* (Boninklijke Brill NV, Leiden 2015), at 216.

⁵⁸⁹ Gallagher and Shan, *Chinese Investment Treaties*, at 43.

legal regime for international investment has been impressive. As the second-largest economy in the world, China has made a commitment to a notably more open and liberal investment regime.

Chapter Four How Far is China from the Internationally Prevailing National Treatment Standard?

The evolution of China's national treatment standard in both the trade and investment regimes has been fully discussed in Chapters 2 and 3. Although the conclusion so far has been positive, it is not objective to simply conclude that China is adopting the highest possible level of national treatment standard. Moreover, conflicts and gaps have become evident during the China-US BIT and EU-China CAI negotiations. This chapter will therefore focus on a discussion of how far China remains from the internationally prevailing national treatment standard practiced, in particular, by the United States and the EU.

As described in Chapter 2, as a member of the WTO, China accepted the national treatment standard in WTO law and also quoted the WTO national treatment standard in its FTA practice. Therefore, in the trade regime, the gap between China's national treatment standard and the internationally prevailing standard is narrow and limited. The characteristics of the well-developed WTO jurisprudence exerted a further influence on China's national treatment standard in the trade regime. Although trade and investment are currently complementary, states enjoy more flexibility concerning the formulation of investment regulations, both domestically and internationally. Therefore, the following analysis will in general focus on the gap between China's national treatment standard and the internationally prevailing national treatment standard in the investment regime.

I. How far is China from the national treatment standard of the United States?

A. How far is China's national treatment standard in the trade regime from that of the United States?

WTO law and FTAs are the main instruments in international trade law. As discussed in Chapter 1, WTO members can justifiably treat products originating in some WTO members (those with which they have concluded a preferential trade agreement) better than like products originating from other WTO members. The discussion below will therefore start with the WTO, and then move on to FTAs.

1. China and the United States are subject to identical national treatment standards according to WTO agreements

National treatment is a fundamental principle running through all WTO Agreements, including the GATT, the GATS, the TBT Agreement, the SPS Agreements, the TRIMs, the TRIPs, etc.

As discussed in Chapter 1, Article III is the most important and widely-applied national treatment clause in the GATT, and it requires that WTO members provide national treatment to all other members, and prohibits discrimination between domestic and foreign goods in the application of internal taxation and government regulations once the foreign goods have satisfied customs measures at the border.⁵⁹⁰ As China and the United States are both WTO members, there is no doubt that these two states should both be subject to Article III of the GATT.

In the GATS, as we saw in Chapter 1, because national treatment is a specific commitment, Article XVII does not generally apply to all measures affecting trade in services, but only comes into play if members choose to inscribe service sectors or sub-sectors in their SSC. According to the SSCs of China and the United States, China made national treatment commitments in professional services,⁵⁹¹ computer and related services,⁵⁹² property services,⁵⁹³ other business services,⁵⁹⁴ communication services,⁵⁹⁵ construction and related engineering services, distribution services,⁵⁹⁶ educational services,⁵⁹⁷ environmental services,⁵⁹⁸ financial services,⁵⁹⁹ tourism and travel-related services,⁶⁰⁰ and transportation

⁵⁹⁰ Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization*, at 183.

⁵⁹¹ Including legal services, accounting, auditing and bookkeeping services, taxation services, architectural services, engineering services, integrated engineering services, urban planning services, medical and dental services.

⁵⁹² Including consultancy services related to the installation of computer hardware, software implementation services, and data processing services.

⁵⁹³ Including real estates services involving owned or leased property and real estates services offered on a fee or contract basis.

⁵⁹⁴ Including advertising services, management consulting services, technical testing and analysis services and freight inspection covered by Central Product Classification (CPC) 749, service incidental to agriculture, forestry, hunting and fishing, related scientific technical consulting services, photographic services, packaging services, convention services, translation and interpretation services.

⁵⁹⁵ Including courier services, telecommunication services, value-added services, and audiovisual services.

⁵⁹⁶ Including commission agents' services, wholesale trade services, retailing services, franchising, and wholesale or retail trade services away from a fixed location.

⁵⁹⁷ Including primary education services, secondary education services, higher education services, adult education services, and other education services.

⁵⁹⁸ Including sewage services, solid waste disposal services, cleaning services of exhaust gases, noise abatement services, nature and landscape protection services, other environmental protection services, and sanitation services.

⁵⁹⁹ Including all insurance and insurance-related services, banking and other financial services.

⁶⁰⁰ Including hotels and restaurants, travel agency and tour operator.

services.⁶⁰¹

The United States, on the other hand, made national treatment commitments in business services,⁶⁰² communication services,⁶⁰³ construction and related engineering services, distribution services,⁶⁰⁴ educational services,⁶⁰⁵ environmental services,⁶⁰⁶ financial services,⁶⁰⁷ health-related and social services,⁶⁰⁸ tourism and travel-related services,⁶⁰⁹ recreational cultural and sporting services,⁶¹⁰ and transportation services.⁶¹¹

Therefore, comparing the SSCs of China and the United States, as well as the different approach concerning the classification of the services sector and sub-sectors, it is clear that the United States made national treatment commitments in health-related and social services, and in recreational, cultural and sporting services, but China did not. In the other sectors or sub-sectors in which both China and the United States made national treatment commitments, the United States inscribed more 'None' in the 'Limitations on national treatment' column, while China inscribed more 'Unbound' and qualifications in mode 4 (presence of natural persons). Therefore, in general, the United States made national treatment commitments in more service sectors than did China.

In sum, concerning the trade in services, although China and the United States are both subject to Article XVII of the GATS, there are discrepancies between China and the United States regarding the specific commitments in various service sectors. The United States made national treatment commitments in more service sectors and inscribed fewer qualifications. China, however, is more conservative in this regard as it included fewer service sectors in its SSC while inscribing more qualifications concerning limitations on national treatment. In other words, China still needs to open more service sectors to foreign services and service suppliers and remove more restrictive qualifications concerning the national treatment accorded to foreign services and service suppliers.

⁶⁰¹ Including maritime transport services, auxiliary services, international waterways transport, air transport services, rail transport services, road transport services, and services auxiliary to all modes of transport.

⁶⁰² Including professional services, computer and related services, real estates services, rental/leasing services without operators, and other business services.

⁶⁰³ Including land-based courier services, telecommunications, and audiovisual services.

⁶⁰⁴ Including commission agents' services, wholesale trade, retailing, and franchising.

⁶⁰⁵ Including adult education services, and other education services.

⁶⁰⁶ Including sewage services, refuse disposal services, sanitation and similar services, and others.

⁶⁰⁷ Including insurance, banking and other financial services.

⁶⁰⁸ Including hospital and other healthcare facilities.

⁶⁰⁹ Including hotels and restaurants, travel agencies and tour operators, tour guide services, and others.

⁶¹⁰ Including entertainment services, news agency services, libraries, archives, museums and other cultural services, and other recreational services.

⁶¹¹ Including air transport services, rail transport, road transport, and services auxiliary to all modes of transport.

Concerning the national treatment standard in other WTO Agreements, as discussed in Chapter 1, the national treatment clause in the TBT Agreement and the SPS Agreement are based on the Article III of the GATT, the national treatment clause in the TRIPS is closely related to Article III of the GATT and the national treatment standard in the TRIMs will be analysed in section I.B of this chapter as regards the investment regime. Therefore, aside from the comparison of China and the United States in trade in services, there are a few topics worth mentioning concerning the national treatment standard in WTO law regarding those states. The next section will therefore focus on the national treatment standard in the trade chapter of FTAs in China and the United States.

2. The national treatment standard in the FTAs of China and the United States

As mentioned above, WTO Agreements are one of the bases for FTA negotiation between WTO members, and the idea that states should ‘build on their rights and obligations under the WTO Agreement’ in the Preamble of FTAs is widely considered to be common practice.

Accordingly, the national treatment clause of the GATT is widely incorporated into the FTAs signed between WTO members. In order to make the comparison more evident and objective, the following section will first make a comparison between the China-Australia FTA and US-Australia FTA, as the former is the most recent FTA signed by China, and represents the highest Chinese standard in this regard. It will then consider the national treatment standards of China and the United States in FTAs in general.

a. The national treatment clauses in the China-Australia FTA and the US-Australia FTA

The China-Australia FTA is the FTA signed most recently by China. It was signed in June 2015, and entered into effect on 20 December 2015. Australia considered it to be a historic FTA, and China regarded it as representing the highest FTA standards and as the most comprehensive FTA signed by China. On the other hand, the US-Australia FTA was signed on 18 May 2004 and entered into force on 1 January 2005; it was modelled on the NAFTA. For the sake of comparison, the national treatment clauses in both the China-Australia FTA and the US-Australia FTA will be discussed below.

In the China-Australia FTA, Chapter 2, Trade in Goods Article 2.3, deals with ‘National

Treatment on Internal Taxation and Regulation’ and regulates as follows:

Each Party shall accord national treatment to the goods of the other Party in accordance with Article III of GATT 1994. To this end, Article III of GATT 1994 is incorporated into and made part of this Agreement, *mutatis mutandis*.⁶¹²

Although this is the FTA most recently signed by China, it made no progress concerning the formulation of the national treatment clause. As discussed in Chapter 2, it is typical of the model of national treatment clause incorporated in China’s FTAs and concerning the trade in goods, and did not represent a breakthrough in any regard.

In Chapter 2 of the US-Australia FTA, the national treatment clause in the trade in goods is as follows:

Each Party shall accord national treatment to the goods of the other Party in accordance with Article III of GATT 1994, including its interpretative notes. To this end, Article III of GATT 1994 and its interpretative notes are incorporated into and made a part of this Agreement, subject to Annex 2-A (Application of Chapter 2).⁶¹³

Although the descriptions of the national treatment standard in the two FTAs are similar, there is one significant difference: the US-Australia FTA incorporates that Article III of GATT 1994 are subject to Annex 2-A (Application of Chapter 2). According to Annex 2-A (Application of Chapter 2), measures of the United States and Australia shall not apply to certain measures respectively.⁶¹⁴

⁶¹² See Article 2.3 of the China-Australia FTA.

⁶¹³ See Article 2.2 of the US-Australia FTA.

⁶¹⁴ See Annex 2-A (Application of Chapter 2) of the US-Australia FTA:

For measures of the United States, “Articles 2.2, shall not apply to:

(a) controls by the United States on the export of logs of all species;

(b) (i) measures under existing provisions of the Merchant Marine Act of 1920, 46 App. U.S.C. § 883; the Passenger Vessel Act, 46 App. U.S.C. §§ 289, 292, and 316; and 46 U.S.C. § 12108, to the extent that such measures were mandatory legislation at the time of the accession of the United States to the General Agreement on Tariffs and Trade 1947 (GATT 1947) and have not been amended so as to decrease their conformity with Part II of GATT 1947;

(ii) the continuation or prompt renewal of a non-conforming provision of any statute referred to in clause (i); and

(c) actions by the United States authorized by the Dispute Settlement Body of the WTO.”

For measures of the Australia, “Articles 2.2, shall not apply to:

(a) controls by Australia on the exports of woodchips and unprocessed forest products (e.g., whole logs) sourced from native forests outside Regional Forest Agreement regions, or plantation forests within States where Codes of Practice have not been approved by the Australian Government, and Sandalwood sourced from any State, the Australian Capital Territory, or the Northern Territory;

(b) controls on importation of second hand motor vehicles under Section 17A of the Motor Vehicles Standards Act of 1989 and the Motor Vehicles Standards Regulations of 1989;

(c) wheat marketing arrangements under the Wheat Marketing Act 1989 and the Customs (Prohibited Exports) Regulations 1958, as amended;

(d) grain marketing arrangements under the New South Wales Grain Marketing Act 1991 and Marketing of Primary Products Act 1983, the South Australian Barley Marketing Act 1993, the Western Australian Grain Marketing Act 2002 and Grain Marketing Regulations 2002, and the Queensland Grain Industry (Restructuring) Act 1991, as amended;

Accordingly, Chapter 2 of the US-Australia FTA lays down conditions for the type of goods that are subject to national treatment. Certain types of goods are to be fully covered by the agreement immediately, and others are either to be phased in over a period of years, or are only temporarily applicable.⁶¹⁵

However, there is no specified national treatment exception in the China-Australia FTA. Although the China-Australia FTA contains exceptions in Chapter 16 in the form of ‘General Provisions and Exceptions’ which incorporate Article XX of GATT 1994, security exceptions and taxation, into the China-Australia FTA, there is no specified national treatment exception in the China-Australia FTA as there is in the US-Australia FTA.

The function of a more specific national treatment exception in an FTA is obvious: it is there to protect the integrity of domestic law and accord legitimacy to the currently non-conforming measures so as not to invoke state responsibility under international law. In this regard, China is less concrete in setting exceptions to the national treatment clause.

With regard to national treatment in trade in services, according to Article 8.5 of the China-Australia FTA, China provides national treatment to Australian services and services suppliers in accordance with the following:

Where a Party schedules commitments in accordance with this Section, in the sectors inscribed in its Schedule of Specific Commitments in Annex III, and subject to any conditions and qualifications set out therein, it shall accord to services and service suppliers of the other Party, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.⁶¹⁶

However, a closer analysis of the SSC in Annex III to the China-Australia FTA reveals that Australia uses a negative listing approach regarding commitments in services, while China adheres to the positive listing approach in the GATS. By comparison, according to Chapter 10, Cross-border Trade in Services in the US-Australia FTA, Article 10.2 provides for national treatment as follows:

(e) sugar marketing arrangements under the Queensland Sugar Industry Amendment Act 2000, as amended;
(f) rice marketing arrangements under the New South Wales Marketing of Primary Products Act 1983, as amended;
(g) horticulture export efficiency licensing arrangements under the Horticulture Marketing and Research and Development Services Act 2000 and Horticulture Marketing and Research and Development (Export Efficiency) Regulations 2002, as amended;
(h) the provisions of and measures under the Livestock Export (Merino) Orders, made under the Export Control Act of 1982, as amended; and
(i) actions by Australia authorized by the Dispute Settlement Body of the WTO.”

⁶¹⁵ *Ibid.*

⁶¹⁶ See Article 8.5 of the China-Australia FTA.

Each Party shall accord to service suppliers of the other Party treatment no less favourable than that it accords, in like circumstances, to its own service suppliers.

In addition, Article 10.6 provides for non-conforming measures as follows:

1. Articles 10.2, do not apply to:
 - (a) any existing non-conforming measure that is maintained by a Party at:
 - (i) the central level of government, as set out by that Party in its Schedule to Annex I;
 - (ii) a regional level of government, as set out by that Party in its Schedule to Annex I; or
 - (iii) a local level of government;
 - (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
 - (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 10.2, 10.3, 10.4, or 10.5.
2. Articles 10.2 do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors, or activities as set out in its Schedule to Annex II.⁶¹⁷

From this comparison it is apparent that China adopted a GATS-style positive listing approach in the China-Australia FTA, while Australia and the United States have been adopting the negative listing approach for more than a decade.

The discrepancy in the services chapter is therefore obvious, as China adheres to the positive listing approach of the GATS concerning its national treatment commitment, while the United States adopted the negative listing approach more than a decade ago. Thus, the conflict in this regard lies in China's persistence with its former positive listing approach and the United States advocates the negative listing approach.

As China is reluctant to provide national treatment to foreign services and foreign services suppliers in many important service sectors, it sees the positive listing approach as a safer choice, and has not yet adopted a negative listing approach concerning national treatment commitments in trade in services in any circumstances. The gap in this regard between China and the United States is therefore obvious, and there has as yet been no sign that China intends to adopt the negative listing approach.

With regard to national treatment in IPR protection, it can be seen from the comparison that although the national treatment clauses concerning IPR protection are not identical in the China-Australia FTA and the US-Australia FTA, they are to some extent similar, and there is no apparent gap in this regard, as each state enjoys more flexibility concerning IPR

⁶¹⁷ See Article 10.6 of the US-Australia FTA.

protection.⁶¹⁸

The national treatment in the investment chapter of these FTAs will be ignored, as they originate from the investment regime of the BITs.

b. The national treatment standard in the FTAs of China and the United States in general

As outlined in Chapter 2, there is a typical model for the national treatment standard in the trade chapters of Chinese FTAs, and the China-Australia FTA represents the highest national treatment standard for the trade in services and IPR protection, while the investment chapter is categorised in BIT analysis with regard to the investment regime.

In the trade chapter of its FTAs, China basically incorporates Article III of the GATT as follows:

Each Party shall accord national treatment to the goods of the other Party in accordance with Article III of the GATT 1994, including its interpretative notes, and to this end Article III of GATT 1994, and its interpretative notes, are incorporated into and made part of this Agreement, *mutatis mutandis*.⁶¹⁹

The national treatment clauses in the trade chapters of FTAs signed by the United States, on the other hand, are generally based on the NAFTA model.

According to Article 301 of the NAFTA:

1. Each Party shall accord national treatment to the goods of another Party in accordance with Article III of the GATT, including its interpretative notes, and to this end Article III of the GATT and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement.
2. The provisions of paragraph 1 regarding national treatment shall mean, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded by such state or province to any like, directly competitive or substitutable goods, as the case may be, of the Party of which it forms a part.
3. Paragraphs 1 and 2 do not apply to the measures set out in Annex 301.3.

Therefore, in general, China's model clause for national treatment in the trade chapters of FTAs is less sophisticated than that of the United States, lacking, as it does, the incorporation of national treatment in provincial/local governments and the legitimacy of non-conforming measures.

⁶¹⁸ See Article 11.5 of the China-Australia FTA and Article 17.1.6-17.1.8 of the US-Australia FTA.

⁶¹⁹ See Article 7 of the China-Pakistan FTA.

With regard to trade in services, the NAFTA incorporates the national treatment clause as follows:

1. Each Party shall accord to service providers of another Party treatment no less favourable than that it accords, in like circumstances, to its own service providers.
2. The treatment accorded by a Party under paragraph 1 means, with respect to a state or province, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that state or province to service providers of the Party of which it forms a part.⁶²⁰

The NAFTA also provides for reservations with regard to the national treatment clause.⁶²¹

On the other hand, China's national treatment clauses incorporated into the services chapters of its FTAs strictly follow Article XVII of the GATS as follows:

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Party shall accord to services and service suppliers of the other Party, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.
2. A Party may meet the requirement of paragraph 1 by according to services and service suppliers of the other Party, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Party compared to like services or service suppliers of the other Party.⁶²²

From this comparison, it is obvious that in the national treatment clauses in the service chapter of its FTAs, the United States covers more content, including the provincial/local government applications of national treatment and exceptions to national treatment. Although China's formulation seems to be more sophisticated, the real discrepancies lie in the provincial/local government application of national treatment and the positive/negative listing approach. The United States has adopted a negative listing approach in almost every

⁶²⁰ See Article 1202 of the NAFTA.

⁶²¹ See Article 1206 of the NAFTA.

"1. Articles 1202, 1203 and 1205 do not apply to:

(a) any existing non-conforming measure that is maintained by

(i) a Party at the federal level, as set out in its Schedule to Annex I, (ii) a state or province, for two years after the date of entry into force of this Agreement, and thereafter as set out by a Party in its Schedule to Annex I in accordance with paragraph 2, or (iii) a local government;

(b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 1202, 1203 and 1205.

2. Each Party may set out in its Schedule to Annex I, within two years of the date of entry into force of this Agreement, any existing non-conforming measure maintained by a state or province, not including a local government.

3. Articles 1202, 1203 and 1205 do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its Schedule to Annex II."

⁶²² See Article 62 of the China-Singapore FTA.

FTA (except the US-Israel FTA signed in April 1985), while China has not yet adopted this approach.

As China incorporated national treatment in IPR protection only very recently, and there is no obvious discrepancy in this regard, it is not necessary to analyse this question specifically here, as the above discussion concerning national treatment standards for IPR chapter in the China-Australia and US-Australia FTAs is adequate.

In short, the above section discusses the gap between China and the United States with regard to the national treatment standard in the trade regime, and the next section will focus on this topic in the investment regime.

B. How far is China's national treatment standard in investment regimes from that of the United States?

As can be seen from the previous chapters, national treatment in the trade regime is more unified than it is in the investment regime. The comparison of national treatment standards in the investment regime will therefore be emphasised, as the gap is more obvious in this regard.

As concluded in Chapter 3, both municipal and international investment laws in China have shared a similar evolutionary path: from nonexistent or no incorporation of national treatment to a comprehensive national treatment regime with a pre-establishment stage. Although China has adopted a comprehensive national treatment standard with pre-establishment stage and negative list approach, there remain gaps between China's national treatment standard in the investment regime and that of the United States.

1. The treatment accorded to foreign investment in the foreign investment regimes of China and the United States

As previously discussed in Chapter 3, China is evolving towards the third generation of foreign investment law, a unified foreign investment law with a pre-establishment national treatment standard. In January 2015, MOFCOM released a discussion draft on proposed *Foreign Investment Law*, soliciting comments from the public.

According to this discussion draft, all foreign investment will use one of the general statutory vehicles for business association allowed under China's *Company Law*, such as

limited liability company. The current corporate forms used for foreign investments, including EJV, CJV and WFE, will no longer be used.

Among others, one notable change proposed by the discussion draft is the introduction of pre-establishment national treatment with a negative list approach, which, if implemented, would raise the national treatment standard in China's foreign investment regime. China can therefore be seen to be evolving towards a unified foreign investment law with improved national treatment accorded to foreign investors, and no categorisation of foreign investment into different forms subject to different regulations.

The United States, on the other hand, has a long history of welcoming investment from abroad – both direct investments and portfolio investments. This is reflected in the relative absence of restrictions as compared to those imposed by other countries, China in particular. Moreover, there is no general system of licensing foreign investments in the United States. In addition to this more welcoming climate, it must not be forgotten that international treaties like the NAFTA also grant signatory countries the right to enter, trade, invest, or establish and operate businesses in the United States.

More specifically, in terms of foreign investment, the four major federal statutes which have an impact upon foreign investment in the United States are information-gathering and disclosure statutes, rather than restrictive statutes.⁶²³ Nevertheless, over the years, Congress has maintained that certain industries which could affect national security should have limits on foreign investment. These industries include the maritime industry, the aircraft industry, banking, resources, and power, as well as the various businesses which are parties in government contracts. Accordingly, those industries are included in a negative list in the Annex of United States IIAs, which will be shown in the following section.

However, this liberal attitude towards foreign investment does not mean that the United States has no approval procedures in this regard. Foreign investors engaging in merger and acquisition activity in the United States must pay particular attention to the national security review under the *Exon-Florio Amendment* to the *Defense Production Act*, as now modified by the *Foreign Investment and National Security Act of 2007*. According to those acts, the Committee on Foreign Investment in the United States (CFIUS), a multi-member

⁶²³ These four major federal statutes are: *International Investment and Trade in Services Survey Act of 1976*, *Foreign Direct Investment and International Financial Data Improvements Act of 1990*, *Agricultural Foreign Investment Disclosure Act of 1978*, and *Domestic and Foreign Investment Improved Disclosure Act of 1977*.

board headed by the Secretary of the Treasury, may review for its possible impact on national security any ‘covered transaction’,⁶²⁴ defined as any merger, acquisition, or takeover by or with a foreign person which could result in foreign control of any person engaged in interstate commerce in the United States. The factors to be considered in determining the impact upon national security are numerous, and if the CFIUS determines that the acquiring party is an entity controlled by a foreign government, the CFIUS is charged with conducting an investigation of the transaction as a national security investigation.⁶²⁵

So it is clear from this brief of the foreign investment regimes in China and the United States that there is a higher level of protection for, as well as fewer restrictions on, foreign investments in the United States, while China maintains a massive approval procedure. However, the United States maintains a tighter control over foreign investment activities in the sensitive industries included in its negative list.

In sum, the comparison shows that the United States is less strict in general, but maintains tighter control over the few sensitive industries where high-level national security investigation is deemed necessary, whereas China is more generally restrictive, with more sectors offering only limited access to foreign investment and a national security review standard which remains ambiguous.

This comparison based on the foreign investment regimes of the two countries is accurate, as China has already published the aforementioned domestic regulations. Pre-establishment national treatment is still only a future commitment made in bilateral negotiations, as the China-US BIT has not been signed at the time of writing. Because China regards domestic regulations concerning pre-establishment national treatment as fundamental for its international obligations, however, the comparison of the national treatment standards in BITs below will be based on China’s most recent regulations in the foreign investment regime, but it is reasonable to conclude that, according to the published domestic regulations, China is preparing to loosen its control over foreign investment.

⁶²⁴ Michael V. Seitzinger, ‘Foreign Investment in the United States: Major Federal Statutory Restrictions’, Congressional Research Service Report for Congress, June 17, 2013, at 14, available at: <https://fas.org/sgp/crs/misc/RL33103.pdf>. [10.07.2017]

⁶²⁵ *Ibid.*

2. The national treatment standard in the BITs of China and the United States

As described in Chapter 3, China's national treatment standard in BITs has undergone three stages: from no incorporation of national treatment, through various non-standard formulations, to the current separate and comprehensive national treatment clause. This section will therefore compare the current national treatment standard in Chinese BITs with that of the United States.

The China-Canada BIT, signed in 2012, currently represents the highest level of national treatment standard of any Chinese BIT, and Article 6 of the China-Canada BIT regulates as follows:

1. Each Contracting Party shall accord to investors of the other Contracting Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the expansion, management, conduct, operation and sale or other disposition of investments in its territory.
2. Each Contracting Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the expansion, management, conduct, operation and sale or other disposition of investments in its territory.
3. The concept of "expansion" in this Article applies only with respect to sectors not subject to a prior approval process under the relevant sectoral guidelines and applicable laws, regulations and rules in force at the time of expansion. The expansion may be subject to prescribed formalities and other information requirements.⁶²⁶

In the latest Chinese BITs, however, the pre-establishment stage of foreign investment is excluded from national treatment, which means that the scope of national treatment in current Chinese BITs does not include the pre-establishment stage.

With regard to the standard applied by the United States in IIAs, it is essential to first analyse the national treatment clause in the NAFTA, as the NAFTA plays a significant role in setting rules for international investment in the United States. In the Investment Chapter of the NAFTA, the national treatment clause is as follows:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

⁶²⁶ See Article 6 of China-Canada BIT.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

4. For greater certainty, no Party may:

(a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or

(b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.⁶²⁷

As well as the NAFTA, the United States uses a Model BIT as the foundation for its bilateral negotiation of multiple BITs with other countries. The national treatment provision of the 2012 US Model BIT is as follows:

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments.⁶²⁸

It is therefore clear that, although the United States has a Model BIT for the negotiation of IIAs, the national treatment clause in the latest Model BIT is in fact based on the Investment Chapter of the NAFTA. This dissertation will therefore refer to the NAFTA national treatment clause as the US standard in this regard, as the NAFTA is a currently effective IIA, and the Model BIT is only a basis for IIA negotiations. More importantly, there has been no further development of the national treatment standard in the 2012 US Model BIT.

a. China does not offer national treatment to foreign investors/investment in the pre-establishment stage

Accordingly, after comparison, the most evident gap concerning the national treatment standard is the incorporation of an '*establishment and acquisition*' stage. The Chinese

⁶²⁷ See Article 1102 of the NAFTA.

⁶²⁸ See Article 3 of the 2012 US Model Bilateral Investment Treaty.

standard refers only to the ‘expansion, management, conduct, operation and sale or other disposition of investments in its territory’, while the US standard includes ‘*establishment, acquisition*, expansion, management, conduct, operation, and sale or other disposition of investments in its territory’. The latter type of clause imposes an obligation on the host state, precluding it from discriminating in the pre-admission phase. This is the most significant discrepancy, and the lack of any ‘*establishment and acquisition*’ stage demonstrates that Chinese BITs have not so far offered pre-establishment national treatment to foreign investors and investment. Therefore, as described in Chapter 1, China only offers national treatment to investments that have already been admitted to China and as yet has acknowledged no obligation to treat foreign investors as it does domestic investors prior to investment.

The reason for China’s choice lies in the difference between its regulatory system for foreign investment and that employed for domestic investment. More specifically, in China, inbound foreign investment must follow two additional steps of governmental approval compared to domestic investments; these are a national security review by MOFCOM and a Ministerial Panel (if applicable), and enterprise approval by MOFCOM.⁶²⁹

A national security review is conducted if, as a result of mergers and acquisitions, a foreign investor would be likely to obtain actual control of a domestic enterprise in any sectors that ‘relate to national security’. Moreover, foreign investors need to be approved by both MOFCOM and local departments of commerce in order to establish foreign invested enterprises.⁶³⁰ In addition, compared to domestic investors, foreign investors have to go through stricter procedures in both project approval and industry regulator approval stages.

It is therefore clear that China maintains a tighter control over the admission of foreign investors and investment, although *de jure* national treatment will be offered after admission. In Article 6 of the China-Canada BIT, ‘expansion’ may be subject to prescribed formalities and other information requirements, and applies only to sectors not subject to the prior approval process under the relevant guidelines and laws at the time of expansion.⁶³¹

⁶²⁹ U.S. Chamber of Commerce, ‘China’s Approval Process for Inbound Foreign Direct Investment: Impact on Market Access, National Treatment, and Transparency’, 2012, at 7.

⁶³⁰ Huang, ‘Challenges and Solutions for the China-US BIT Negotiations’, at 325.

⁶³¹ See Article 6.3 of China-Canada BIT.

However, as discussed above in Chapter 3, in the China-US BIT negotiation in July 2013 China made an official commitment regarding the adoption of pre-establishment treatment, so although China has been lagging behind with regard to the pre-establishment stage, it is striving to catch up with the US standard.

b. The discrepancy concerning the content of the ‘negative list’

Although China has committed to offering pre-establishment national treatment in the China-US BIT, according to Chapter 1, pre-establishment is rarely granted without exceptions, since every country has sensitive sectors where foreign investment is not permitted, and members of IIAs usually list a number of measures, or even entire sectors, where pre-establishment does not apply. Therefore, even if China incorporates an ‘establishment and acquisition’ stage in the national treatment clause in its future BITs, this may not manifest itself in the Chinese standard being equivalent to the highest prevailing standard of national treatment, as there are huge gaps between China and the United States when it comes to the negative list of non-conforming measures.

In general, if a party does not want to offer pre-establishment national treatment in certain sectors, the party must clearly state this in the negative list. According to the national treatment principle, the admission of foreign investment projects and the establishment and transformation of foreign-invested enterprises in sectors not included in the negative list should adopt the same system as domestic investments. For sectors included in the negative list, the admission of foreign investment projects and the establishment and transformation of foreign invested enterprises will need the approval of the relevant governmental agencies of the host country.⁶³²

For instance, the United States uses a ‘negative list’ approach, in which the terms of the treaty apply to all sectors except those expressly listed as exclusions. This means that investments by foreign entities are treated the same as investments by domestic entities except for the few sectors specifically excluded from the terms of the treaty. The two most recent US BITs, with Uruguay (2005) and Rwanda (2008), include the same list of exceptions.

According to the US-Rwanda BIT, Article 3 (national treatment) does not apply to:

⁶³² Huang, ‘Challenges and Solutions for the China-US BIT Negotiations’, at 328.

1. (a) Any existing non-conforming measure that is maintained by a Party at:
 - (i) the central level of government, as set out by that Party in its Schedule to Annex I or Annex III,
 - (ii) a regional level of government, as set out by that Party in its Schedule to Annex I or Annex III, or
 - (iii) a local level of government;
 - (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
 - (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment.
2. Any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II.⁶³³

Accordingly, in the Annex I Schedule of the United States, sectors excluded from national treatment includes atomic energy, mining, Overseas Private Investment Corporation insurance and loan guarantees, air transportation, transportation, services-customs brokers, small business registration forms under the Securities Act of 1933/1934, communications-radio communications/cable television, social services, minority affairs, and banking and other financial services.⁶³⁴ There are also obligations in every sector/subsector included in the Annex concerning level of government, and measures and descriptions concerning the details of the measures that do not apply the national treatment clause.

After reviewing the US negative list, it is clear that it has very few sectors that are closed to foreign ownership, and most of the restrictions it does apply are either criteria that foreign investors must meet in order to participate in a sector, or limitations on certain activities.

When it comes to China's negative list, as mentioned previously, China has not yet signed a BIT with pre-establishment national treatment and a negative list, so the only way to address this question is to review China's recently published domestic negative list.

As described in Chapter 3, China issued a trial version of the *Draft Negative List of Market Access* on 3 February 2016, which applies in the four FTZ regions. This includes 96 items in 17 sectors in the 'admission prohibited' category of the trial version. Also included are 232 items in 22 sectors in the 'admission restricted' category, which means governmental approval is necessary.⁶³⁵ These items have been compiled from several sources, including

⁶³³ See Article 14 of the US-Rwanda BIT.

⁶³⁴ For the full text of the United States' list, please find in Annex I, Annex II and Annex III of the US-Rwanda BIT, available at: https://ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file743_14523.pdf. [10.07.2017]

⁶³⁵ For the trial version of *Draft Negative List of Market Access* issued on 3 February 2016, please find in the MOFOM website, Chinese only, available at: http://images.mofcom.gov.cn/www/201604/2016041509435822_1.pdf. [10.07.2017]

(1) investment projects requiring administrative approvals as set out in the *Consolidated List of Administrative Approval Items* by Departments under the State Council (included in the list as restricted items); (2) project categories designated for elimination or closed to new investment under the *Catalogue for Guiding Industry Restructuring* (2011 version), which make up 46 of the 96 prohibited items; (3) projects requiring approvals from the relevant development and reform departments under the *Catalogue of Investment Projects Subject to Government Verification and Approval* (2014 version) (included in the list as restricted items); and (4) projects restricted or prohibited under other national laws, administrative regulations, and State Council decisions. In total, 12 out of a total of 328 items are (or include sub-items that are) entirely new, and were not restricted or prohibited under previous laws and regulations. These new items include an approval requirement for collaborations between domestic media and foreign news agencies, and censorship requirements for gaming and entertainment equipment.

Comparing China's negative list with that of the United States, it is not surprising to find that the Chinese list is much longer. More specifically, China has copied all the prohibited and restrictive sectors and relevant administrative measures in its domestic regulations into the negative list verbatim. This means that China, while ostensibly adopting the negative list approach, is in practice retaining, unchanged, a massive number of administrative measures which are prohibitive and restrictive in nature. It is also worth mentioning that those investing in the four FTZ regions where the trial version of the negative list is being piloted should note that they will be subject to both the trial version negative list and to any other restrictions on foreign investment that may currently exist (whether these restrictions be written or *de facto*). Consequently, foreign investors in the four Pilot FTZs will need to heed both the restrictions and prohibitions contained in the trial version negative list, as well as those on the foreign-investment negative list for the pilot FTZs.

In short, the trial version negative list does not, in itself, offer any improvement in market access for foreign investors in China. Rather, it represents an effort on the part of the Chinese government to consolidate in one place a list of all the restrictions applicable to both domestic and foreign investors. The goal, hopefully, is to lay the groundwork for procedural reforms, as well as for future revisions to the list which would provide

improved market access.⁶³⁶

Although the NDRC and MOFCOM recently released a draft 2016 version of the *Catalogue for the Guidance of Foreign Investment Industries* for public comment on 7 December 2016, China is on its way to shortening the negative list. The draft was issued following the recent reform of the FIE approval regime in China. The special administrative measures on access for foreign investments (Negative List) section of the *Catalogue for the Guidance of Foreign Investment Industries* will be used to determine whether foreign investments in relevant industries will be subject to the approval of MOFCOM or its local branches. The new draft also promises to open up a significant number of currently restricted and prohibited sectors to foreign investors. Compared to the current version of the *Guiding Catalogue*, which was issued on 10 March 2015, the draft Catalogue reduces the number of restrictive measures (i.e. limitations on the ownership of shares, restricted items and prohibited items) from 93 to 62.⁶³⁷

C. Conclusion concerning the gap between China and the United States in the national treatment standards

From the comparison above, it is apparent that even with a pre-establishment national treatment stage and a negative list approach, China will still lag behind the national treatment standard of the United States.

From a historical perspective, the United States has a long tradition of protecting foreign investment in international investment law. In fact, the origin of the law on foreign investment lies very much in the history of efforts made by the United States to protect its foreign investments in Latin America.⁶³⁸ Historically, the United States emphasised the protection of foreigners from certain actions of state and local government. Because the *Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution* apply to persons, rather than to citizens, these provisions guarantee that states cannot abridge the rights of foreign nationals within the United States. The Supreme

⁶³⁶ Ashwin Kaja, Timothy P. Stratford, and Yan Luo, 'China Moves Forward with Negative List for (Domestic and Foreign) Market Access', Covington Global Policy Watch, available at: <https://www.globalpolicywatch.com/2016/04/china-moves-forward-with-negative-list-for-domestic-and-foreign-market-access/>. [10.07.2017]

⁶³⁷ See the official website of the MOFCOM, Chinese only, available at: <http://www.mofcom.gov.cn/article/b/f/201612/20161202088897.shtml>. [10.07.2017]

⁶³⁸ Shan and Su (ed), *China and International Investment Law*, at 23.

Court has, in the past, voided state laws which have established classifications in government actions solely on the basis of citizenship. In doing so, the Supreme Court has made clear that a classification based solely upon citizenship or nationality is inherently suspect and subject to strict scrutiny.⁶³⁹ More recently, in the trade and investment regime, the United States has maintained its predominant position concerning the equal treatment accorded to foreign investment, and is regarded as having the leading national treatment standard.

As to the conclusion; in the trade regime, because China and the United States are both WTO members it is clear that both states should be subject to Article III of the GATT.

Concerning the trade in services, although China and the United States are both subject to Article XVII of the GATS, there are discrepancies between them with regard to their specific commitments in various service sectors. The United States has made national treatment commitments in more service sectors and inscribed fewer qualifications. China, however, has been more conservative in this regard, and has included fewer service sectors in its SSCs, while inscribing more qualifications concerning limitations on national treatment. In other words, China still needs to open up more service sectors to foreign services and service suppliers and remove more restrictive qualifications concerning the national treatment accorded to foreign services and service suppliers.

The discrepancy is also obvious in that China continues to adhere to the positive listing approach of the GATS when it comes to national treatment commitments, while the United States adopted the negative list approach in this regard more than a decade ago. Thus, the conflict in this regard lies in China's persistence with its previous GATS positive listing approach as opposed to the negative list approach adopted by the United States.

With regard to FTAs, China's model national treatment clause in the trade chapter of FTAs is less sophisticated than that of the United States, and lacks the incorporation of national treatment in provincial/local governments, as well as the legitimacy of non-conforming measures.

Moreover, in the service chapter in FTAs, US national treatment clauses have more content, including provincial/local government application of national treatment and exceptions to the national treatment clause. But the real discrepancy lies in the

⁶³⁹ Seitzinger, 'Foreign Investment in the United States', at 14.

positive/negative listing approach. China still adopts the GATS-like positive listing approach in its FTAs, while the United States has adopted the negative listing approach for more than a decade. There is therefore clearly a significant difference between the two approaches, and China is apparently not ready for a more advanced approach to the trade in services.

With regard to the domestic investment regime, the comparison shows that the United States is less strict in general, but maintains tighter control over a few sensitive industries where high-level national security investigation is required. China, on the other hand, is stricter in general, but more sectors are foreign-limited and the national security standard is ambiguous.

With regard to BITs, China does not offer national treatment to foreign investors/investment in the pre-establishment stage, and as such maintains tighter control over the admission of foreign investors and investment, although *de jure* national treatment is offered after admission. Although China has committed to providing national treatment to foreign investors in the pre-establishment stage in future, there are still huge gaps between China and the United States in respect of their negative lists of non-conforming measures. A review of the respective negative lists of China and the United States reveals that the Chinese list is far longer than that of the United States. In practice, China has copied all the prohibited and restrictive sectors and relevant administrative measures in its domestic regulations into the negative list verbatim, ostensibly adopting a negative list approach, but retaining a massive number of prohibitive and restrictive administrative measures unchanged in nature. Besides, the current Chinese version of the negative list offers no improvement in market access for foreign investors in China, rather, it represents an effort on the part of the Chinese government to consolidate in one place a list of all the restrictions applicable to both domestic and foreign investors.

After drawing the conclusion concerning BITs, it must be said that, as the China-US BIT is under negotiation at the time of writing, there are several significant discrepancies concerning the negotiation of a China-US BIT.

From a Chinese perspective, non-conforming measures, pre-establishment national treatment, and transparency are thorny issues in its BIT negotiations with the United States, because China has seldom made binding commitments in these areas in its previous BITs. In order to conclude a BIT with the United States, China has agreed to adopt a

negative-list of non-conforming measures, provide pre-establishment national treatment, and enhance transparency in the proposed BIT.⁶⁴⁰ If the China-US BIT is concluded, these unprecedented treatments will not only benefit investors/investment from the United States, but also other foreign investors/investment, because of the MFN automatic adaptation function in other BITs concluded by China.⁶⁴¹

Some may express reservations about China's determination to shorten the negative list and substantially open its domestic market. Such reservations are understandable, as the formulation of China's negative list includes nothing creative, and demonstrates China's continued strong intention to protect its domestic industries and investors. However, China's efforts to shorten the negative list should not be ignored, as the negative list has been revised annually since its first publication. Perhaps the best illustration of China's determination to further open its domestic market to foreign investors is that since 2013, it has gradually implemented both a negative list of non-conforming measures and pre-establishment national treatment for foreign investors/investment in several trial regions.⁶⁴²

In short, the persistence of the United States in maintaining a higher national treatment standard and China's conservative attitude concerning substantially opening up to foreigners are in sharp contrast. Although China seems recently to have accepted pre-establishment national treatment and the negative list approach, the comparison of national treatment standards leads inevitably to a comparison of the length of the respective negative lists, which in turn provides some idea of the relative degree of openness in the respective domestic markets. When it comes to the length of the negative list, China is undoubtedly lagging behind the United States, as China has only just started to adopt the negative listing approach, and the United States has been using this approach for more than a decade. However, the fact that China has frequently revised and shortened its negative list in an attempt to reach a satisfactory level cannot be ignored.

⁶⁴⁰ The official blog of USTR, '2013 Year in Review: A Look Back at USTR's Work to Support Jobs and Economic Growth Here at Home', <http://www.ustr.gov/about-us/press-office/blog/2014/january/2013-year-review-look-back-ustr's-work-support-jobs-and-econ>. [10.07.2017] In January 2015, the Chinese government announced that it has finished negotiations of core issues and major provisions of the BIT and has begun to exchange non-conforming measures with the USA. Yali Cheng, 'First Exchange of Negative List in Early 2015: the China-US BIT Negotiation is Speeding Up', *International Business Daily*, 5 January 2015, A1.

⁶⁴¹ Schwarzenberger, 'The Most-Favored-National Standard in British State Practice', at 99 and 119.

⁶⁴² Article 13 of the Regulations of the Shanghai FTZ. Regulations of Shanghai FTZ, adopted at the 14th Session of the Standing Committee of the 14th Shanghai Municipal People's Congress of Shanghai on 25 July 2014, an English version is available at: <http://en.shftz.gov.cn/Government-affairs/Laws/General/319.shtml>. [10.07.2017] The Regulations of Shanghai FTZ is based on the Procedures for the Administration of Shanghai FTZ, promulgated by Decree No. 7 of Shanghai Municipal Government on 29 September 2013, an English version is available at <http://en.shftz.gov.cn/Government-affairs/Laws/General/169.shtml>. [10.07.2017]

Perhaps international society should show more confidence in China, as a change of role for China has undoubtedly taken place: from an important FDI recipient towards an important recipient and source of FDI at the same time.⁶⁴³ This changing role will contribute to China's attitude towards the national treatment standard, and the improvement of this standard in recent years is an inevitable result of China's massive outbound capital flow. Moreover, the conclusion of the China-Canada BIT in 2012 provided a significant impetus for China's subsequent agreements with the United States, as well as the EU.

II. How far is China from the national treatment standard of the European Union?

Following the comparison between China and the United States with regard to the national treatment standard, this research will now focus on a comparison between China and the EU. However, unlike the United States, the EU is not a state under international law.

The EU is nevertheless a unique economic and political union between 28 European countries.⁶⁴⁴ The union has a purely economic origin, and evolved gradually into a political union. Although it is defined as a 'union', the Treaty of Lisbon clearly confirmed the international legal personality of the EU,⁶⁴⁵ and the EU is therefore competent to enter into international agreements with third states and other international organisation in certain areas;⁶⁴⁶ among which are international trade and investment agreements.

A. How far is China's national treatment standard in the trade regime from that of the Europe Union?

⁶⁴³ Gallagher and Shan, *Chinese Investment Treaties*, at 4.

⁶⁴⁴ EU website, about the EU, EU in brief, available at: https://europa.eu/european-union/about-eu/eu-in-brief_en. [10.07.2017]

⁶⁴⁵ See Article 47 of the Treaty the European Union: "*The Union shall have legal personality.*"

⁶⁴⁶ See Article 37 of the Treaty the European Union: "*The Union may conclude agreements with one or more States or international organisations in areas covered by this Chapter.*"

According to Article 3.2 in the Treaty on the Functioning of the European Union (TFEU):

"The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope."

1. China and the European Union are subject to identical national treatment standards according to WTO agreement

As regards WTO membership, the EU ⁶⁴⁷ has been a WTO member since 1 January 1995, and the 28 member states of the EU are also WTO members in their own right.⁶⁴⁸ Aside from this, the EU is in itself a regional trade agreement in the meaning of WTO law.

As discussed in previous section, as WTO members, both China and the EU are subject to Article III of the GATT.

As for the GATS, as China's committed sectors have already been enumerated in the previous section, an analysis of EU SSCs is necessary for comparison. However, as it was the European Community as a whole that participated in the Uruguay Round of negotiations and made market access commitments on a number of service sectors, the European Community services schedules include its then Member States as well as those that joined in 1995 (Austria, Finland, Sweden) and 2004, which also have schedules under their own names.⁶⁴⁹

Therefore, in order to achieve a consolidated version of the EU's service schedule, this research will focus on the EU's SSC and List of MFN Exemptions for Trade in Service Agreement (TiSA).⁶⁵⁰

According to this TiSA service schedule, the EU adopts a negative list approach for national treatment commitments, with a positive list approach for market access commitments. It is thus difficult to draw a clear line between these positive and negative listing approaches.

In order to gain a concrete impression, the services sectors included in the EU's service schedule will be enumerated as follows: business services,⁶⁵¹ communication services,⁶⁵²

⁶⁴⁷ Until 30 November 2009 known officially in the WTO as the European Communities for legal reasons.

⁶⁴⁸ WTO website, Member Information, The European Union and the WTO, available at: https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm. [10.07.2017]

⁶⁴⁹ *Ibid.*

⁶⁵⁰ The TiSA is a trade agreement currently being negotiated by 23 members of the WTO, including the EU. TiSA is based on the GATS. The key provisions of the GATS – scope, definitions, market access, national treatment and exemptions – are also found in TiSA. TiSA aims at opening up markets and improving rules in areas such as licensing, financial services, telecoms, e-commerce, maritime transport, and professionals moving abroad temporarily to provide services. The full text of EU's SSC in the TiSA is available at: http://trade.ec.europa.eu/doclib/docs/2016/may/tradoc_154590.pdf. [10.07.2017]

⁶⁵¹ Including professional services, computer and related services, research and development services, real estate services, rental/leasing services without operators, and other business services.

⁶⁵² Including postal and courier services and telecommunications services.

construction and related engineering services, distribution services,⁶⁵³ educational services,⁶⁵⁴ environmental services,⁶⁵⁵ financial services,⁶⁵⁶ health services and social services,⁶⁵⁷ tourism and travel-related services,⁶⁵⁸ recreational, cultural and sporting services,⁶⁵⁹ transportation services,⁶⁶⁰ services auxiliary to transport,⁶⁶¹ energy services,⁶⁶² and other services not included elsewhere.⁶⁶³

Comparing the SSCs of China and the EU, although different approaches are adopted concerning the classification of service sectors and sub-sectors, the EU's schedule contains health services and social services, recreational cultural and sporting services, energy services, and other services not included elsewhere, but China does not.

Although it is not common for two different approaches to market access and national treatment commitments to be adopted in service schedule of one state, the practice in the China-Australia FTA has already demonstrated the co-existence of both the negative and positive list approaches. As for the EU, it is not easy to balance the different national treatment standards of different Member States. The EU therefore adopts the negative listing approach to national treatment commitments, and allows Member States to inscribe their own reservations. Any sectors or sub-sectors that are not listed are, by default, open to foreign service suppliers under the same conditions as for domestic service suppliers.⁶⁶⁴

⁶⁵³ Including commission agents' services, wholesale trade services, retailing services, and franchising.

⁶⁵⁴ Including primary education services, secondary education services, higher education services, adult education services, and other education services.

⁶⁵⁵ Including waste water services, solid/hazardous waste management, excluding cross-border transport of hazardous waste, protection of ambient air and climate, remediation and clean-up of soil and waters, noise and vibration abatement, protection of biodiversity and landscape, and other environmental and ancillary services.

⁶⁵⁶ Including insurance and insurance-related services, banking and other financial services.

⁶⁵⁷ Including hospital services, ambulance services, residential health facilities other than hospital services, and social services.

⁶⁵⁸ Including hotels, restaurants and catering, travel agencies and tour operator services, and tourist guides services.

⁶⁵⁹ Including entertainment services, news and press agency services, libraries, archives, museums and other cultural services, sporting services, and recreation, park and beach services.

⁶⁶⁰ Including maritime transport, inland waterway transports, road transport, and pipeline transport of goods other than fuel.

⁶⁶¹ Including services auxiliary to maritime transport, services auxiliary to inland waterway transport, services auxiliary to rail transport, services auxiliary to road transport, services auxiliary to air transport services, and services auxiliary to pipeline transport of goods other than fuel.

⁶⁶² Including services incidental to mining, pipeline transportation of fuels, storage and warehouse services of fuels transported through pipelines, wholesale trade services of solid, liquid and gaseous fuels and related products, retailing services of motor fuel, retail sales of fuel oil, bottled gas, coal and wood, and services incidental to energy distribution.

⁶⁶³ Including washing, cleaning and dyeing services, hairdressing services, cosmetic treatment, manicuring and pedicuring services, other beauty treatment services, Spa services and non-therapeutical massage, to the extent that they are provided as relaxation or physical well-being services and not for medical or rehabilitation purposes.

⁶⁶⁴ For greater certainty, for the European Union, the obligation to grant national treatment does not entail the requirement to extend to nationals or juridical persons of the other Party the treatment granted in a Member State to the nationals and juridical persons of another Member State pursuant to the TFEU, or to any measure adopted pursuant to that Treaty, including their implementation in the Member States. Such national treatment is granted only to legal persons of the other party established in accordance with the law of another Member State and having their registered office,

In short, within the WTO legal framework for services, China's service schedule contains fewer service sectors than that of the EU, and the latter adopts the negative list approach concerning national treatment commitments, while the former adopts the positive list approach.

Concerning the national treatment standard in other WTO Agreements, as discussed in Chapter 1, the national treatment clause in the TBT Agreement and the SPS Agreement are based on Article III of the GATT, the national treatment provision in the TRIPS is closely related to Article III of the GATT, and the national treatment standard in the TRIMs as regards the investment regime will be analysed in Section II.B of this chapter. But aside from the comparison of China and the EU in trade in services, it is worth mentioning a few topics with regard to the national treatment standard of those states in WTO law, and the next section will focus on the national treatment standard in the trade chapter of Chinese and EU FTAs.

2. The national treatment standard in the FTAs of China and the European Union

Clauses from the universal WTO system always provide a benchmark for the national treatment clauses in FTAs, particularly as almost all the partners in FTAs with the EU are also WTO Member States.⁶⁶⁵

With respect to the analysis of the FTA practice of China and the EU, the comparison method already used to compare the FTAs of China and the United States will be adopted, which means that section a. of this part will focus on FTAs that China and the EU have signed with a single country: namely the Republic of South Korea, and section b. will focus on the national treatment standard in Chinese and EU FTAs in general.

a. The national treatment clauses in China-South Korea FTA and the EU-South Korea FTA

The China-South Korea FTA was signed in 2015, and represents China's highest FTA

central administration or principal place of business in that Member State, including those legal persons established within the EU which are owned or controlled by nationals of the other Party.

⁶⁶⁵ Only the Lebanon is not a WTO Member State, nor does it have observer status. Although neither Algeria, Bosnia and Herzegovina, Serbia, the Bahamas, nor the Seychelles, are full members, they all have observer status at the WTO and are preparing themselves for full membership.

standard to date, while the EU-South Korea FTA was signed in 2010, and entered into force on 13 December 2015.

In the trade chapter, both China and the EU incorporated the same national treatment clause into the FTAs they signed with South Korea, as follows:

Each Party shall accord national treatment to goods of the other Party in accordance with Article III of GATT 1994, including its interpretative notes. To this end, Article III of GATT 1994 and its interpretative notes are incorporated into and made part of this Agreement, *mutatis mutandis*.⁶⁶⁶

Both FTAs directly recall the GATT, and the fact that national treatment should be granted in accordance with the GATT, however, the EU- South Korea FTA is far more complicated than the China-South Korea FTA in the service chapter.

Chapter 7 of the EU- South Korea FTA deals with Trade in Services, Establishment and Electronic Commerce, and is accordingly divided into seven sections: general provision, cross-border supply of services, establishment, temporary presence of natural persons for business, regulatory framework, electronic commerce and exceptions.

In the cross-border supply of services and establishment sections, the EU-South Korea FTA incorporates similar GAT-like national treatment clauses as follows:

1. In the sectors where market access commitments are inscribed in Annex 7-A and subject to any conditions and qualifications set out therein, each Party shall accord to services and service suppliers of the other Party, in respect of all measures affecting the cross-border supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.
2. A Party may meet the requirement of paragraph 1 by according to services and service suppliers of the other Party, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of a Party compared to like services or service suppliers of the other Party.
4. Specific commitments assumed under this Article shall not be construed to require any Party to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.⁶⁶⁷

This three-paragraph structure is also adopted by the China-South Korea FTA as follows:

1. In the sectors inscribed in its Schedule of Specific Commitments, and subject to any conditions and qualifications set out therein, each Party shall accord to services and service suppliers of the other Party, in respect of all measures affecting the

⁶⁶⁶ See Article 2.3 in China-South Korea FTA and Article 2.8 in EU- South Korea FTA.

⁶⁶⁷ See Article 7.6 in the EU-Korea FTA.

supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.⁶⁶⁸

2. A Party may meet the requirement in paragraph 1 by according to services and service suppliers of the other Party either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Party compared to like service or service suppliers of the other Party.⁶⁶⁹

Accordingly, the national treatment standards in the China-South Korea FTA and the EU-South Korea FTA are identical in nature, as the EU-South Korea FTA divides different modes of service and thus, the difference lies in the SSC.

When it comes to their SSCs, according to Annex 7-A-2, both the China-South Korea FTA and the EU-South Korea FTA contain professional services, computer and related services, real estate services, other business services, communication services, construction and related engineering services, distribution services, educational services, environmental services, financial services, tourism and travel-related services, recreational, cultural and sporting services, transportation services in the cross-border supply of service.

In addition, the EU-South Korea FTA contains research and development services, rental/leasing services without operators, health services and social services, services auxiliary to transport, other transport services, energy services, other services not included elsewhere in the cross-border supply of service, while the China-South Korea FTA does not.

As well as the differences concerning the service sectors included, in its SSC, the China-South Korea FTA adopts a GATS-like positive list approach, while the EU-South Korea FTA has only one column: 'Description of reservations'. This column describes national treatment limitations that apply to Korean services and service suppliers in certain sectors, also known as the applicable reservations.

A national treatment clause is also included in the establishment section, and according to Annex 7-A-2 of the EU-South Korea FTA, this covers establishment in agriculture, hunting, forestry, fishing and aquaculture, mining and quarrying, manufacturing, production, transmission and distribution on own account of electricity, gas, steam and hot

⁶⁶⁸ Specific commitments assumed under this Article shall not be construed to require any Party to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

⁶⁶⁹ See Article 8.4 in the China-Korea FTA.

water, as well as all the sectors included in cross-border supply of service.

Therefore, the service schedule in the EU-South Korea FTA includes more service sectors than does the China-South Korea FTA, and both FTAs adopt a positive list approach in this regard.

In sum, in terms of sectoral coverage and depth of national treatment commitments, the EU-South Korea FTA is by far the most ambitious services FTA ever concluded by the EU, and goes beyond any other services agreement that South Korea has concluded so far. As well as the national treatment in the trade and service chapter as discussed above, it requires that both parties grant national treatment in the access to public participation in the decision-making process for issuing technical standards, and China is incapable of incorporating this content into its FTAs.

b. The national treatment clauses in Chinese and European Union FTAs in general

In general, the EU's FTAs usually cover a broader range of issues than just the trade in goods, and include the cross-border supply of services and the establishment of companies.⁶⁷⁰

First of all, after reviewing all the FTAs concluded by the EU,⁶⁷¹ it can be seen that only 13 out of the 31 FTAs contain a national treatment clause in relation to the trade in goods. This lack of directly-granted national treatment does not seem to be connected with a lack of trust in the relations with contracting parties. It is quite significant that even agreements with especially close partners (which have concluded Stabilisation and Association Agreements and Euro-Mediterranean agreements) do not include national treatment provisions in relation to goods.⁶⁷² Moreover, it is well-known that Article III of the GATT is the most important benchmark and inspiration for the national treatment clause, and

⁶⁷⁰ Magdalena Słok-Wódkowska, 'National Treatment Rules in EU Regional Trade Agreements', *Polish Yearbook of International Law*, Vol. 34, 2014, pp. 225-248, at 239.

⁶⁷¹ These FTAs are: EC-Albania Stabilisation and Association Agreement (SAA), EU-Algeria Euro-Mediterranean Association Agreement, EU and Bosnia and Herzegovina SAA, EU-Cameron Economic Partnership Agreement (EPA), EU-Canada Comprehensive Economic and Trade Agreement (CETA), EC-CARIFORUM EPA, EU-Central America FTA, EU-Chile FTA, EU-Columbia & Peru FTA, EU-Eastern African Community EPA, EU- Eastern & Southern Africa EPA, EU-Egypt Euro-Mediterranean Association Agreement, EU-Georgia Deep and Comprehensive Free Trade Area (DCFTA), EU-Israel Euro-Mediterranean Association Agreement, EU-Ivory Coast EPA, EU-Jordan Euro-Mediterranean Association Agreement, EU-Korea FTA, EU-Lebanon Euro-Mediterranean Association Agreement, EU-FYROM SAA, EU-Mexico FTA, EU-Moldova DCFTA, EU-Montenegro SAA, EU-Morocco Euro-Mediterranean Association Agreement, EU-Pacific countries EPA, EU-Palestinian Authority Euro-Mediterranean Association Agreement, EU-Serbia SAA, EU-Singapore FTA, EU-South Africa Trade, Development and Cooperation Agreement, EU-Tunisia Euro-Mediterranean Association Agreement, EC-Turkey Customs Union, and EU-Ukraine DCFTA.

⁶⁷² Słok-Wódkowska, 'National Treatment Rules in EU Regional Trade Agreements', at 239.

since the majority of the EU' FTA partners are WTO members, the less favourable treatment of goods, as well as discriminatory taxation, is prohibited by that article, and technical requirements are also governed by the TBT Agreement. Hence there is not much need for the additional granting of national treatment or any other means to provide for non-discrimination.⁶⁷³

This means that the national treatment standards are similar in the FTAs of both China and the EU when it comes to the trade in goods, as both were inspired by the national treatment clause in the GATT.

Second, the gaps and discrepancies between China and the EU are more apparent when it comes to the trade in services.

According to the previous section, it is obvious that the EU generally makes commitments in more sectors in its FTAs than does China, including: research and development services, rental/leasing services without operators, health services and social services, services auxiliary to transport, other transport services, energy services, and other services not included elsewhere. As for the listing approach, the EU has used both negative (e.g. agreement with Canada) and positive lists (e.g. agreements with South Korea and Singapore) and is actually simultaneously engaged in (or has just concluded) negotiations using negative (Japan) and positive (Vietnam) lists. Moreover, the EU has also accepted the use of the so-called 'hybrid approach' in the TiSA.

A greater variety of national treatment clauses can also be found in the EU's FTAs in relation to the trade in services, and the majority do not follow the GATS model of liberalisation of trade in services, nor are they described by modes. They usually contain separate provisions concerning services and service suppliers (mode 1 and partly also mode 2 of service supply) and establishment, which is closer to the GATS mode 3 (commercial presence). Only two of the EU's FTAs can be classified as GATS-like, namely the agreements with Mexico and with Chile.⁶⁷⁴

Generally speaking, the European Union is more flexible and more concrete than China with regard to national treatment in the trade in services, as there are 28 Member States within the Union, and the standard varies from state to state. The gap basically lies in the sectoral coverage and the depth of national treatment commitments.

⁶⁷³ *Ibid.*

⁶⁷⁴ *Ibid.*, at 242.

B. How far is China's national treatment standard in the investment regime from that of the European Union?

With the entry into force of the Lisbon Treaty, the EU assumed exclusive competence over direct foreign investment.⁶⁷⁵ Although the EU has progressively extended the common commercial policy covering numerous trade-related topics, one important distinction with regard to investment policy is that in trade-related topics, such as government procurement or trade in services, the Member States had no well-developed external policies. Such well-established external policies of Member States do, however, exist in the case of investment, particularly with regard to investment protection.⁶⁷⁶ The EU's approach to international investment policy, as well as that of its Member States, will be discussed respectively prior to the national treatment comparison.

1. The approach of the European Union and its Member States to national treatment provision in IIAs

Because the EU is composed of 28 Member States, a preliminary issue must be addressed before comparing national treatment in the investment regimes of China and the EU: following the Lisbon Treaty, is there now a unified national treatment standard at EU level, or does this remain within the competence of each individual Member State?

a. Towards a European Union policy on foreign direct investment

With the entry into force of the Lisbon Treaty in 2009, the EU acquired new competences in the area of international investment law and policy. Article 207 of the TFEU now provides the EU with external treaty-making power in the field of foreign direct investment.⁶⁷⁷ The EU is thus expressly entitled to negotiate and conclude IIAs or FTAs

⁶⁷⁵ Article 206 and Article 207 of the TFEU includes foreign direct investment as one of the areas of common commercial policy of the Union, an area of exclusive EU competence in accordance with Article 3(1) TFEU.

⁶⁷⁶ European Parliament, 'The EU Approach to International Investment Policy After the Lisbon Treaty', Directorate-General for External Policies, Policy Department Study, October 2010, at 9, available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/433854/EXPO-INTA_ET\(2010\)433854_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/433854/EXPO-INTA_ET(2010)433854_EN.pdf). [10.07.2017]

⁶⁷⁷ See Article 207(1) of the TFEU:

"The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action."

including chapters on investment comparable to those previously concluded by individual EU Member States. This comprehensive investment competence marks the beginning of a unified EU approach to international investment law.⁶⁷⁸

A unified EU approach to international investment law also means that the EU will be able to establish uniform provisions for investors throughout the EU, in contrast to the current position in which investors in some Member States have better protection in some markets than others.⁶⁷⁹ Moreover, some Member States (such as Germany, Britain, France, the Netherlands and Italy) have been very active in negotiating BITs with a wide range of countries, while others have remained inactive.⁶⁸⁰

At the same time, the latest enlargement rounds of the EU have created the problem of intra-EU BITs, because most of the newly acceding countries had concluded BITs with previously existing Member States. These intra-EU BITs pose manifold legal questions: they provide the possibility of ‘treaty/forum shopping’ for investors, in that arbitral tribunals may interpret provisions in the BITs that are also covered by the EU law establishing the single market. It is not yet clear whether an EU investment policy would overcome these problems.⁶⁸¹

It is natural to count on the EU investment agreement to solve the above mentioned problems, this goal is, however, unlikely to be achieved in the short term, and will only be achieved if Member States and EU institutions can define common aims and cooperate in a genuinely common policy. The Treaty of Lisbon is silent on the transition from national BITs to the full implementation of EU investment agreements. It does not address the issue of the continued validity of the BITs of individual Member States, nor does it specify deadlines for their replacement,⁶⁸² so how the transition from individual BITs to EU level investment agreements is to be achieved remains unclear. Change is likely to be progressive rather than dramatic, with the EU progressively extending the number of EU investment agreements, and in the individual BITs of Member States are likely to continue

⁶⁷⁸ Gabriel M. Lentner, A Uniform European Investment Policy?: The unwritten EU Model BIT, *Journal of Law and Administrative Sciences*, No.2/2014, pp. 156-165, at 156.

⁶⁷⁹ European Parliament, ‘The EU Approach to International Investment Policy After the Lisbon Treaty’, at 7.

⁶⁸⁰ European Commission, ‘Towards a Comprehensive European International Investment Policy’, Commission White Paper, Com (2010) 343, 7 July 2010, at 5, available at: http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf. [10.07.2017]

⁶⁸¹ Thomas Eilmansberger, ‘Bilateral investment treaties and EU law’, *Common Market Law Review*, Vol. 46, Issue 2, 2009, pp. 383-429, at 400.

⁶⁸² European Parliament, ‘The EU Approach to International Investment Policy After the Lisbon Treaty’, at 59.

to remain in force in the meantime.⁶⁸³

As there is as yet no official, finalised EU investment agreement, and a unified EU investment policy is still under discussion, the following sections will focus on the national treatment standards of individual Member States in IIAs and national treatment at an EU level as proposed by the European Commission.

b. The national treatment standard in the IIAs of European Union Member States

Over the last 50 years, the most visible manifestation with regard to investment in the policies of Member States has been the number of BITs that they have concluded with third countries. Germany was the first nation in the world to conclude a BIT in 1959, and many other countries, including all but one EU Member State,⁶⁸⁴ have followed their lead. With a total of almost 1,400 agreements covering all forms of investment, EU Member States together account today for almost half of the investment agreements currently in force around the world.⁶⁸⁵ However, not all Member States have concluded such agreements, and not all agreements provide for the same national treatment standards. The following section will therefore focus on national treatment standards in the IIAs of EU Member States.

Virtually all IIAs seek to ensure national treatment for investors. In investment regimes, national treatment typically ‘requires that foreign investors should receive treatment no less favourable than that accorded to nationals of the host country engaged in similar business activity’.⁶⁸⁶ This is a key aspect of any investment agreement, and crucial to ensuring that a country’s investors do not face discrimination vis-à-vis local businesses. While the IIAs of most EU Member States include clauses on national treatment, there are also differences when it comes to their approach to the national treatment standard. The following section will focus on the national treatment standards of some of the more influential EU Member States.

⁶⁸³ *Ibid.*, at 6.

⁶⁸⁴ Ireland’s only BIT is with the Czech Republic was signed in 1996 and has been terminated. Therefore, Ireland is the only country in the European Union that has not adopted the BIT strategy.

⁶⁸⁵ European Parliament, ‘The EU Approach to International Investment Policy After the Lisbon Treaty’, at 4.

⁶⁸⁶ Peter Muchlinski, ‘The Framework of Investment Protection: The Content of BITs’, in Sachs, Lisa and Karl P. Sauvant *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press: 2009), at 140.

i. Germany's national treatment standard in BITs

As the first country ever to conclude a BIT, Germany has been an active player in the negotiation of BITs, and the standards adopted in German BITs have influenced other EU countries. Germany's recent practice as regards the national treatment standard in BITs is exemplified by Article 3 of the Germany-Jordan BIT, signed in 2007:

- (1) Neither Contracting Party shall in its territory subject investments owned or controlled by investors of the other Contracting Party, to treatment less favourable than it accords to investments of its own investors or to investments of investors of any third State.
- (2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their activity in connection with investments, to treatment less favourable than it accords to its own investors or to investors of any third State.
- (3) Such treatment shall not relate to privileges which either Contracting Party accords to investors of third States on account of its membership of, or association with, a customs or economic union, a common market or a free trade area.
- (4) The treatment granted under this Article shall not relate to advantages which either Contracting Party accords to investors of third States by virtue of a double taxation agreement or other agreements regarding matters of taxation.
- (5) This treatment shall not apply to privileges in a special economic zone granted without distinction to domestic and foreign investors by a Contracting Party.

The aforementioned national treatment is identical to the clause in the German Model BIT. According to this clause, German BITs are silent as to the basis for comparison in the application of national treatment, which means there is no mention of '*in like circumstances*'. Moreover, German BITs only cover the post-establishment stage of foreign investment. Nevertheless, the national treatment standard in German BITs can be taken as exemplifying the attitude towards national treatment standard of most other EU states.

ii. France's national treatment standard in BITs

As another influential country in the EU, the national treatment standard in French BITs should not be ignored.

One of the BITs signed most recently by France is the China-France BIT, which was renegotiated and signed in 2007. The national treatment provision in the China-France BIT is as follows:

- (1) Without prejudice to its legal and regulatory provisions, each Contracting Party shall apply in its territory and maritime zone to the investors of the other Party, with respect to their investors and investments, a treatment no less favorable than it accords to investments of its own investors.
- ...
- (4) This treatment shall not, however, extend to any pecuniary interest which one of the Contracting Parties grants to the investors of a State by virtue of its

participation in its association with a free trade area, a customs union, a common market in the another form of regional economic organization.

(5) The provisions of this Article shall not be interpreted as requiring either Contracting Party to extend to investors of the other Contracting Party any treatment, preference or privilege of any kind by virtue of a double taxation agreement or other agreements regarding matters of taxation.

(6) Nothing in this Article shall be interpreted as preventing either Contracting Party from making any provision for the regulation of investments by foreign investors and the conditions governing the activities of such investors measures to preserve and encourage cultural and linguistic diversity.⁶⁸⁷

The aforementioned national treatment is also similar to the clause in the German Model BIT, meaning that the French BIT is also silent when it comes to the basis for comparison in the application of national treatment. Like the German BIT, French BITs also only cover the post-establishment stage of foreign investment.

iii. The United Kingdom's national treatment in BITs

Although the United Kingdom has voted to leave the EU, at the time of writing it is still a member. This dissertation therefore considers the United Kingdom to be a member of the EU.

The latest BIT signed by the United Kingdom is the UK-Colombia BIT, signed in 2010 and entering into force in 2014. The national treatment clause in this BIT is as follows:

1. Each Contracting Party shall grant to the investments of investors of the other Contracting Party made in its territory, a treatment not less favourable than that accorded, in like circumstances, to investments of its own investors or to investments of investors of another third State, whichever is more favourable to the investor.
2. The most favourable treatment to be granted in like circumstances referred to in this Agreement does not encompass mechanisms for the settlement of investment disputes, such as those contained in Articles IX and X of this Agreement, which are provided for in treaties or international investment agreements.⁶⁸⁸

The UK-BIT is not silent on the basis for comparison in the application of national treatment, and incorporates '*in like circumstances*'. In recent UK-BITs, '*in like circumstances*' is more likely to have been incorporated as a comparator, which is different to the German and French standards. However, UK BITs also only cover the post-establishment stage of foreign investment.

In sum, as can be seen from the national treatment standards of the three most influential countries in the EU, the national treatment standard in EU Member States with regard to

⁶⁸⁷ See Article 4 of the China-France BIT.

⁶⁸⁸ See Article 3 of the UK-Colombia BIT.

the scope of investment protection covers the ‘post-entry’ or ‘post-admission’ stage only. This implies that the BITs of these EU Member States provide no specific binding commitments with regard to the conditions of entry, either from third countries regarding outward investment by companies of EU Member States, or *vice versa*.⁶⁸⁹ For instance, the Model BITs of Germany, France, Belgium and Luxembourg only cover the post establishment phase in their national treatment clauses. EU Member States typically provide national treatment to foreigners in the ‘management, use, enjoyment and disposal’ of the investment, which is similar to the third generation of Chinese BITs.

In general, none of the BITs of EU Member States include pre-establishment protection. Clauses in these BITs usually limit the scope of application to the ‘management, operation, maintenance, use, enjoyment, sale and liquidation of an investment’.⁶⁹⁰ This approach has been analysed and characterised as the ‘investment control approach’,⁶⁹¹ which is similar to the Chinese approach as discussed in Chapter 3. Accordingly, the BITs concluded by the United States (and Canada) present two essential differences when compared to those concluded by EU Member States: the former cover access or first establishment as well as post-establishment, while those of the EU Member States cover only the post-establishment phase. US-BITs also include a list of sectors derived from the agreement.⁶⁹²

Another feature of the national treatment standard in EU Member States is their silence on the basis for comparison in the application of national treatment. According to Chapter 1, national treatment involves a comparison between the treatment of domestic and foreign investors, and there are often issues regarding how to determine an appropriate comparator. This generally involves the first substantive content of the national treatment principle: *likeness*. Although determination of the basis of comparison remains a controversial issue, many IIAs explicitly refer to investors or investments ‘*in like circumstances*’. However, international investment tribunals have yet to determine a consistent approach as to what ought to be the comparator, i.e. who is in a ‘*like circumstance*’. Tribunal practice therefore remains unpredictable as to what ought to be considered a likeness test, regardless of

⁶⁸⁹ European Parliament, ‘The EU Approach to International Investment Policy After the Lisbon Treaty’, at 5.

⁶⁹⁰ See Article 3.3 of the Austria Model BIT. See also model BITs of UK, Belgo-Luxembourg, Denmark and Greece. Nevertheless, The Finland Model BIT has a clause drafted similarly to the US Model BIT. In the MFN clause the BIT includes the words ‘establishment’ and ‘acquisition’. However, as regards national treatment, it includes only acquisition.

⁶⁹¹ UNCTAD, *International Investment Agreements: Key Issues*, at 143.

⁶⁹² Ramon Torrent, ‘The Contradictory Overlapping of National, EU, Bilateral, and the Multilateral Rules on Foreign Direct Investment: Who is Guilty of Such a Mess’, *Fordham International Law Journal*, Vol. 34, Issue 5, 2011, pp. 1377-1399, at 1386.

whether the agreement includes an explicit reference to ‘*in like circumstances*’ or not.⁶⁹³

As for EU Member States, most of their BITs appear to be silent on the basis for comparison in the application of national treatment. Some of the newer BITs such as the BITs between Canada and Latvia, Slovakia, Czech and Romania, revised in 2009, provide for such a comparator, probably because this is standard Canadian practice.⁶⁹⁴

In sum, according to this analysis, the national treatment standard of EU Member States is similar to that of China. Until the entry into force of the Lisbon Treaty, EU Member States generally remained competent to conclude BITs and to regulate investment protection and post-establishment treatment,⁶⁹⁵ but the EU is now working on a unified investment policy for the negotiation of IIAs, which will raise the national treatment standard.

c. Higher national treatment standard proposed by the European Union

In general, it seems that the EU is now determined to seek a higher level of protection for its investors abroad. Officials of the European Commission have asserted that the Commission would ‘go for the “gold standard” of investment protection provisions’,⁶⁹⁶ based on the existing practice of EU Member States. Unlike trade agreements, no investment agreement has yet been signed by the EU with a third party, however, the EU-Canada Comprehensive Economic and Trade Agreement (CETA) is the first time there have been EU-wide rules on investment as part of a broad trade agreement. The EU-Canada CETA will therefore be used as a model to analyse the potentially higher national treatment standard proposed by the EU.

According to Article 8.6, the national treatment standard in the EU-Canada CETA is as follows:

1. Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management,

⁶⁹³ Janina M. Mank, André Marini, Jason Rudall, “‘Gold Standards’ for the International Investment Policy of the European Union after the Entry into Force of the Lisbon Treaty”, The Graduate Institute, Memorandum to European Commission, Cabinet of the Trade Commissioner, Mr. Damien Levie, at 32, available at: https://www.tradelab.org/images/tradelab/pdf/clinics/2016/Gold_Standards_for_the_International_Investment_Policy_of_the_European_Union_after_the_Entry_into_Force_of_the_Lisbon_Treaty.pdf. [10.07.2017]

⁶⁹⁴ European Parliament, ‘The EU Approach to International Investment Policy After the Lisbon Treaty’, at 33.

⁶⁹⁵ *Ibid.*, at 10.

⁶⁹⁶ Frank Hoffmeister and Günes Ünüvar, ‘From BITS and Pieces towards European Investment Agreements’, in Marc Bungenberg, August Reinisch, Christian Tietje ed. *EU and Investment Agreements: Open Questions and Remaining Challenges* (Nomos Verlagsgesellschaft mbH & Co. KG: 2013), pp. 57-85, at 70.

maintenance, use, enjoyment and sale or disposal of their investments in its territory.

2. The treatment accorded by a Party under paragraph 1 means, with respect to a government in Canada other than at the federal level, or, with respect to a government of or in a Member State of the European Union, treatment no less favourable than the most favourable treatment accorded, in like situations, by that government to investors of that Party in its territory and to investments of such investors.

According to the clause above, it incorporates at EU level the '*in like circumstances*' and also covers the pre-establishment stage of foreign investment. While the former is not an innovation, as there are already some Member States who adopted this approach as the basis for comparison, the latter is a breakthrough, as none of the existing BITs entered into by EU Member States include pre-establishment protection. In addition, paragraph 2 of Article 8.6 of the EU-Canada CETA emphasises the application of national treatment for local government. Because Canada is the contracting party, this clause is related to the NAFTA national treatment provision.

The EU-Canada CETA apparently raises the national treatment standard at EU level, which is in line with the EU's objective of liberalisation, a key factor in the EU's international investment policy.⁶⁹⁷

Although few IIAs have been signed by the EU, the Commission has explicitly declared that EU policy on international investment is to adhere to an investment liberalisation objective.⁶⁹⁸ For example, it is clear that the EU seeks to extend protection from nationality-based discrimination to market access, and will thus subject the pre-establishment phase of investments to the requirements of both national treatment and MFN.⁶⁹⁹

It also seems likely that the national treatment clause proposed by the EU will incorporate '*in like circumstances/situations*' as indicated by the EU-Canada CETA.

Therefore, from an EU perspective, adopting a more liberal approach and including pre-establishment rights is in line with the main objectives of the European Commission as regards the shift of competence post-TFEU; namely the liberalisation of investments.⁷⁰⁰ Moreover, it will provide greater investment access for European investors and also

⁶⁹⁷ See Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America of 17 June 2013.

⁶⁹⁸ European Parliament, 'The EU Approach to International Investment Policy After the Lisbon Treaty', at 5.

⁶⁹⁹ Antonios Tzanakopoulos, 'National Treatment and MFN in the (Invisible) EU Model BIT', *Journal of World Investment and Trade*, Vol. 15, 2014, pp. 484-505, at 489.

⁷⁰⁰ European Parliament, 'The EU Approach to International Investment Policy After the Lisbon Treaty', at 5.

guarantee a more level playing field in competition with North American investors. Accordingly, it is to be expected that future EU IIAs will largely resemble the typical BITs concluded by its Member States, though there may be a few modifications concerning pre-establishment national treatment and ‘*in like circumstance*’.⁷⁰¹

2. The challenge faced in the negotiation of the national treatment standard in the EU-China CAI

The negotiation background and the possible choice of national treatment standard in the EU-China CAI are discussed in Chapter 3, therefore, this section will focus on the analysis of Chapter 3 and on possible difficulties surrounding the national treatment principle and affecting the conclusion of the EU-China CAI. As it is likely to adopt pre-establishment national treatment with a negative list approach, what will be the challenges for the national treatment clause of the EU-China CAI?

The EU wishes to achieve a ‘better balance’ between the state’s right to regulate and investment protection, and to elaborate ‘clearer and better standards’ with its new investment policy.⁷⁰² The two objectives are intertwined, and the European Commission considers that investment protections must be clearly defined and must leave no room for ‘interpretative ambiguity’, particularly where the ‘state’s right to regulate for public policy objectives’ is involved.⁷⁰³ The following analysis will therefore focus on the possible divergence of the national treatment clause in the EU-China CAI.

a. Should ‘*in like circumstances*’ be the basis for comparison?

According to Chapter 3, ‘*in like circumstances*’ has become a standard description when it comes to the basis for comparing domestic and foreign investors in the third generation of Chinese BITs, so there is no reason why China should have a problem with incorporating ‘*in like circumstances*’ in the national treatment clause of the EU-China CAI; the problem lies with the EU.

According to Chapter 1, the application of nationality-based non-discrimination clauses

⁷⁰¹ August Reinisch, ‘The EU on the Investment Path—*Quo Vadis* Europe? The Future of EU BITs and Other Investment Agreements’, *Santa Clara Journal of International Law*, Vol. 12, Issue 1, 2014, pp. 111-157, at 128.

⁷⁰² European Commission, Investment Protection and Investor-to-State Dispute Settlement in EU Agreements, Fact Sheet, November 2013, at 5, available at: http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_15196.pdf. [10.07.2017]

⁷⁰³ European Parliament, ‘The EU Approach to International Investment Policy After the Lisbon Treaty’, at 6.

requires a comparison of the treatment afforded to two different investors with different nationalities. In turn, such a comparison requires the identification of an appropriate comparator. Many investment treaties require that the investors or the investments being compared be ‘*in like circumstances*’ or ‘*in like situations*’.

However, many EU Member States do not explicitly include the above requirement in their BITs,⁷⁰⁴ so the incorporation of ‘*in like circumstances*’ by the EU will raise a controversial issue. When individual states sign IIAs, the comparison is always between the nationals, however, in light of the new competence, if a foreign company investing in an EU Member State brings a claim against the EU, who or what should be the comparator? Should it be the most favourable treatment given by any EU Member State, or should it be limited to the treatment given by the EU Member State in which the investment was made?⁷⁰⁵ Some scholars have recommended creating a new ‘*likeness*’ test which will make the reference to the comparator more explicit.⁷⁰⁶ Technically speaking, this is a decision that will have to be made by the EU.

Looking at a recent case: the investment chapter in the EU-Singapore FTA incorporate ‘*in like situation*’ in the national treatment clause.⁷⁰⁷ It is therefore reasonable to predict that the national treatment clause in the EU-China CAI will incorporate ‘*in like circumstances/situation*’. However, as this is an inherent problem of the EU, there is a possibility that the EU will design a new solution to make the comparator more explicit.

b. Divergence in the content of the negative list

According to the previous discussion concerning the national treatment standard in Chinese and US BITs, it is clear that the core issue concerning the incorporation of a pre-establishment national treatment clause lies in the length and the content of the negative list, as pre-establishment national treatment is rarely granted without exceptions.

⁷⁰⁴ For instance, see Article 4 of France Model BIT 2006, Article 3 Germany Model BIT 2008 and Article III Italy Model BIT 2003. Antonios Tzanakopoulos, ‘National Treatment and MFN in the (Invisible) EU Model BIT’, at 487.

⁷⁰⁵ Armand De Mestral, ‘Is a Model EU BIT Possible—Or Even Desirable?’, *Columbia FDI Perspectives*, No. 21, Perspectives on topical foreign direct investment issues by the Vale Columbia Center on Sustainable International Investment (March 24, 2010), at 2, available at: <http://www.vcc.columbia.edu/content/model-eu-bit-possible-or-even-desirable>. [10.07.2017]

⁷⁰⁶ European Parliament, ‘The EU Approach to International Investment Policy After the Lisbon Treaty’, at 59.

⁷⁰⁷ Article 9.3 of the EU-Singapore FTA:

‘Each Party shall accord to covered investors of the other Party and to their covered investments, treatment in its territory no less favourable than the treatment it accords, in like situations, to its own investors and their investments with respect to the operation, management, conduct, maintenance, use, enjoyment and sale or other disposal of their investments.’

The EU currently urges the stipulation of a negative list approach granting pre-establishment national treatment to foreign investments in all sectors not included in the list.⁷⁰⁸ Although China seems to be willing to accept a negative list approach, China is likely to favour a more cautious and limited approach, including a long negative list. The EU, by contrast, will push for a more ‘symmetric’ liberalisation of access which, given the fact that the EU is already much more open to foreign (including Chinese) investments, would imply a rather short negative list.⁷⁰⁹

According to the recently initialled EU-Singapore FTA,⁷¹⁰ notwithstanding the national treatment obligation, the EU and Singapore can adopt or maintain measures consistent with their commitments inscribed in their SSCs in the Service, Establishment and Electronic Commerce Chapter. According to the EU’s specific commitment concerning establishment in Appendix 8-A-2 of the EU-Singapore FTA, it inscribes the special requirement made by Member States, if any. If there are no specific requirement of Member States and only a ‘none’ inscription, it will mean that this sector has no reservations and is open to foreign investors in every country of the EU. Therefore, in the EU-Singapore FTA, a positive list approach is adopted in the service and investment chapter concerning the national treatment clause.

However, the EU-Canada CETA includes a negative list concerning the reservations for sensitive activities in the service chapter, and the pre-establishment national treatment clause is designated on the basis of a negative list of reserved sectors. According to the reservations and exceptions clause in the investment chapter, the national treatment clause in the EU-Canada CETA does not apply to existing non-conforming measures that are maintained by the EU, as set out in its Schedule to Annex I. Annex I is the Schedule of the EU concerning measures which are not subject to the national treatment obligation. Annex I consists of reservations applicable in the EU (these are applicable in all Member States unless otherwise indicated) and the reservations applicable in every single Member State. Like the US’s negative list, the EU’s list explicitly incorporates sector, sub-sector, industry classification, type of reservation, level of government, measures and descriptions, which

⁷⁰⁸ Frank Bickenbach, Wan-Hsin Liu, and Guoxue Li, ‘The EU-China Bilateral Investment Agreement in Negotiation: Motivation, Conflicts and Perspective’, *Kiel Policy Brief*, No. 95, October 2015, at 6, available at: <https://www.ifw-kiel.de/wirtschaftspolitik/zentrum-wirtschaftspolitik/kiel-policy-brief/kpb-2015/kiel-policy-brief-95>. [10.07.2017]

⁷⁰⁹ *Ibid.*, at 20.

⁷¹⁰ The EU and Singapore completed the negotiation for a FTA on 17 October 2014 and the agreement now needs to be formally approved by the European Commission and then agreed upon by the Council of Ministers and ratified by the European Parliament, available at: <http://ec.europa.eu/trade/policy/countries-and-regions/countries/singapore/>. [10.07.2017]

is the standard formulation for a negative list.

On the other hand, as we have seen the Chinese negative list is based on Chinese national law. It is clear that the current Chinese negative list is longer than the EU's list in the EU-Canada CETA, neither does the Chinese negative list adopt the standard formulation of a negative list. It is anticipated that it will set forth 'restricted' and 'prohibited' investments, and that investors with restricted investments will have to apply for foreign investment approval by submitting required material, while prohibited investments will have little or no chance of obtaining market entry approval. It is also the case that Chinese negative lists do not explicitly enumerate the national measures which are not subject to national treatment obligations, nor have Chinese negative lists previously contained classification, type of reservation, level of government, or measures and descriptions.

Apart from the above discrepancy, unlike the negotiation of the China-US BIT, which could be described as the United States using its shorter and more mature negative list to push China into accepting its offer, one of the difficulties for the EU-China CAI is the lack of experience in the composition of a negative list in an investment agreement, as both the EU and China are latecomers to the negative list approach.

Generally, a negative list takes a long time to negotiate, as both sides have to work out which sectors and industries they are ready and willing to open up to foreign investors. Indeed it is an even more demanding job for the EU, given that it is a unitary entity and will have to seek the cooperation of all 28 of its Member States before such a list can finally be compiled. As a matter of fact, like China, in BIT practice to date all of the EU Member States have adhered to the investment protection approach.⁷¹¹ There will inevitably be some contention between China and EU in the negotiating of negative lists, as well as a degree of internal conflict between the EU and its Member States.

In this regard, the divergence between China and the EU on the content of their respective negative lists could turn out to be far more complicated than the gap between China and the United States. The United States has already developed a negative list model which can be used as the basis for investment treaty negotiation with any country; no such mature negative list exists for either the EU or China.

The aforementioned challenges are the most obvious with regard to the national treatment

⁷¹¹ Shan and Zhang, 'The Potential EU-China BIT', at 104.

principle in an EU-China CAI. The EU suffers from the additional internal challenge of unifying and balancing the interests of 28 Member States in the conclusion of EU IIAs. In fact, relevant EU documents, including negotiating mandates, statements of principles and, notably, the preliminary treaty versions of the EU-Canada CETA and the EU-Singapore FTA, indicate that the model BITs of EU Member States play only a marginal role in EU negotiations, as the EU appears to follow the trajectory of new generation investment agreements⁷¹² and this represents a break with the best practice of Member States. So when it comes to concluding IIAs, the differences between the 28 Member States and the EU is obvious, and very different from the China-US BIT negotiations.

There are obvious discrepancies between China and the EU with regard to the EU-China CAI concerning fair and equitable treatment, expropriation and the procedural issue of ISDS,⁷¹³ which will not be discussed in this dissertation.

In sum, negotiating a BIT with China presents distinct challenges for the EU, primarily due to the radical differences that exist between the respective legal frameworks, their differing values and levels of development, and the structural features of their economic models. The evolving model BIT used by the EU is still in the very early stages of its development, and China remains generally cautious about consent to international arbitration tribunals.⁷¹⁴ With regard to the national treatment principle, the EU and China are formulating a new national treatment clause incorporating a pre-establishment stage and a negative list, thus, the most significant problem will be the length and content of the negative list, which was to some extent the problem for the China-US BIT negotiations.

III. Conclusion concerning how far China is from the national treatment standards advocated by the United States and the European Union

The internationally prevailing national treatment standard mentioned in this dissertation is led by the United States, which has created *de facto* global standards for investment

⁷¹² Catharine Titi, 'The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration', *Journal of World Investment and Trade*, Vol. 14, No. 5, 2013, pp. 829-851, at 843.

⁷¹³ Catharine Titi, 'International Investment Law and the European Union: Towards a New Generation of International Investment Agreements', *The European Journal of International Law*, Vol. 26, No. 3, 2015, pp. 639-661, at 655.

⁷¹⁴ David Hallinan, 'The EU-China Bilateral Investment Treaty: a challenging first test of the EU's evolving BIT model', *China-EU Law Journal*, Vol. 5, 2016, pp. 31-53, at 32.

agreements not matched by those of the EU,⁷¹⁵ although the EU is now in the process of construing comprehensive European investment agreements which incorporate advanced standard clauses.

The reason why the comparisons in the above sections have concentrated on the investment regime is that it seems likely that China and both the United States and EU will be prepared to accept identical national treatment standards in the trade regime.

In WTO law, China, the United States and the EU are all subject to identical national treatment standards in the trade regime according to WTO Agreements, although the United States and EU incorporate more service sectors into their SSCs in the GATS.

With respect to FTA strategy, China's national treatment clauses in the trade chapter are less sophisticated than those of the United States, as they do not incorporate the application of national treatment in provincial or local government, or the legitimacy of non-conforming measures. On the other hand, China's national treatment clauses in the trade chapter are similar to those of the EU, as both were inspired by the national treatment clause in the GATT.

As for the national treatment standard in the service chapter of FTAs, the US clauses have more content, and include provincial and local government application of national treatment, as well as the exception of national treatment clauses. China is, however, reluctant to upgrade to the negative list adopted by the United States, and still adheres to the positive list approach concerning the sectors of commitments. On the other hand, the FTAs signed by the EU generally make national treatment commitments in more service sectors than do those of China, and are more diverse with regard to the formulation of service schedules.

Accordingly, the discrepancy between the national treatment standards of China and the United States and EU is narrow in the trade regime, and more attention needs to be paid to the investment regime.

With regard to national treatment in the investment regime: domestically, the United States offers a higher level of protection to foreign investment. There is also less restriction on foreign investment in the United States, while China maintains massive approval

⁷¹⁵ Sophie Meunier, 'Divide and conquer? China and the cacophony of foreign investment rules in the EU', *Journal of European Public Policy*, Vol. 21, No. 7, 2014, pp. 996-1016, at 1006.

procedures in this regard. In short, the United States is in general less strict, but maintains tighter control over a few sensitive industries, for which it requires high-level national security investigation. China, on the other hand, is generally stricter, with limited foreign access in more sectors and an ambiguous national security standard. As the foreign investment law of the EU is more frequently discussed in the IIAs regime, there is no comparison here between China and the EU in this regard.

Internationally, China does not offer national treatment to foreign investors/investments in the pre-establishment stage in BITs, whereas the United States is an advocate of the pre-establishment national treatment standard. But even with the adoption of a pre-establishment national treatment standard, the Chinese negative list of non-conforming measures is far longer than that of the United States, so although it ostensibly adopts the negative list approach, China's massive number of prohibited and restrictive administrative measures remain unchanged in nature.

With regard to the EU, the current Chinese negative list is longer than that of the EU in the EU-Canada CETA. In addition to this, the Chinese negative list does not adopt the standard formulation for a negative list. Although EU Member States are not advocates of a higher national treatment standard, the EU is shifting from the 'best practice' of Member States to a new standard for the EU as a whole. China does, however, have more similarities with the EU than with the United States, as both China and the EU are relative newcomers to the concept of a higher national treatment standard, and China has suffered from its internal foreign investment regime reforms, while the EU is hampered by the unification of foreign investment regulation following the Lisbon Treaty. Accordingly, although the launch of negotiations for an EU-China CAI is lagging behind the China-US BIT, it is possible that the former could be concluded before the latter, given that the current Chinese BITs are more comparable to the European than to the US model.⁷¹⁶

According to these comparisons, the persistence of the United States in maintaining higher national treatment standards and China's conservative attitude towards openness to foreigners are in sharp contrast. Although China has recently accepted the pre-establishment national treatment and the negative list approach, the comparison of national treatment standards leads to the comparison of the length of the negative list, which represent the degree of openness of the domestic market. When it comes to the length of

⁷¹⁶ Shan and Zhang, 'The Potential EU-China BIT', at 89.

the negative list, China is undoubtedly lagging behind the United States, as China has only just started to adopt the negative list approach and the United States has been using this approach for more than a decade. However, the fact that China has frequently revised and shortened the negative list in an attempt to reach a satisfactory level cannot be ignored.

Some, may express reservations about China's determination to shorten the negative list and substantially open up its domestic market. Such reservations are understandable, as the formulation of China's negative list is nothing creative and demonstrates China's abiding intention to protect its domestic industries and investors. However, China's efforts to shorten the negative list should not be ignored, and the negative list has been revised annually since its first publication. Perhaps the best illustration of China's determination to further open its domestic market to foreign investors is that since 2013 it has gradually been implementing a negative list of non-conforming measures and pre-establishment national treatment to foreign investors/investment in several trial regions.

International society should have more confidence in China, as a change of role has taken place for China, from being a major recipient of FDI to being an important source of FDI as well. This changing role will undoubtedly affect China's attitude to the standard of national treatment, and the improvement of this standard must be an inevitable result of China's massive outbound capital flow. Moreover, the conclusion of the China-Canada BIT in 2012 provides a significant impetus for China's subsequent agreements with the United States, as well as the EU.

As a corollary, it is apparent that although China is lagging behind the United States and the EU when it comes to the adoption of pre-establishment national treatment with a negative list approach, the improvements that China has made in this regard should not be ignored, and China needs more time to conduct its internal reform of foreign investment regimes and catch up with the internationally prevailing national treatment standard, especially with the standard advocated by the United States.

Conclusion

National treatment is a traditional standard of treatment in international economic law, and has resulted more from the fact that states were interested in reducing duties than from the wish to eliminate discrimination against foreigners.⁷¹⁷ Currently, national treatment is becoming a prominent principle in both international trade and investment laws. As the core of the non-discrimination principle, the national treatment standard emphasises the formal equality of treatment between foreign and domestic products and enterprises, therefore, reviewing the national treatment standard in China is an effective way of revealing whether China is adopting a more liberal approach in international economic law.

With regard to the national treatment standard in the trade regime, after its WTO accession, China was obliged to comply with national treatment clauses in all WTO Agreements. There were also a number of articles in the China Protocol concerning the obligation to comply with national treatment principles in specific issues, some of which merely confirmed existing WTO obligations in Article III of the GATT, while others were WTO-plus obligations regarding the national treatment principle. China's willingness to meet these commitments demonstrated its determination to solve the issues which most concerned other WTO members and embrace a more liberal approach regarding the national treatment principle.

In order to comply with its WTO national treatment commitments, China renewed and modified its legal system in this regard, and the legislative activities undertaken by China have demonstrated its intention to comply with the national treatment commitments since its WTO accession. Therefore, in general, China has lived up to its commitments regarding the national treatment principle since joining the WTO.

From the dispute settlement perspective, China's attitude has been less positive concerning national treatment-consistent practice, and it has not won every dispute about national treatment violation claims. The *de jure* discrimination of Chinese measures also indicates that China is still stagnating in the first level of national treatment violation, and does not strive to disguise the obvious discriminatory purpose of its national treatment inconsistencies. However, in the aftermath of the 17 disputes about national treatment

⁷¹⁷ Geoffrey Butler, Simon Maccoby, *The development of International Law* (New York: Longmans, Green and Co, 1928), p. 506.

inconsistency, China has brought some of its tax, internal charge, and export subsidy measures, IPR measures and financial service measures into national treatment consistency.

In general, China's meeting of its WTO commitments on national treatment has been greatly complicated by the sheer size and complexity of its economy, the structure of its central and local government relations, the poor regulatory enforcement standards of its local government, and its basic lack of a proper domestic legal and administrative infrastructure.⁷¹⁸

Beyond the WTO multilateral framework, China has been an active participant in concluding FTAs with trading partners. With regard to national treatment clauses in China's FTAs, every FTA signed by China contains a national treatment clause in goods, services and the investment sector, while some of its more recently signed FTAs also contain national treatment clauses concerning IPR protection. Chinese FTAs adhere to the GATT national treatment clause and the GATS positive list commitments for trade in goods and services, while for the investment sector, the FTAs follow the national treatment clause in Chinese BITs, or even incorporate the entire corresponding BIT. For IPR protection, China FTAs do not derogate from the TRIPS.

Generally speaking, the liberalisation process in the national treatment clauses of Chinese FTAs has been sluggish compared to the liberalisation of the general content and formal processes of Chinese FTAs. China uses FTAs as a tool to attain goals which are difficult to achieve in a multilateral framework, because China has more bargaining power against its opponents in bilateral negotiation processes, as it typically has a larger volume of trade as compared to the other FTA contracting parties. China is therefore ready to offer preferential tariffs or simplified procedural requirements with regard to trade to these contracting parties, but when it comes to the national treatment standard, China is sticking to its bottom line, and the liberalisation of the national treatment standard is not a priority in China's FTA strategy.

In sum, China has voluntarily put itself into the WTO legal framework, and its practices concerning national treatment since its WTO accession have not fundamentally deviated from WTO principles. Accordingly, China has actively brought its domestic laws,

⁷¹⁸ Michaela Eglin, 'China's entry into the WTO with a little help from the EU', *International Affairs*, Vol. 73, No. 3, 1997, pp. 489–508, at 498.

regulations and other legal documents into national treatment consistency according to its WTO commitments, something which manifests China's positive attitude towards a more liberal international trade approach. Although outcomes turn out to be ambiguous when China's national treatment inconsistency disputes before WTO DSB are taken into consideration, China has made great, and sometimes painful, efforts to implement WTO obligations and unfavourable WTO rulings in this regard, and China's FTAs are evolving towards a higher standard NAFTA model, with current coverage of national treatment requirement in goods, services, investment and IPR sectors.

The conclusion to be drawn from examining progress in the international trade regime is that China has made numerous efforts regarding the evolution of its national treatment standard, but improvement is still needed, and China has not yet reached the highest standard of national treatment in this regard.

In the investment regime, domestically, the evolution of the national treatment standard in Chinese foreign investment law can be divided into the following stages: evolution from the non-existence of national treatment, through foreign investments in the pre-WTO accession period, to the adoption of WTO national treatment for trade-related investment measures since accession to the WTO, with a final upgrading to the currently prevailing pre-establishment national treatment with a negative list approach. However, the United States continues to offer a higher level of protection to foreign investments than does China, and there is less restriction on foreign investment in the United States, whereas China continues to maintain massive approval procedures in this regard. In short, the United States is less strict in general, but maintains tighter control over a few sensitive industries for which it requires a high-level national security investigation, and China is in general stricter, limits foreign access to more sectors and has an ambiguous national security standard.

Since its WTO accession, China's determination concerning the pursuit of a more stringent national treatment standard in the investment regime has been obvious. This can be seen from the fact that China made numerous WTO-plus commitments with regard to TRIMs, and China conducted all-round revisions of the treatment accorded to foreign investment in order to provide equal treatment to both domestic and foreign investors insofar as possible. More recently, the commencement of pre-establishment national treatment is further supporting evidence of a more liberal approach by China in its foreign investment regime.

Internationally, when it comes to FTA strategy, China's national treatment clauses in trade chapters are less sophisticated than those of the United States, as they do not incorporate the application of national treatment in provincial and local government or the legitimacy of non-conforming measures. As for national treatment standards in the service chapters of FTAs, US clauses have more content, including provincial and local government application of national treatment and exceptions to national treatment provision. China has been reluctant to upgrade to the negative list approach adopted by the United States, and still adheres to the positive list approach for the sector of commitments. The EU's FTAs generally make national treatment commitments in more service sectors than do those of China, and are more diverse concerning the formulation of schedules.

With respect to BIT strategy, the evolutionary history of China's approach to national treatment in BITs can be divided into three stages: initially, China almost completely rejected the national treatment standard in the 1980s and 1990s, so there was no national treatment clause or similar formulation in the Chinese BITs during that period; it then accepted a conditional acknowledgment of post-establishment national treatment from 2000-2010, and the BITs from that period contained various non-standard formulations of national treatment clause; and finally, after 2010, it incorporated a comprehensive national treatment clause, and its adoption of pre-establishment national treatment with a negative list during the China-US BIT negotiation in 2013 represented a milestone. From a more practical perspective, since 1998, Chinese BITs have granted access to international arbitration, including ICSID arbitration, for all investor-state disputes, an obvious move towards a more liberal approach in international investment arbitration.

Having signed investment treaties with most other countries around the world, it is finally time for China to negotiate with and challenge the two global trading giants with the new generation of Chinese investment treaties currently under negotiation – namely the China-US BIT and the EU-China CAI. According to a comparison of the national treatment standards in China with those in the United States and the EU, China still needs to strive for a higher national treatment standard.

Municipal law and international investment law share a similar evolutionary path in China as regards the national treatment standard: from nonexistent or no incorporation of national treatment to comprehensive national treatment with pre-establishment stage included. This fundamental change of position has taken China three decades to achieve, so it is not surprisingly to find that the evolution of municipal and international law have been

concurrent.

With regard to the investment treaty with the United States, China does not offer national treatment to foreign investors/investments in the pre-establishment stage in BITs, while the United States has long been an advocate of the pre-establishment national treatment standard. But even with the adoption of a pre-establishment national treatment standard, the Chinese negative list of non-conforming measures is much longer than that of the United States; something which can be seen as China ostensibly adopting a negative list approach while retaining a massive number of prohibited and restrictive administrative measures virtually unchanged in nature.

With regard to the EU, the current Chinese negative list is longer than that of the EU in the EU-Canada CETA. Nor does the Chinese negative list adopt the standard formulation of a negative list. Although EU Member States are not, by and large, advocates of higher national treatment standards, the EU is shifting from the ‘best practice’ of Member States to a new standard for the EU as a whole. China does, however, have more similarities with the EU than with the United States, as both China and the EU are latecomers to the concept of a higher national treatment standard, and China has been hampered by the reform of its internal foreign investment regime, while the EU is having to deal with the unification of foreign investment regulations following the Lisbon Treaty.

In sum, the persistence of the United States in maintaining a higher national treatment standard and China’s conservative attitude to substantially opening up to foreigners are in sharp contrast. Although China has recently accepted pre-establishment national treatment and a negative list approach, a comparison of national treatment standards inevitably leads to a comparison of the length of the respective negative lists, something which illustrates the degree of openness in a domestic market. China is undoubtedly lagging behind the United States in this respect, as it has only just started to adopt the negative list approach, and the United States has been using this approach for more than a decade. However, the fact that China has frequently revised and shortened the negative list in an attempt to reach a satisfactory level cannot be ignored.

The content and length of the negative list is the core of a pre-establishment national treatment standard. Not only does China not follow the standard international formula for a negative list, which consists of sector, sub-sector, industry classification, type of reservation, level of government, measures and description, the Chinese negative list is a

verbatim copy of the *Catalogue of Industries for Guiding Foreign Investment*, so China has shown no creativity or innovation in this regard. Frankly speaking, it is currently difficult for China to adopt the standard international formulation of negative list for the following reasons. First, the Chinese economy is still in transition, and its full industrialisation is yet to be completed, which means that it is not sufficiently mature for full openness to foreign competition. Taking many fragile Chinese domestic industries into consideration, it is still necessary to include many infant Chinese industries in the negative list to protect them and prevent them from being ruined by foreign competition. Second, concerning the formulation, it would be a time-consuming and challenging task for China to enumerate all its non-conforming national treatment measures in a negative list like those of the United States and the EU. This is partly due to an inherent chaos in the Chinese foreign investment regime, which is currently regulated by three Investment Laws plus three Regulations for the Three Investment Laws, the *Company Law*, *Guiding Catalogues* and many other policy documents. Although there are currently attempts to unify those laws, most of the foreign regulatory power is scattered through the numerous administrative regulations issued by the State Council, MOFCOM, NDRC or other competent central authorities. One of the hallmarks of these administrative regulations is their temporary nature, which makes it rather difficult to incorporate them into a more lasting negative list, as a negative list is a textual record of bilateral or multilateral negotiation. As a corollary, the content and length of the negative list is bound up with the foreign investment regime, and the current level of foreign investment regulation in China makes it impossible to compete with the negative lists of the United States and the EU.

Some may therefore express reservations about China's determination to shorten the negative list and substantially open up its domestic market. Such reservations are understandable, but China's efforts to shorten the negative list should not be ignored, as the negative list has been revised annually since its first publication. Perhaps the best illustration of China's determination to further open up its domestic market to foreign investors is that, since 2013, it has been gradually implementing a negative list of non-conforming measures and pre-establishment national treatment to foreign investors/investment in a number of trial regions.

From an objective perspective, perhaps international society should show more confidence in China, as its role has undoubtedly changed from that of an important recipient of FDI to both a source and recipient of FDI at the same time. This changing role will inevitably

influence China's attitude to the standard of national treatment, and the improvement of this standard will be an inevitable result of China's massive outbound capital flow. Moreover, the conclusion of the China-Canada BIT in 2012 provides a significant impetus for China's subsequent agreements with both the United States and the EU.

In short, the domestic regulation of foreign investment and the national treatment clause, as well as the role of China in the international investment regime, have undergone changes in the past decade, and the significant change in the way in which China has participated in the legal regime for international investment has been impressive. As the second largest economy in the world, China has made a commitment to a much more open and liberal investment regime. However, the Chinese economy is still in transition and its industrialisation is not yet complete, which means that it is not sufficiently mature to tackle comprehensive trade and investment liberalisation. As a corollary, it is apparent that, although it has recently adopted pre-establishment national treatment with a negative list approach, China is lagging behind by the United States and the EU concerning the national treatment standard. However, the improvements that China has made in this regard should not be ignored, and China will need more time to conduct its internal reform of the foreign investment regime before it can begin to catch up with the internationally prevailing national treatment standard, particularly the standard advocated by the United States.

Given that China has followed a liberalising course in the last few years, and considering its fast-growing outward investment, it would seem more realistic to expect China to carry on with this liberal trend rather than revert to a more conservative approach.

Therefore, the final conclusion of this dissertation is as follows: after reviewing the national treatment standard in China, it is fair to draw the conclusion that China is adopting a more liberal approach in international economic law. However, with regard to the content of the national treatment standard, China lags behind the United States and the EU, and many internal reforms need to be carried out by China before it can begin to catch up with the internationally prevailing national treatment standard.

Abstract / Zusammenfassung

The national treatment principle is one of the most significant precepts in international economic law, in both trade and investment regimes. In short, national treatment stipulates formal equality between foreign and national factors. In order to answer the question of whether China is adopting a more liberal approach in international economic law, this research will focus on the national treatment standard in Chinese trade and investment regimes. Both Chinese municipal law and international law in trade and investment regimes concerning the national treatment principle are examined. Specific cases include China's national treatment commitments in the World Trade Organization and relevant cases before the Dispute Settlement Body, the national treatment clauses in its Free Trade Agreements signed with many countries, the country's national treatment regulations in municipal laws and foreign investment laws, its national treatment clauses in the Bilateral Investment Treaties it has signed with other countries (the European Union and the United States are emphasized), and so on. This intensive research concerning national treatment standards in China and the latest developments in Chinese investment laws with regard to the national treatment principle are combined together so as to describe the full picture of the national treatment standard in China and also to reveal the gap between China's national treatment standard and the prevailing national treatment standard, led by the European Union and the United States.

Der Grundsatz der Inländerbehandlung ist einer der bedeutendsten Grundsätze des internationalen Wirtschaftsrechts, sowohl im Handels- als auch im Investmentregime. Um die Frage zu beantworten, ob China einen liberaleren Ansatz im internationalen Wirtschaftsrecht annimmt, konzentriert sich diese Forschung auf den nationalen Gleichbehandlungsstandard im chinesischen Handels- und Investitionsregime. Sowohl Chinas kommunales als auch internationales Recht in Handels- und Investitionsregelungen über das nationale Behandlungsprinzip werden behandelt, wie zB die nationalen Gleichbehandlungsverpflichtungen Chinas in der Welthandelsorganisation und relevante Fälle vor dem Streitbeilegungsgremium, Chinas Behandlungsklauseln / Gleichbehandlungsklauseln in seinen bilateralen und multilateralen Freihandelsabkommen, Chinas Gleichbehandlungsvorschriften in innerstaatlichem Recht und ausländischen Investitionsgesetzen, Chinas Gleichbehandlungsklauseln in den

bilateralen Investitionsverträgen mit anderen Ländern (wobei hier die Europäische Union und die Vereinigten Staaten hervorgehoben werden), etc.

Die intensive Auseinandersetzung mit dem Gleichbehandlungsstandard in China und die jüngste Entwicklung der chinesischen Investitionsgesetze in Hinblick auf das Gleichbehandlungsprinzip werden miteinander kombiniert, um das vollständige Bild des nationalen Gleichbehandlungsstandards in China zu beschreiben und auch die Kluft zwischen der vorherrschenden nationalen Behandlungsanforderung, die von der Europäische Union und die Vereinigten Staaten vorgegeben werden, aufzuzeigen.