

CHINA'S LEGAL ENVIRONMENT OF INTERNATIONAL TRADE IN SERVICES¹

XUE'AN ZHANG

Northwest University of Political Science and Law

I. An overview of China's legal environment

China has established a legal structure to regulate its market economy, which should be able to keep up with the pace of economic globalization.

China's economy is now a market economy (we call it a socialist market economy). As far as its nature is concerned, the socialist market economy is a kind of legal economy, thus the legislative bodies, such as the People's Congress of China and other competent governmental bodies have paid a deal of attention to and accomplished much fruitful work on legislation. China began its economic reform in 1978, after adopting a policy of opening to the world. Since then, with the transformation of the economic regime from a planned economy to a planned commodity economy, and now to market economy, China has been strengthening its legislation, most notably the legislation in the field of economy, including the legislation in international economic co-operation. The legal environment here refers to the environment created by laws, regulations, rules and other measures issued by the central government, as well as by sub-national authorities (hereinafter referred to as „laws”). On the whole, a legal framework covering every main field of the socialist market economy has been set up, and the law of international trade in services is uniformly enforced in China.

II. China's legislation on international trade in services

As it can be seen in the General Agreement on Trade in Services (GATS), international trade in services generally occurs in four ways: cross-border supply, consumption abroad, commercial presence and presence of natural persons. Since commercial presence is in close relation with international investment, China's foreign-related investment laws will be examined in the underlying paragraphs.

¹ China here refers to Chinese mainland.

1. Overview

China has sped up the legislating of international trade in services. In order to be in comply with its commitments in GATS, some major laws were revised just prior to and shortly after China's accession to the WTO. The following are major laws, which have substantial influence on China's legal environment of trade in services.

The most important law is the Foreign Trade Law (adopted in 1994 and revised on April 6, 2004). It is the basic law regulating international trade in services. „Foreign trade” in this law refers to import and export of goods and technologies, and the international trade in services.

The National People's Congress and its standing committee have issued laws in every main field of international trade in services, among others including Maritime Law (enforced on July 1, 1993), Law on the Commercial Bank (adopted on May 10, 1995, revised on December 27, 2003), Insurance Law (valid from October 1, 1995), Law of Securities (valid from July 1, 1999), Law on Advertisement (adopted on October 27, 1994), Law on Lawyers (valid from January 1, 1997, and revised on December 29, 2001), Law on Civil Aviation (valid from March 1, 1996), Law on Registered Accountants (adopted on October 31, 1993), Company Law (valid from July 1, 1994, and revised on December 29, 1999), and another one that is worth mentioning is the Law on Income Tax of P.R.C. for Enterprises with Foreign Investment and Foreign Enterprises (adopted by NPC in 1991).

As far as the regulations, rules and other measures at both the central governmental and sub-national level are concerned, most fields of international trade in services are covered. Among those rules included are those for the implementation of the above-mentioned laws on international trade in services, and other regulations, provisions, administrative measures, notices, including the fields, which have not been regulated by the National People's Congress and its standing committee. It is said that just prior to China's accession to the WTO at the end of 2001, more than 300 laws, 800 administrative regulations and more than 30,000 rules and other measures had been promulgated since 1979. Many of them were phased out or revised due to their contradiction with China's commitments to the WTO. In order to have a good understanding of China's legal environment of trade in services, I would like to mention some important regulations and rules. These are the Provisions on Guiding Foreign Investment Directions, the Catalogue for the Guidance of Foreign Investment Industries, the Provisions on Administration of Foreign Investment in the Road Transport Sector, the Provisions on Foreign Investment in the Civil Aviation Industry, the Regulations on Administration of Foreign-funded Financial Institutions, the Measures on Trial of Foreign-Invested Merchandising Enterprises, and the Provisions on Administration of Foreign-Invested Telecommunications enterprises.

On international level, the General Agreement on Trade in Services is now binding on China. In the Protocol on the Accession of the P.R.C, one of China's obligations is to apply and administer in a uniform, impartial and reasonable manner all of its laws, regulations and other measures of the central government, as well as local regulations, rules and other measures issued or applied at a sub-national level, pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights or the control of foreign exchange. Recently China entered into the Mainland/Hong Kong Closer Economic Partnership Arrangement (CEPA), which annulled some restrictions on regional trade in services.

2. Major points of China's law on trade in services

In 2001, when China became a member of the WTO after 8 years of hard negotiation, the country entered into many commitments on trade in goods, services and trade-related aspects of intellectual property rights. During the last 2 years or even more than that, after China's entry into the WTO, the Chinese government strictly complied with the WTO rules to revise laws and regulations, to expand the open area and to fulfill its commitments. China was advancing step by step in terms of free trade in both goods and services. Trade in services was further opened to the outside world, and the policy became more transparent. The legal environment of trade in services can be summarized as follows:

2.1. Most-favored-nation treatment on the condition of non-discrimination

As set forth in China's newly revised foreign trade law, it shall – in accordance with the international treaties and agreements to which it is a contracting party or a participating party – grant the other contracting parties or participating parties, or on the principle of reciprocity grant the other party the most-favored-nation treatment or national treatment in the field of foreign trade. As a general principle, China will render foreign services and service suppliers the most-favored-treatment, but China may also maintain measures inconsistent with that, provided that the measure is recorded in the List of Exemptions annexed to the Protocol, and meets the conditions of the Annex to the GATS on Article II Exemptions, which covers sectors or sub-sectors of maritime transport, international transport, freight and passengers. China is also under no obligation to render the most-favored-nation treatment and non-discrimination to international services made possible by the free movement of natural persons.

Unless otherwise provided for in the above-mentioned Protocol, foreign individuals and enterprises, and foreign-funded enterprises shall be accorded treatment no less favorable than that accorded to other individuals and enterprises, regarding the prices and availability of services supplied by national authorities and public or state enterprises.

2.2. China's legal environment has become transparent

Nowadays, only those laws that are published and readily available to other WTO members, individuals and enterprises, shall be enforced. China used to have interior documents or take nonpublic measures to regulate the economic order. This kind of law isn't binding anymore in China.

2.3. Market access of foreign services and service suppliers

The international trade in services shall be carried out in compliance with the provisions of the Foreign Trade Law and other relevant laws and administrative regulations. China's laws bear the unique characteristic of opening the doors to the outside world and developing foreign trade. Yet, with regard to the market access in the fields of trade in services, China takes a policy of gradual liberalization.

China made specific commitments in the Schedule covering sectors and sub-sectors, including business services such as 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, and transport services. In the Schedule of specific commitments, generally speaking, there is no limitation on cross-border supply services and consumption abroad. China does not require the presence of natural persons, except as indicated in Horizontal Commitments. As to the services connected to commercial presence, some are limited only to the establishment of joint ventures, and some have geographic restrictions within certain specific periods of time. (This is outlined in the following paragraph of the section). In the Schedule of Horizontal Commitment, it is stipulated that the proportion of foreign investment in an equity joint venture shall be no less than 25 per cent of the registered capital of the joint venture. The conditions of ownership, operation and scope of activities, as set out in the respective contractual or shareholder agreement, or in a license establishing or authorizing the operation or supply of services by an existing foreign service supplier, will not be restricted to a greater extent, than the restrictions existing from the date of China's accession to the WTO. As to the presence of natural persons, China has no restrictions, except for measures concerning the entry and temporary stay of natural

persons, who are managers, executives and specialists defined as senior employees of a corporation of a WTO Member, as well as some regulated service sales-persons. The former shall be permitted entry for an initial stay of three years, the latter are limited to a stay of a 90 days.

According to the Catalogue for the Guidance of Foreign Investment Industries, foreign investment projects are classified into four categories: encouraged, permitted, restricted and prohibited. Encouraged projects include, among others: 1. projects for new agricultural technology, comprehensive agricultural development and projects for energy, transportation and key raw materials industries; 2. projects for new and high technology, advanced applicable technology, which can improve the performance of products and increase the technoeconomic efficiency of enterprises or produce new equipment and new materials that domestic capacity cannot supply; 3. projects that can promote the quality of products, enter new markets or strengthen the competing capability of products in the international markets; 4. projects adopting new technology and new equipment for saving energy and raw materials for comprehensive utilization of resources, and for prevention of environment pollution; 5. projects that can make full use of manpower and resource advantages in the mid-west region and are in accordance with the State's policies; 6. other cases that are regulated by laws and administrative regulations. Restricted industries: such as banks, finance companies, trust investment companies, insurance companies, security companies, construction and operation of networks of gas, heat, water supply and water drainage etc. Prohibited industries can be summarized as: 1. projects that endanger the safety of the State or damage social and public interests; 2. ...pollute the environment, and destroy natural resources or impair the health of human beings; 3. ...occupy large amounts of arable land, unfavorable to protection and development of land resource; 4. ...endanger the safety of military facilities and their performance; 5. ...adopt the unique craftsmanship or technology of China to make products.

To be specific, the following are prohibited: construction and operation of power network; companies of air traffic control, companies of postal services; futures companies; educational industries for basic education (compulsory education); business of publishing, producing, master issuing and importing of books, newspapers and periodicals; radio stations, TV stations, radio and TV transmission networks at various levels. In some industries, forms and percentage of capital are also limited. For example, the development of parcels of land; medical treatment establishments; educational institutions for senior high school students; advertising services; telecommunication services; life insurance companies. In some industries, the percentage of shares is limited. For example, securities companies, foreign service suppliers now are permitted to establish joint ventures with foreign investment up to 33% to conduct domestic securities business management investment funds. In 2005, foreign investment shall be increased to 49%.

According to the newly revised Foreign Trade Law, the authority responsible for foreign trade under the State Council (now notably the Commerce Ministry) together with other relevant authorities under the State Council shall, in accordance with the Law and other relevant laws and administrative regulations, determine, adjust and publish the market access list of international trade in services.

2.4. National treatment of foreign services and service suppliers

With respect to international trade in services, China shall, in accordance with the commitments made in international treaties or agreements, to which the People's Republic of China is a contracting party or a participating party, grant the other contracting parties or participating parties national treatment.

According to China's commitments in the Schedule to GATS, there are no limitations on foreign services and service suppliers either by cross-border supply or by consumption abroad. The services supplied that way are given national treatment. On the other hand, generally, there is no commitment to the services provided by way of the presence of natural persons. As to the services taking the form of commercial presence, most of the sectors and sub-sectors listed in the schedule of specific commitments have no limitations on national treatment, only with the exception of some of the sectors and sub-sectors listed there, such as financial services, construction and related engineering services.

China may impose restrictions and prohibitions on international trade in services in order to safeguard state security, public interest or public morals, to protect health or security, the environment, to establish or accelerate the establishment of a particular domestic service industry, to maintain the balance of international payment by the state, and in other situations set forth by laws and administrative regulations, and by international treaties or agreements, to which the state is a contracting party or a participating party.

III. Some problems relating to the enforcement of laws and further liberalization of international trade in services

Although there are numerous laws, regulations, rules and other kinds of administrative measures, quite a few sub-sectors have not yet been regulated due to the absence or lower development of those services in China. For example, regulations on services provided by midwives, on market research and public opinion polling services have not been promulgated, as far as I know. Some laws enacted are not easy to implement, due to a lack of skill. The legislative level of many laws is not high enough to successfully enforce them all over China. In fact, there are even some contradictions between them. There are

many authorities responsible for foreign trade in services under the State Council. For example, the China Banking Regulatory Commission, the China Securities Regulatory Commission, and the China Insurance Regulatory Commission. They are all in charge of the administration of foreign trade in financial services across the entire country, but their policies are not always in conformity with each other. The administrative measures, most notably those taken by lower-level local governments, are not always transparent enough, sometimes even not in accordance with the laws.

Many developing countries are not active in opening their service trade markets to the outside world, because some sectors are very important to the safety of nations and the national economy. China's international trade in services is still relatively underdeveloped, and the level of free trade in services can still be raised. This can be seen from the commitments in the Schedule. As mentioned above, China's policy relating to international trade in services aims at gradual liberalization. Therefore, China has made no commitments in many sectors or sub-sectors pertaining to areas, such as research and development services, health related social services, as well as recreational, cultural and sporting services. These will be opened step by step to the world. On the whole, China will fulfill its WTO obligations, it already follows a policy of expanding the opening to the outside world, developing foreign trade, including foreign trade in services.

