CHINA’S DOMESTIC LEGISLATION RELATING TO ITS GATS OBLIGATIONS:

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CHINA’S DOMESTIC LEGISLATION RELATING TO ITS GATS OBLIGATIONS:
The Structure, characteristics and potential problems affecting the application of GATS obligations

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ABSTRACT

This paper explains how China’s GATS obligations are implemented, illustrates the structure of relevant domestic legislation from the Constitution to departmental rules, and summarizes the characteristics of domestic legislation. Based on the analysis of the structure and characteristics, this paper tries to reveal some common problems which are not just existent in certain service sectors but are applicable in all service sectors and may affect the implementation of China’s GATS obligations. In the light of the examination of domestic legislation relating to trade in services, this thesis exposes four potential problems: lack of transparency, lack of legislation on the other three modes except for commercial presence, lack of efficiency, and the uniform application affected by legal flexibility.

I. INTRODUCTION

In January 1995, as a result of the Uruguay Round negotiation, the General Agreement on Trade in Services (GATS) entered into force as the first multilateral and legally enforceable agreement covering trade in services. The GATS includes the general framework agreement (which applies directly to all Members regardless of the commitments in specific service sectors), several important annexes on specific service sectors (such as air transport, financial services, telecommunication, and maritime transport), and also the Schedule of Specific Commitments of each Member (which list market access and national treatment commitments and exceptions on committed service sectors).

China’s accession to World Trade Organization (WTO) followed a long and difficult path. After 16 years of painful and often frustrating bilateral and multilateral negotiations, China officially became the 143rd Member of WTO on 11 December 2001. The rules concerning China’s obligations were contained in the Accession of People’s Republic of China (the Accession Protocol) that is signed at the Fourth Ministerial Conference in Doha on 11 November 2001. The Report of the Working Party on China’s Accession (the Working Party Report) is another important document, which contains the conclusions of the final negotiations between China and other WTO Members. The Accession Protocol together with the annexed schedule, and the relevant parts of the Working Party Report comprises the whole of China’s commitments on rules and forms a wide-ranging package.

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1 Marc Lanteigne China and International Institutions (Routledge, New York, 2005), at 33.


4 Trade in Services, The People’s Republic of China Schedule of Specific Commitments, GATS/SC/135, 14 February 2002, hereinafter the Schedule of Commitments or the Schedule.
Upon accession to WTO, China amended numerous pieces of legislation to comply with WTO rules. After the accession, the Chinese Government continues to revise legal documents concerning the control of imports and exports of technology intensive services in an effort to promote the development of trade in technology services. However, there are 23 disputes cite the GATS in the request for consultation, and China has been involved in six of them as a respondent. Other Members alleged that some of China’s domestic measures were inconsistent with its GATS obligations and affected the supply of services and services suppliers in China. Regarding to the China-Tax and China-Financial Information, China and the alleged Members reached a mutually satisfactory solution and signed a Memorandum of Understanding. In the China-Publication and China-Electronic Payment, the Panel and Appellate Body concluded that certain domestic measures were inconsistent with China’s obligations under the GATS, and recommended that the Dispute Settlement Body (DSB) requested China to bring its measure into conformity with the GATS.

Apart from the GATS disputes against China, other WTO Members remain concerned that China has still limited the access of foreign services and services suppliers by domestic measures. For example, the European Union stated that restrictions in the investment Catalogues continue to limit the access of “foreign companies to key sectors of the economy, while high capital requirements, branching restrictions, or cumbersome or non-transparent licensing requirements reduce or effectively prevent market access in several services sectors”. In the final transitional review, the United States concentrated on the point that China’s domestic measures still frustrate the efforts of foreign suppliers of banking, insurance, express delivery, telecommunications, legal and other services. These Members also questioned the transparency, uniform application and judicial review.

Both the GATS disputes and other Members’ concerns show the tensions between China’s GATS obligations and its relevant domestic legislation. There could be lots of reasons inducing the tensions. Instead of examining each service sector, this paper will profile the structure and explore the characteristics of domestic legislation relating to trade in services, and then aspire to identify some potential problems which are not just existent in certain service sectors but are applicable in all service sectors and may affect the implementation of China’s GATS obligations.

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7 The investment Catalogues include: Regulations on Guiding the Orientation of Foreign Investment, Several Opinions of the State Council on Further Doing a Good Job in the Utilization of Foreign Investment and the Guideline Catalogue of Industry with Foreign Investment.
In order to achieve the research objective, the paper will explain how GATS rules are implemented in China in part II, précis the structure and characteristics of domestic legislation relating to trade in services in part III, and then discuss the potential problems induced by the legal system relating to trade in services.

II. IMPLEMENTING GATS RULES IN CHINA

The principle for implementing international treaties is based on Article 26 of the Vienna Convention on the Law of Treaty (Vienna Convention).\textsuperscript{10} Article 26, named \textit{pacta sunt servanda}, states that every treaty in force is binding upon the parties to it and must be performed in good faith. According to the \textit{pacta sunt servanda} principle, China, as a party to the Vienna Convention and a WTO Member, has to observe its obligations under WTO in good faith. A treaty in force is also binding on the parties’ judicial organs, which is one of the legal bases for the fact that an internal court may implement international treaties, including WTO rules. But how does an internal court implement international treaties, either directly applying or transforming to domestic law? The way international treaties are to be implemented is usually decided by the state’s internal legislation or legal precedents.

\textit{Law on Procedure of the Conclusion of Treaties}\textsuperscript{11} was established to regulate bilateral and multilateral treaties and agreements and other instruments of the nature of a treaty or agreement concluded between China and foreign states. However, this law, along with the Constitution and other laws, does not contain any provision on recognizing the legal status of international treaties and on how to implement them.

About 70 laws and regulations have provisions about China’s treaty obligations.\textsuperscript{12} They state that China’s international treaty obligations shall override conflicting internal laws.\textsuperscript{13} For example, Article 142 of Civil Law states that: if any international treaty concluded or acceded to by China contains provisions different from those in Civil Law, the provisions of the international treaty will have priority, unless the provisions are ones on which China has announced reservations. The way of incorporating international treaties through specific reference in domestic legislation is a “mediated incorporation approach” which means “each law directs courts, in cases involving foreigners, to apply the provisions of international treaties to which China is a signatory when such provisions conflict with relevant provisions of the law in question”\textsuperscript{14}. Although some domestic laws have referred to international treaties, it does not mean that international treaties are automatically considered as sources of domestic legislation. These laws just confirm that a treaty is superior to municipal law in


\textsuperscript{11} Law of the People’s Republic of China on the Procedure of the Conclusion of Treaties, adopted at the 17th Meeting of the Standing Committee of the Seventh National People's Congress on December 28, 1990 and promulgated by Order No.37 of the President of the People’s Republic of China on December 28, 1990.

\textsuperscript{12} Hanqin Xue and Qian Jin, “International Treaties in the Chinese Domestic Legal System” (2009) 8:2 Chinese Journal of International Law, 299 at 303.


\textsuperscript{14} Ibid, at 100.
application,\textsuperscript{15} and provide conflict rules to ensure the coherence of domestic legislation with the state’s international obligations under treaties.

Normally, there are two ways to implement international treaties: by transformation of treaty obligations and by direct adoption of treaties.\textsuperscript{16}

The doctrine of transformation means that international treaties are enforceable within the domestic jurisdiction only if international treaties are expressly and specifically transformed into the municipal legal system through customary use, court decisions or legislation. China has adopted the doctrine of transformation on many occasions, for example \textit{Regulations on Diplomatic Privileges and Immunities}\textsuperscript{17} was established to implement the \textit{Vienna Convention on Diplomatic Relations}.\textsuperscript{18} The doctrine of adoption follows the process whereby international treaties are incorporated into the domestic legal system so that they become part of the municipal laws and directly applicable. In China, the precedence of adoption is the application of the \textit{International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading}\textsuperscript{20} in two cases.\textsuperscript{21} Since no provisions recognize treaties as part of municipal laws and international treaties are directly applied in court, it is difficult to decide whether China belongs to the Monist or Dualist system.\textsuperscript{22} Thus, the implementation of treaties in China depends on whether the treaty is self-executing or non-self-executing. Administrative and judicial organs can apply self-executing treaties directly, while non-self-executing treaties need to be transformed into national law.\textsuperscript{23}

Regarding the GATS, firstly, according to Article I of GATS, the responsible entities of GATS are the governments, authorities and non-governmental bodies who take measures affecting trade in services.\textsuperscript{24} The rights and obligations of natural and judicial persons who are involved in trade in services may be affected by these measures, but the GATS does not regulate specific rights and duties on them. In this sense, the court cannot directly use GATS rules to adjudge international trade issues affecting natural or judicial persons. Secondly, the

\begin{itemize}
  \item Tieya Wang, \textit{International Law in China: Historical and Contemporary Perspective}, (Recueil des Cours, Hague, 1990), at 330.
  \item Hanqin Xue and Qian Jin, above n 12, at 305.
  \item Regulations of the People’s Republic of China Concerning on Diplomatic Privileges and Immunities, adopted at the 17th Meeting of the Standing Committee of the Sixth National People's Congress, promulgated by Order No.44 of the President of the People's Republic of China and effective on 5 September 1986.
  \item Donald C. Clarke, above n 13, at 99.
  \item Ibid 1203.
  \item Article I:3 (a) of GATS: “Measures by Members” means measures taken by: (i) central, regional or local governments and authorities; and (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.
\end{itemize}
direct application of GATS rules in municipal laws depends on national sovereignty, but the application of GATS is not regulated in any Chinese laws even not in a mediated incorporation approach. Thirdly, in China’s Accession Protocol, China stated that it would implement the WTO rules by “revision or enactment of domestic laws, regulations and other measures related to China’s commitments under the WTO Agreement”. Therefore, China’s GATS obligations will not directly become part of its domestic legislation, binding courts and government bodies, until the enactment of appropriate domestic laws and regulations incorporating those obligations. It means the doctrine of transformation is the way GATS is implemented in China.

Domestic legislation relating to trade in services is pivotal to apply GATS rules in China, and the implementation of GATS obligations could be affected by the system of relevant domestic legislation. Thus, the next part will give a brief view and analyse how domestic legislation relating to trade in services are constructed and what their characteristics are.

III. STRUCTURE AND CHARACTERISTICS OF RELEVANT DOMESTIC LEGISLATION

According to China’s Constitution and the Legislation Law of People’s Republic of China (Legislative Law), the hierarchy of Chinese legislation is the Constitution, laws issued by the National People’s Congress (the NPC) and its Standing Committee, administrative regulations enacted by the State Council, departmental rules enacted by ministries and agencies under the State Council, local decrees enacted by the people’s congress of province and local rules enacted by local governments.

The scope of GATS is defined by Article I as measures by Members affecting trade in services. Article I:3 (a) provides that “measures by Members” means measures which are taken by any level of government including central, regional or local governments and authorities, and also non-governmental bodies in the exercise of powers delegated by any level of government, except for immigration rules, fiscal policies and taxation measures, and restrictions on short-term capital movement and so on. In this sense, the Constitution, laws,

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26 Donald C. Clarke, above n 13, at 99.
27 This viewpoint is supported by several scholars. See, Guohua Yang and Jin Cheng “The Process of China’s Accession to the WTO” (2001) Journal of International Economic Law, 297 at 320; Donald C. Clark, above n 63, at [99]; Keyuan Zou China’s Legal Reform: Towards the Rule of Law (Koninklijke Brill NV, Leiden, 2006), at 20;
28 The Constitution of the People’s Republic of China (hereinafter Constitution), was adopted at the 5th Session of the 5th National People's Congress and promulgated for implementation by the Announcement of the National People's Congress on December 4, 1982; Amended in accordance with the Amendments to the Constitution of the People's Republic of China adopted respectively at the 1st Session of the 7th National People's Congress on April 12, 1988, the 1st Session of the Eighth National People's Congress on March 29, 1993, the 2nd Session of the 9th National People's Congress on March 15, 1999 and the 2nd Session of the 10th National People's Congress on March 14, 2004.
29 The Legislation Law of People’s Republic of China (hereinafter the Legislation Law), was adopted and promulgated on 5th Session of the 7th National People’s Congress on March 15, 2000, and entered into force on July 1 2000.
"(a) immigration rules, provided they do not contravene commitments on temporary entry under Mode4; (b) services supplied in the exercise of governmental authority; (c) fiscal policy and taxation measures, provides the
regulations, departmental rules, and local decrees could be covered by the GATS if they affect trade in services.

There are thousands of regulations and rules have been promulgated by the State Council, ministries, departments, even an agency of a ministry, all of which could be measures affecting trade in services and applicable to GATS obligations. Thus, this paper applies a selective method to decide what laws and regulations will be examined and how to choose them. The selection of relevant legislation mainly relies on the lists of all legislation relating to trade in services regularly updated by China in 2011, and also refers to other legislation which mentions foreign elements or participation.

Based on the analysis of relevant domestic legislation, the structure and characteristics of domestic legislation relating to trade in services will be illustrated in the follow.

A. Constitution

There is no article in the Constitution stipulates international trade. However, Article 18 of the Constitution regulates that foreign investors can set up wholly foreign-owned enterprises, joint ventures and any other forms of economic cooperation with Chinese enterprises or economic organization, which overlaps with trade in services in the mode of commercial presence. Article I of the GATS defines commercial presence as the provision of services “by a service supplier of one Member, through commercial presence in the territory of any other Member”. The commercial presence could be a wholly foreign-owned enterprise, joint venture or any other form of economic cooperation. It clearly covers foreign investment with regard to services.

B. Laws

The laws relating to trade in services can be divided into three categories: basic law, laws on specific service sectors, and other laws relating to trade in services.

1. Basic law: Foreign Trade Law

In the Foreign Trade Law of People’s Republic of China (Foreign Trade Law), Article 2 states that foreign trade include the import and export of goods, technologies and trade in taxes do not discriminate against foreign services or service suppliers; (d) air transportation services; (e) import restrictions on equipment necessary for the supply of a services; (f) restrictions on short-term capital movement, or measures that affect property rights, provided they are non-discriminatory; (g) exchange rate management; (h) privatization of state-owned property, though there are disciplines for state-owned trading entities and monopolies”.


32 According to Article 18 of Constitution, Chinese individuals cannot cooperate with foreigner investors. However, the third-amended Company Law allows the formation of one-person limited liability company. Therefore, Chinese individuals can set up joint venture enterprises with foreign investors through the form of one-person limited liability company.

33 The Foreign Trade Law of the People’s Republic of China (hereinafter The Foreign Trade Law) was promulgated by the 7th Session of the Standing Committee of the 10th National People’s Congress of the People’s Republic of China; and it has been revised and adopted by the 8th Session of the Standing Committee of the 10th National People’s Congress of the People’s Republic of China. The revised Foreign Trade Law of The People’s Republic of China is hereby promulgated and shall be implemented as of July 1, 2004.
services. Article 10 is a principle regulation about the establishment of enterprises, organizations and business activities concerning trade in services. This article does not list the conditions for foreign suppliers, but requires only that enterprises conducting trade in services comply with the Foreign Trade Law, other relevant laws, and administrative rules and regulations. Article 26 lists six restrictions or prohibitions of trade in services, which are also principle.\textsuperscript{34} The characteristic of the Foreign Trade Law is that: as the basic law, it just sets out the parameters or general provisions of trade in services, and what is required to comply with this law is specified in other laws, regulations, rules, commitments, and market access catalogues.

2. \textit{Laws in specific service sectors}

Apart from the Foreign Trade Law, laws are promulgated in each service sector, for example, Commercial Bank Law,\textsuperscript{35} Insurance Law,\textsuperscript{36} Advertisement Law,\textsuperscript{37} and Lawyer Law.\textsuperscript{38} They have four common features and characteristics.

Some laws have no article specifically referring to foreign participation, for example health-related and social services. When laws in specific service sectors have no article or have only a general phrase about trade in services, it does not mean that foreign participation in that service sector is not permitted, and they can apply to trade in services when domestic enterprises provide cross-border services or foreign suppliers establish a commercial presence in the territory of China. Where no particular regulation about trade in services is stipulated in national laws, precise instructions or rules may be listed in administrative regulations and departmental rules. For example, Construction Law\textsuperscript{39} relates to the provision of construction services without any particular article about trade in services, but the Interim Regulations on

\textsuperscript{34} Article 26:  
1. restrictions or prohibitions are needed to safeguard the state security, public interests or public morals,  
2. restrictions or prohibitions are needed to protect the human health or security, the animals and plants life or health or the environment,  
3. restrictions are needed to establish or accelerate the establishment of a particular domestic service industry,  
4. restrictions are needed to maintain the balance of international payment of the state,  
5. restrictions or prohibitions are needed as laws and administrative regulations so provide, or  
6. restrictions or prohibitions are needed as the international treaties or agreements to which the state is a contracting party or a participating party so require.


\textsuperscript{36} Law of the People’s Republic of China on Insurance, hereinafter Insurance Law, adopted at the 14th Session of the Standing Committee of the 8th National People’s Congress on 30 June 1995; amended for the first time at 30th Session of the Standing Committee of the 9th National People’s Congress on 28 October 2002; amended for the second time at the 7th Standing Committee of the 11th National People’s Congress on 28 February 2009.


\textsuperscript{38} Law of People’s Republic of China on Lawyers, hereinafter Lawyers Law, adopted at the 19th Session of the Standing Committee of the 8th National People’s Congress on 15 May 1996; amended for the first time at the 25th Session of the Standing Committee of the 9th National People’s Congress on 29 December 2001; and amended for the second time at 25th Session of the Standing Committee of the 10th National People’s Congress on 28 October 2007, entered into force on 1 June 2008.

\textsuperscript{39} Construction Law of People’s Republic of China, adopted at the 28th Meeting of the Standing Committee of the 8th National People’s Congress and implemented on 1 March 1998.
the Administration of Foreign Enterprises Engaged in Project Design Activities within the Territory of China details the foreign provision of cross-border services.

Some laws have an article relating to international issues, but these articles state only that the provisions of international treaties will be applied when the provisions differ from laws in China unless the provision has announced reservations, such as the laws on environmental services and on transport services.

Some laws refer only to the mode of commercial presence, which generally allows for the formation of wholly foreign-owned enterprises, Chinese-foreign joint ventures, branches, or representative offices. Those laws can be found in the service sectors of business services, communication services, education services, financial services, and recreational, cultural and sporting services. For example, Article 44 of Certified Public Accounts Law allows foreign accounting firms to establish a permanent representative office or a cooperative public accounting firm in China sponsored by a foreign firm and a Chinese accounting firm.

Some laws state that foreign service suppliers must satisfy qualification and licensing requirements when they provide services in China through the mode of personal presence. Medical Practitioners Law allows foreign individuals to participate in doctors’ examinations, register as doctors, practise medicine, engage in clinical teaching by demonstration, and undertake clinical research in China.

Laws in service sectors either have no article about foreign participation or mainly concern the priority of international treaty, the right of setting up commercial presence and the qualification of natural persons in a principle way. In this case, thousands of regulations and rules were enacted to implement laws.

C. Regulations and Rules

The Legislation Law stipulates that the State Council has the right to enact administrative regulations in order to implement national laws, and exercise its administrative regulation right. The State Council issued numerous administrative regulations to adjust trade in services in particular service sectors and in the mode of commercial presence.

For service sectors, the State Council instituted Rules for the Implementation of Postal Law, Regulation on Administration of Foreign-funded Insurance Companies, Regulations

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40 Interim Regulations on the Administration of Foreign Enterprises Engaged in Project Design Activities Within the Territory of China, issued by the Ministry of Construction on No.78 [2004] on 10 May 2004.
43 Article 47 of Medical Practitioners Law.
44 Article 56 of Legislation Law.
45 Rules for Implementation of Postal Law, promulgated by Decree No. 65 of the State Council on 12 November 1990, and entered into force at the date of promulgation.
46 Regulation on Administration of Foreign-funded Insurance Companies, adopted at the 49th executive meeting of the State Council on 5 December 2001, and entered into force on 1 February 2002.
With regard to the overlap of trade in services and investment, the State Council issued provisions and opinions to guide and promote investment that can be applied to several service sectors. The Provisions on Guiding the Orientation of Foreign Investment and Several Opinions of the State Council on Further Doing a Good Job in the Utilization of Foreign Investment, along with the Guideline Catalogue of Industry with Foreign Investment and the Catalogue of Dominant Industries with Foreign Investment of the Mid-west Region, are the basic policies for directing, examining and approving projects and enterprises with foreign investment. Owing to the link between investment and trade in services, market access catalogues on trade in services are also listed in the Provisions, the Opinions, and two Catalogues.

The Legislation Law stipulates that ministries, commissions, the People’s Bank of China, the Auditing agencies, and a body directly under the State Council have the right to enact administrative rules within the scope of their authority. Departmental rules are enacted to regulate matters which concern implementing laws and administrative regulations.

How do departmental rules affect trade in services? The former GATS disputes against China answered this question. In all six disputes, alleged measures are mainly departmental rules. Taking the China-Electronic Payment as an example, all measures referred to in the Panel’s report are departmental rules, including announcement, circular, notice and opinion, which are issued by the People’s Bank of China, the China Banking Regulatory Commission (CBRC), the State Administration of Foreign Exchange, the State Administration for Industry and Commerce, the Ministry of Public Security, the Ministry of Finance, the Ministry of Information Industry, and the Ministry of Commerce.

These regulations and rules are more specific than laws. They do not simply allow the formation of a commercial presence, but also regulate the conditions of formation, such registered capital, capital contribution ratio of the shareholder, the period of operation, the scope of operation. A few of them set up concrete requirements on foreign services suppliers who are judicial persons. For example, the sole or controlling shareholder of a wholly foreign-funded bank must satisfy the following conditions: (1) The bank must be a commercial bank; (2) Two or more years must have passed since it established a representative office within the territory of China; (3) Its total assets at the end of the year before the application must be no less than 10 billion US dollars; (4) Its capital adequacy

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47 Regulations on Administration of Foreign-funded Banks, adopted at the 155th executive meeting of the State Council on 8 November 2006, and entered into force on 11 December 2006.
48 Regulations on Permanent Offices of Foreign News Agencies and Foreign Journalists Interview, adopted at the 31th executive meeting of the State Council on 17 October 2008, replaced the Regulations Concerning on Foreign Journalists and Permanent Offices of Foreign News Agencies.
49 Catalogue of Dominant Industries with Foreign Investment of the Mid-west Region, hereinafter the Catalogue of Mid-west Region, the active Guideline was approved by the State Council and promulgated by the State Development and Reform Commission and Ministry of Commerce on 23 December 2008, and entered into force on 1 January 2009. The first Guideline was promulgated in 2000, and has been revised for twice in 2004 and 2008.
50 China-Certain Measures Affecting Electronic Payment Services WT/DS413/R, 16 July 2012 (Report of the Panel) at page vii and viii, “Abbreviations of Measures, Certain Evidence, and Other Selected Instruments Referred to in this Report”.
51 Article 10 of Regulation on the Administration of Foreign-funded Banks.
ratio must meet the requirements of the financial regulatory authority of the country or region where it is located and of the banking regulatory institution of the State Council. Oppositely, it is hardly to find regulations and rules about the qualifications of individual service supplier.

D. Local Decrees and Rules

According to the Legislative Law, the local organs that can enact local decrees or normative documents having legal effect encompass: the people’s congresses and their standing committee in major cities including cities of the people’s government of the provinces or autonomous regions seated, cities located in special economic zones, and other major cities approved by the State Council.

Within one district, there could be more than hundreds local decrees and rules enacted by over 10 administrative organs. Taking Shanghai municipality as an example, from 1985 to April 2011, there were 185 local decrees and rules adopted in the Shanghai municipality. Additionally, other 33 provinces, municipalities and autonomous regions also promulgate their sub-national rules.

Article 64 of the Legislative Law states that a local decree may be enacted to implement a national law or administrative regulation in light of the actual situation; provide for matters which are local in nature and require the enactment of a local decree. Thus, the enactment of a local decree may be required in order to implement a law or regulation relating to foreign trade and investment. For example, the Regulation on Shanghai Municipality of Examination and Approval for Foreign Investment Enterprises was promulgated to specify conditions for the establishment of foreign enterprises in the administrative area of Shanghai, after Wholly Foreign-owned Enterprises Law and Chinese-foreign Equity and Contractual Joint Venture Law.

Due to numerous organs have the right to enact local decrees, thousands of local decrees and rules are issued to interpret and administrate vague and principle-like laws and regulations. As local decrees are enacted in light of the specific situations and actual needs of the district, local decrees enacted to implement a law or regulation may be dissimilar in different districts.

From Foreign Trade Law to local decrees, the aims of this section are to show how trade in services is regulated in China’s domestic legislation, and to summarise characteristics of laws and regulations referring foreign participation. Based on the demonstration of domestic legislation, the paper will try to explore potential problems affecting the GATS obligations which are caused by the structure and characteristics of relevant legislation.

IV. POTENTIAL PROBLEMS INDUCED BY THE STRUCTURE AND CHARACTERISTICS OF RELEVANT DOMESTIC LEGISLATION

As well as committing to trade liberalization, China must also practise transparency, predictability and fairness in the implementation of its WTO obligations because “liberalization will require the implementation of complementary regulatory reform and the

52 “Local Regulations” (2011) Shanghai Municipal People’s Congress, online: <www.spcsc.sh.cn>
53 Regulation on Shanghai Municipality of Examination and Approval for Foreign Investment Enterprises, promulgated on 4 September 1996, and effective as of 1 October 1996.
appropriate sequencing of reforms”. 54 Although China has promulgated and revised thousands of laws and regulations in order to comply with its WTO obligations, the former GATS disputes and other Members’ questions show the tensions between China’s GATS obligations and relevant domestic legislation. The tension could be activated by several reasons, but this paper tries to identify potential problems which are applicable to all service sectors and caused by the structure or characteristics of relevant domestic legislation instead of exploring concrete domestic measures contrary to the GATS.

A. Transparency

Before China’s WTO accession, some Members were concerned about the lack of transparency and the difficulty in finding and obtaining WTO-related legislation,55 and some even identified a lack of transparency as China’s main problem.56 After more than 10 years of trying, the Chinese Government has made noticeable progress on transparency. The discussion in Section III shows that a legal system affecting trade in services has been founded. However, China’s GATS obligations are not only limited on the formation and revision of legislation, but also include the availability of legislation by other WTO Members, individuals and enterprises.

1. Obligations of transparency

Transparency is a cornerstone of the multilateral trading system,57 and it may also facilitate international trade by providing a predictable regulatory system. Transparency is also a very important element in ensuring competitive markets, because the less transparent the regulatory environment is the more likely anti-competitive markets will remain58 and it can also reduce opportunities for officials to engage in trade-distorting practices behind closed doors.59

The transparency principle under Article III of GATS requires each Member to publish all relevant legislation and international agreements affecting trade in services by the time they come into force at the latest, and to respond to all requests for specific information on any measures affecting trade in services. The GATS recognises the importance of transparency both in Article III, in its preamble.60 In general, transparency obligations under the GATS

57 The Fundamental WTO Principles of National Treatment, Most-Favoured Nation and Transparency, Background Note by the Secretariat WT/WGTCP/W114, 14 April 1999.
59 United States Trade Representative, above n 9, at 11.
60 Paragraph 2 of the preamble of GATS “Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries”.

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comprise two groups: “obligations concerning the publication and notification of relevant measures and obligations concerning the administration and application of measures”.  

As well as in Article III, the practice of transparency is also specified in China’s Accession Protocol as follows: China shall publish all WTO-related laws, regulations, and other measures, make drafts of all such documents available for comment for a reasonable time prior to the enforcement, establish or designate an official journal on a regular basis to publish all these measures, and also establish a joint enquiry to reply to requests for information relating to these measures within certain days. In the Working Party Report, China promised to make available, not less than 90 days following implementation, all laws, regulations, and other measures pertaining to or affecting trade in goods or services, intellectual property, or foreign exchange control in one or more of the official WTO languages (English, French and Spanish).  

2. Improvement of Transparency after China’s WTO Accession

Foreign investment and trade-related laws and regulations have been published in an official gazette since 1993 and the Chinese Government listed seven official journals that contain WTO-related information. In 2006, China adopted a single official journal administered by the Ministry of Commerce (MOFCOM) for the publication of trade-related laws, regulations and other measures. As well, three entities, the Department of WTO Affairs, the China WTO Notification and Enquiry Centre, and the Fair Trade Bureau for Import and Export, was established. Now, the MOFCOM has set up a website to disseminate information and has also organized a China/WTO website (WTO/FTA Consulting).

In 2008, Provision on the Disclosure of Government Information was promulgated to establish the processes for information disclosure. As indicated in Article 1 of Provision on the Disclosure of Government Information, the purpose of this regulation is to safeguard legal access to government information by citizens, legal persons and organizations, improve the transparency of government work, promote administration according to the law, and take full advantage of government information on serving, living, social and economic activities. It can be said that this regulation promotes the progress of transparency in China.


66 Ministry of Commerce of the People’s Republic of China Department of WTO Affairs (China WTO Notification and Inquery Centre) online: <sms.mofcom.gov.cn>.

67 China and WTO, online: <chinawto.mofcom.gov.cn>.

3. Lack of Transparency

Even though transparency may also encompass the procedural fairness in decision-making, the judicial review and the non-discrimination principle, \(^{69}\) this paper will examine China’s transparency obligations focusing on five elements committed in the Accession Protocol and the Working Party Report. They are: the publication of all measures relating to WTO, an official journal dedicated to the publication of measures in all levels, an reasonable period for comment to the appropriate authorities before such measures are implemented, an enquiry point upon request of all information relating to the measures, and the availability of all measures in one or more of the official WTO language.

(a) Publication of all measures

The existence of internal notices that are not publicly available makes governments’ decisions impossible to comprehend. \(^{70}\) The internal notices are also known as normative documents, which are used extensively by administrative bodies especially at the local level, encompass many forms (such as working guide, decisions, notices and provisions), and have the general binding force. \(^{71}\) These normative documents are not regulated by Legislative Law and other relevant laws; \(^{72}\) thus the publication requirements provided in Legislative Law do not apply to them. \(^{73}\)

Since these normative documents are not recognized by the Legislative Law, whether they could be measures affecting trade in services under Article I of GATS?

The term “measures” is defined in Article XXVIII (a) of GATS and covers any measures taken by a Member, “whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form”. \(^{74}\) In the Panel report of the EC-Bananas III, “measures” was interpreted as any measure that “affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services”. \(^{75}\) The rather broad definition of “measures” means, “all governmental policies that affect services, including those not specific to services such as general labour market policies or other broad regulations, are included under GATS”. \(^{76}\) In this sense, once the normative documents affect trade in services, they are measures by Members under the GATS.

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\(^{70}\) Tobias Bender, “How to Cope with China’s (Alleged) Failure to Implement the TRIPS Obligations on Enforcement” (2006) 9:2 The Journal of World Intellectual Property, 230 at 235; also see, Sijie Chen, supra note 92, at 44.


\(^{72}\) See above, China’s legal system composed by the Constitution and Legislative Law is referred in section III.

\(^{73}\) Sijie Chen, above n 71, at 46.

\(^{74}\) Article XXVIII: Definitions of GATS.

\(^{75}\) European Communities-Regime for the Importation, Sale and Distribution of Bananas WT/DS27/R, 22 May 1997 (Report of the Panel) at [7.285].

The characteristic of normative documents is internal and not made known so that it is difficult to prove the existence. However, the lack of transparency resulting from the unpublished internal notices is not a new issue.77

(b) An official journal dedicated to the publication

The United States claimed that the single official journal publishes most, but not all government entities’ trade-related measures; publication is less common for measures such as opinions, circulars, orders, directives and notices.78 Taking the China-Electronic Payment as an example, the United States alleged that eighteen measures79 were inconsistent with China’s GATS obligations on banking service. Most of these measures were circular, notice, opinions, and guiding opinions issued by the People’s Bank of China, however a certain number of these measures cannot be found in the website of the MOFCOM, the website of the People’s Bank of China80 and not in the lists of all legislation relating to trade in services regularly updated by China to the Council for Trade in Services Committee in 2011.81

As described in Section III, one of the characteristics of domestic legislation is that: laws relating to trade in services are general so that regulations and rules are used to specify the conditions. Departmental rules are essential to provide the details on how the more general laws and regulations would be implemented. Thus, the less publication of these measures may impede the achievement of transparency that “governments and traders could be prepared to comply with such provisions and could exercise their rights in respect of implementation and enforcement of such measures”.82

Moreover, there is a difficulty in finding and obtaining measures taken by provincial and other local authorities, because there is no official journal that publishes local decrees and rules83 and they are also not published in the official journal and websites mentioned above.84 Even though the website of MOFCOM published some WTO-related legislation, the published legislation is regulations and departmental rules established by MOFCOM or associated with other ministries. The website of the China Legislative Information Network System published mainly the central government’s trade-related legislation, and the website “China Trade in Services”85 administered by the MOFCOM published laws, regulations and departmental rules relating to trade in services in the central level. Although Legislative Law

79 China-Certain Measures Affecting Electronic Payment Services, Request for Consultations by the United States, WT/DS413/1, S/L/375, 20 September 2010.
81 See above n 31.
82 The Working Party Report, above n 3, at [324].
83 Christopher Duncan, above n 71, at 464.
84 See above, Section III. A. 2 Improvement of Transparency after China’s WTO Accession.
85 The MOFCOM, China’s Trade in Services, http://tradeinservices.mofcom.gov.cn.
states that local decrees and rules must be published in the bulletin and newspaper, it is still difficult to find out all local decrees and rules relating to trade in services and virtually impossible for anyone to know exactly which rules apply.

During China’s accession negotiation, “some Members noted the difficulty in finding and obtaining copies of regulations and other measures undertaken by various ministries” and they also suggested using “the Internet and other means to ensure that information … at all levels could be assembled in one place and made readily available”. However, until now, neither a single official journal nor a website has published legal information from all governments at all levels. These entities and websites limited themselves to formalistic transparency and did not achieve the purpose of transparency: to “provide adequate information for foreign firms and individuals to make decisions on an accurate assessment of potential costs, risks, and market opportunities”.

(c) The publication for public comments

Except for the Accession Protocol, the Legislation Law and its relevant regulations require that the draft of regulations, rules and local decrees be made known to the public for collecting the opinions of relevant authorities, other organizations, and citizens. However, “many of China’s ministries have not been consistent in publishing draft departmental rules for public comment”. For example, several alleged departmental rules in the China-Electronic Payment had not been published for public comments before they entered into force, such as the Notice of the China Banking Regulatory Commission on the Issues Concerning Wholly Foreign-funded and Chinese-foreign Equity Joint Banks in Conducting the Bank Card Business.

The large quantity of these departmental rules, issued by more than sixty departments and agencies of the State Council, increases the difficulty of publication and public accessibility for all. Thus, in the 2012 Trade Policy Review Report, the Secretariat said, “It would appear that not all departmental rules have been published for public comment”, and the OECD stated that public participation in policy formulation was “characterized by informing the public rather than collecting opinions for improving policy making”.

Referring to an enquiry point upon request of all information relating to the measures, China set up WTO enquiry point at both central and local level. The China WTO Notification and Enquiry Centre (CWNEC) was set up in 2002 to establish an open and transparent trade administration system and to perform China’s obligations. CWNEC offers consultation on laws, regulations, decisions, rules, and other measures affecting foreign trade in goods and

86 Article 70 of the Legislation Law.
88 Working Party Report, supra note 55, at [330]
89 Christopher Duncan, supra note 56, at 460.
91 United States Trade Representative, supra note 78, at 11.
92 Sijie Chen, above n 71, at 42 and 43.
94 At [14], see also OECD 2010-B-Producer Support Estimate (PSE) and Related Indicators by Country.
services, TRIPS, and foreign exchange control. The Shanghai WTO Affairs Consultation Centre, a non-governmental consulting institution sponsored by the Shanghai People’s Municipal Government, is a successful example of an institution providing legal and policy advice on WTO affairs as well as WTO-related training services.

(d) The availability of measures in one of the official WTO language

Although the English edition of laws and some regulations can be found, most newly published regulations relating to trade in services are published only in Chinese editions. As the legislation uses professional and technical terminology in Chinese characters, it is unlikely to be understood well by foreign services suppliers who are not native Chinese speakers. Chinese lawyers can do bilingual consulting for foreign investors, but the cost may increase for foreign investors and lead to ambiguity and conflict because different lawyers may have different understandings. Furthermore, the lawyer’s translation can be used only as a reference; it has no legal effect. China has not yet established an infrastructure to undertake the translations of trade-related measures.  

The unavailability of measures in one of the official WTO language actually caused a number of issues of translation. For example, in the China-Electronic Payment, the United States submitted translations of certain measures at issue, but China alleged that the United States had incorrectly translated of certain words or phrases thereby affecting the original meaning of the measures.

B. Limited Range of Legislation

In the light of Article I of GATS, trade in services includes four modes: cross-border supply, consumption abroad, commercial presence, and presence of natural persons. However, most Chinese laws and regulations concern the mode of commercial presence and only a few of them refer to the other three modes of service supply, which demonstrates the encouragement of foreign investment in China. As discussed in Section III, Laws relating to trade in services normally allow the formation of wholly foreign-owned enterprises, equity or contractual joint ventures, and branches of foreign companies; regulations and departmental rules specify the conditions of formation such as the registered capital, capital contribution ratio of the shareholder, the period of operation, the scope of operation, and the requirements for judicial services suppliers.

With the improvement of information industry and technological development, not only the commercial presence but other three modes of supply are growing. For example, the cross-border provision of financial services, telecommunication services, and E-commerce.

95 United States Trade Representative, above n 78, at 11.
96 Report of the Panel, China-Electronic Payment, above n 79, at [1.9].
become widely used and continue to expand. In 1999, the electronic delivery of services was generally agreed to fall within the scope of GATS.\footnote{Work Program on Electronic Commerce, Progress Report to the General Council S/L/74, 27 July 1999.} Electronic delivery can take place under any of the four modes of supply, but the electronic cross-border delivery of services is widely used.\footnote{Sacha Wunsch-Vincent, “The Internet, Cross-border Trade in Services and the GATS: lessons from US-Gambling” 5:3 (2006) World Trade Review, 319 at 319 and 320.} In spite of the development of cross-border supply, the China-Electronic Payment presented the tension of data processing for financial services and payments associated with cross-border services in China, and revealed that the limitations on cross-border supply challenged China’s compliance of its GATS obligations. Moreover, the presence of natural person is also a key mode of trade in services. According to the 2011 China Trade in Services Statistics, there were 846,605 labourers employed oversee.\footnote{2011 China Trade in Services Statistics, http://tradeinservices.mofcom.gov.cn/a/2012-01-18/95917.shtml.}

Some people may argue that China’s commitments to GATS do not include much of the other three modes and there is therefore no need to regulate the other modes of China’s domestic legislation. However, in China’s GATS schedule, not all service sectors or subsectors make “none” commitments in the modes of cross-border supply and consumption abroad. Similarly, not all service sectors or subsectors are committed as “unbound except as indicated in horizontal commitments” in the mode of presence of natural persons.

Taking the education service sector as an example, China made the commitment, in the mode of presence of natural persons, to allow foreign individual service suppliers to enter China and provide education services when they are invited or employed. In China’s domestic legislation, the Regulations on Chinese Foreign Cooperation in Running Schools and its Implementation Measures are the only two pieces of legislation regulating foreign education services. These two regulations refer to the mode of commercial presence in supplying education services without any specific legislation about the presence of natural persons. The Central People’s Government reported a phenomenon that some institutions illegally hired unprofessional foreigners. The report also emphasised that: institutions have to be authorized to hire foreigners by state or local Administration of Foreign Experts Affairs; and, foreigners need to apply for Foreign Expert Permit/Certificate to teach in China.\footnote{The Central People’s Government, the People’s Republic of China, http://www.gov.cn/fwxx/wy/2011-12/20/content_2024473.htm.} There are several rules of applying the permit/certificate published by the local administration or even institutions, but there are no relevant regulations or rules published by State Administration of Foreign Experts Affairs at least not published in the websites.\footnote{See, the website of State Administration of Foreign Experts Affairs, on 29 April 2014, http://www.safea.gov.cn/catalog.shtml?id=laws} Thus, the disordered condition of foreign teachers could be caused by the lack of legislation specifying the requirements on foreign services suppliers and their employers.

**C. Lack of Efficiency**

Article VI: 2 and 3 of GATS requires the administration affecting trade in services to be in accordance with due process and efficiency standards. The efficiency standards require the authorities to complete the consideration and inform the applicant within a reasonable period of time. In light of examining relevant domestic legislation in Section III, the lack of
efficiency could be caused by the complicated Review and Approval System (Shen Pi Zhi Du) regulated by legislation and applied to all foreign participation.\textsuperscript{106}

For example, the lack of efficiency caused by legislation can be verified in Article 22 of Regulations on the Administration of Tourist Agencies.\textsuperscript{107} According to this article, if a foreign investor wants to establish a tourist agency in China, they must take two steps. The first is to receive an examination opinion from the department of the State Council in charge of tourism. Once they have the examination opinion the foreign investor has to submit the application to the department in charge of business. A foreign-funded tourist agency needs to hand in two applications and get two opinions from two different departments of the State Council, which is repetitive and may affect the efficiency of the governments’ administration. Furthermore, there is no time limit for the department in charge of business to make the decision on whether or not to approve the application and then to notify the applicant. The absence of a time limit may also reduce efficiency.

\textit{D. Legal Flexibility Affecting the Uniform Application of Legislation}

In the Accession Protocol, China committed, at all levels of government, to apply and administer measures affecting trade and trade-related aspects in a uniform, impartial and reasonable manner.\textsuperscript{108} In the Working Party Report, China pledged that the central government would ensure that the measures of governments at the sub-national level conformed to China’s WTO obligations.\textsuperscript{109} Although the central government has “the right to disallow conflicting rules, national supervision has little effect on the numerous provincial and local rules created each year”.\textsuperscript{110} Local governments enjoy considerable \textit{de facto} autonomy and may use it to restrict competition and protect local industry.\textsuperscript{111}

The latest Trade Policy Review Report stated, “Many aspects of China’s trade and investment policy regime remain complex and opaque, leaving scope for administrative discretion and corruption”.\textsuperscript{112} In the 2011 Report to Congress on China’s WTO Compliance, the United States contended “differences in views and approaches between China’s central government and provincial and local governments frustrated economic reform effects”.\textsuperscript{113} This statement implies: local governments are taking different approaches from the central government so that measures relating to trade in services may not be administrated in a uniform way by central and local levels.

\textsuperscript{107} Regulations on the Administration of Tourist Agencies, adopted at the 49th Executing Meeting of the State Council on 5 December 2001, promulgated by Decree No.334 of the State Council of the People’s Republic of China on 11 December 2001, and effective as of 1 January 2002.
\textsuperscript{108} China’s Accession Protocol, supra note 62, at Part One 2. (A) 2.
\textsuperscript{109} Working Party Report, supra note 55, at 70.
\textsuperscript{112} Trade Policy Review Report, above n 93, at [4].
\textsuperscript{113} United States Trade Representative, “2011 Report to Congress on China’s WTO Compliance” December 2011, at 2.
The reason can be found in the flexible and broad nature of law in China, and China’s decentralised legislative and administrative systems provide local governments with the opportunity to regulate and administrate measures. According to the Constitution and Legislative Law, the people’s congresses and governments of provinces, municipalities and autonomous regions have the right to institute local decrees or provisions and administer laws and regulations. In addition, Article I:3(a) of GATS gives central, regional and local governments and authorities, even non-governmental bodies, authority to take measures affecting trade in services. It is obvious that local authorities are responsible for implementing and interpreting legislation, including GATS rules, over a given geographical region. China’s legal system and the hierarchy of legislation shows that the process of implementation, monitoring and enforcement in China is “a multi-layered complexity”. The complexity makes it more difficult for China to effect compliance with WTO rules, especially the formal harmonization at sub-national levels. The situation of “multi-layered complexity” also exists in other countries similar in size to China, such as Canada. In Canada-Gold Coins, the Panel concluded that the provincial government of Ontario afforded protection to domestic production by applying the retail sales tax. Since “a multi-layered complexity” is the result of a state’s systems, the central government is unable or unwilling to intervene.

However, the decentralised legislative and administrative systems will not necessarily lead to inconsistent implementation between central and local governments. Legal flexibility is the issue that affects uniform application and could be corrected by governments.

As stated in Section II, legislation concerning to trade in services is insufficient and lacks the specificationity, which allows authorities much discretion in interpreting and applying measures affecting trade in services. Flexibility is allowed in China’s legal system because the legislation pronounced by the NPC and the State Council is vague and principle-like. The aim of adopting the flexible legislation is that it can be actually applied to facets of policies and changeability of local normative structures and conditions. The result of legal flexibility is the flexible legal interpretation and administration of laws and regulations at central and local levels.

The local governments not only have autonomy on legislation and administration, but also have economic independence. Owing to the dependence of local government on local enterprises for revenue, local governments may interpret and administrate laws and regulations to protect local enterprises’ interests. The leader of a sub-national entity is judged according to the economic performance of their constituency; so that they may issue

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116 Paolo D. Farab, above n 69, at 273.
118 “concerning the application of the retail sales tax by the provincial government of Ontario to the sale of gold coins in a manner which afforded protection to domestic production of gold coins”.
119 Donald C. Clarke, above n 63, at 106.
120 Peter Howard Corne, above n 114, at 257.
121 Ibid 262.
122 Ibid 263.
123 Ibid, at 276.
local decrees or rules inconsistent with WTO rules for the sake of local interests.\textsuperscript{123} Internal trade barriers have not been successfully removed by the central government yet,\textsuperscript{124} not to mention some WTO commitments are seen as a danger to local enterprises businesses.\textsuperscript{125}

To conclude, local authorities, with their increased power and economic independence, may produce non-compliance or less than full compliance with WTO rules.\textsuperscript{126} Furthermore, China has a tradition of legal flexibility, and “China’s unique historical background including the communist period, long-standing imperial traditions and feudalism”\textsuperscript{127} also make the legal flexibility possible.

CONCLUSION

In order to reveal the reason of tensions between GATS and domestic legislation caused by the legal system, this paper explains that China’s GATS obligations are implemented by the revision or enactment of domestic legislation, and then summarized the structure and characteristics of domestic legislation affecting trade in services from the Constitution to local decrees. Based on the study of relevant domestic legislation, this paper reveals four potential problems that may impede the application of GATS obligations and induce the tensions. Even though the transparency of legislation has been improved after China’s WTO accession, not all measures affecting trade in services are published (the existence of internal notices), neither an official journal nor a website had published legal information from all governments at all levels, some of draft departmental rules are not published for public comments, and most of regulations are not available in one or more of the official WTO languages. Moreover, the lack of legislation in cross-border and presence of natural person could provoke the disordered condition and lead to the tensions, and the complicated Review and Approval System applying to foreign participation may affect the efficiency of administration regulated in Article VI of GATS. Lastly, legal flexibility, caused by the vague and principle-like laws and the autonomy and economic independence of local governments, may lead to inconsistent implementation of GATS obligations between central and local governments.

\textsuperscript{123} Tobias Bender, above n 70, at 234; Also see, Qingjiang Kong, above n 21.
\textsuperscript{124} Donald C. Clarke, above n 63, at 107.
\textsuperscript{127} Paolo Davide Farah and Elena Cima, above n 126, at 87.